Climate Change: Emerging Litigation Challenges

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There is a growing scientific consensus that climate change is occurring, and perhaps most relevant, that human activity – specifically, the release of CO2 and other emissions commonly known as "greenhouse gases" – is its primary cause.[2] At the local, regional, national and international levels, governments, non-governmental organizations, and corporations are analyzing and debating possible approaches to reduce greenhouse gas emissions and their potential impacts. Apocalyptic predictions of climate-related catastrophes have captured the public's attention, with help from the Academy Award and Nobel Prize committees.

But the complexities of potential approaches to addressing climate change are significant given the global movement and cumulative impact of greenhouse gas emissions, as well as the significant economic implications of regulating activities that reach into every aspect of human productivity and daily life. Regulators face a difficult challenge to reduce emissions while minimizing economic harm and fairly allocating societal costs of emission reductions and any harm associated with climate change. For some, the pace of regulation is too slow, for others, too fast.

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[2] Intergovernmental Panel on Climate Change, *Fourth Assessment Report* (Nov. 17, 2007) (http://www.ipcc.ch/ipccreports/ar4-syr.htm).

Not surprisingly, this confluence of political, economic, business, and legal questions has drawn the attention of lawyers -- and not just environmental lawyers. Climate law does not respect traditional practice group boundaries. We are seeing substantial activity, if not substantial litigation (yet), across practice areas, including administrative, environmental, tort, insurance coverage, securities, and international.

The current combination of piecemeal regulation and actual and looming litigation threats presents both corporate and outside counsel with multifaceted challenges. These challenges are discussed below.

THE FIRST WAVE OF CLIMATE LITIGATION

The first wave of climate litigation has been characterized, primarily, by attempts to create or force either actual climate-based regulations, or judicially imposed injunctive relief that would effectively impose standards for greenhouse gas emissions. The plaintiffs are mainly state governments and interest groups dissatisfied with the pace and substance of the federal government's actions in the climate arena. There is no better indication of how the plaintiffs and potential plaintiffs view their roles than their own words. For example, California's Attorney General, Jerry Brown, has a "global warming" section on the California Department of Justice's website.[3] There he states, "As the chief law enforcement officer of this State, elected by the People and charged by the Constitution to protect the public interest and the State's natural resources, I am committed to doing everything in my power to ensure that California meets its greenhouse gas reduction targets."[4]

One step taken by his predecessor, and continued under his authority, was the filing of two separate lawsuits against power plants and auto manufacturers, alleging that emissions from their processes and products constituted a "public nuisance" that harmed the people of California.[5] These actions – discussed more fully below – plainly had a regulatory/political objective. In describing the power plant complaint, the Attorney General's office noted: "The complaint seeks a court order that enjoins each defendant to abate its contributions to the public nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least ten years."[6] In other words, California was asking a court to do what no federal or California regulatory agency had done – regulate greenhouse gas emissions.

Likewise, Earthjustice – a self-described public interest law firm – states that it is "using the courts to fight global warming." In their own words, "We represent fellow environmental organizations and community-based coalitions in going after the biggest contributors to global warming—the oil and

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[3] *See* http://ag.ca.gov/globalwarming/.

[4] *Id.*

[5] *See Conn. v. Am. Elec. Power Co., Inc. ("AEP")*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California v. General Motors Corp.*, C06-05755 MJJ, 2007 U.S.Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007).

[6] *See* http://ag.ca.gov/globalwarming/litigation.php.

coal industries, polluting power companies, and the current administration—in our nation's courtrooms."[7] Earthjustice has targeted the permitting of coal-fired power plants. For example, they successfully challenged the issuance of a permit for a new power plant near the Florida Everglades, in part because of its potential impact on climate.[8] Earthjustice's President explained this strategy:

> **"Until maybe two years ago, people couldn't see how to use litigation to address climate change . . . They thought until there is a global warming law, there was nothing to litigate, but when we looked at it we saw we could use existing law to go after the 150 proposed coal plants. It's pushing the law forward by going to court to make sure the government enforces the law."[9]**

In a 2002 letter to President Bush, eleven states criticized perceived federal inaction on climate issues and warned that "states and others are beginning to review their litigation options."[10] States have followed through on this warning in lawsuits challenging either the lack of regulation, or the perceived inadequacy of regulation.

For example, in *Massachusetts v. EPA*,[11] the U.S. Supreme Court ruled that Massachusetts had standing to challenge the EPA's decision not to regulate carbon dioxide emissions as pollutants under the Clean Air Act, and that the EPA is authorized by the Act to regulate such emissions for new motor vehicles. The Ninth Circuit U.S. Court of Appeals rejected federal fuel economy standards covering light trucks and SUVs and directed the National Highway Traffic Safety Administration to reconsider the standards, taking into account the potential benefits of lower greenhouse gas emissions.[12] And late last year, California sued EPA to try to force the agency to decide California's 2-year-old request to waive federal pre-emption and allow California to enforce tailpipe carbon dioxide standards.[13] After EPA denied California's request to waive preemption, California, joined by fifteen other states, lodged a petition for review of that decision in the United States Court of Appeals for the Ninth Circuit.[14]

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[7] *See* http://www.earthjustice.org.

[8] *See* http://www.earthjustice.org/news/press/007/florida-commission-vote-kills-proposed-coal-fired-power-plant.html.

[9] "A Non-Profit Law Firm with Earth as a Client," National Law Journal, Feb. 4, 2008.

[10] Letter from Chief Legal Officers of Alaska, California, Connecticut, Maine, Maryland, New Hampshire, New Jersey, New York, Rhode Island and Vermont to George W. Bush (July 17, 2002) (available at www.grist.org/pdf/climate_letter.pdf).

[11] 127 S.Ct. 1438 (2007).

[12] *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 06-71891 (9th Cir. Nov. 15, 2007).

[13] *California v. United States Environmental Protection Agency*, 1:07cv2024 (D.D.C. Filed Nov. 8, 2007); *California v. United States Environmental Protection Agency*, 07-1457 (D.C. Cir. Ct. App. Filed Nov. 8, 2007).

[14] *California v. United States Environmental Protection Agency*, Case No. 1:08-CV-02024 (9th Cir., Jan. 2, 2008) (a copy of the petition is available at http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf).

CLIMATE-BASED TORT LITIGATION

Over the last decade, and increasing number of voices have predicted that the world would see climate based tort litigation. For example:

- In 2001, law professor Andrew Strauss told a London conference that countries "that are the victims of climate change have a good case in law for suing polluters like the United States for billions of dollars."[15]
- In 2003, Innovest – which described itself as a socially responsible investment group – issued the following warning as part of its Carbon Disclosure Project: "**Legal liabilities may result . . . significant emitters may face billion dollar lawsuits**: Precedents set by asbestos and tobacco litigation could lead to a spate of lawsuits against significant emitters."[16]
- The Australian Conservation Forum asserted, "legal practitioners from Australia and other countries now recognize the potential for climate change and its consequences to be the subject of litigation on a scale that could eclipse anything yet witnessed in any domestic or international jurisdiction."
- A number of legal commentators and law professors have embraced the idea of tort-based climate litigation.[17]

These predictions, which were once the stuff of academics and interest groups, have reached the popular press. Business Week proclaimed: "Global Warming: Here Come the Lawyers," and "[i]t's the next wave of litigation – after tobacco, guns and junk food. Why Detroit, Big Oil and utilities should worry."[18]

A few high-profile cases appeared to give credence to predictions that large-scale climate litigation was on the way. State attorneys general filed separate public nuisance lawsuits against power companies and automobile manufacturers, alleging that greenhouse gas emissions from their activities and products contribute to global warming and harm the states' environment, economies and citizens.[19] And Mississippi property owners sued oil, coal and chemical companies, alleging their activities contributed to climate change and magnified the effects of Hurricane Katrina.[20]

In *California v. General Motors Corp.*, California sued six of the major automakers for allegedly "creating, and contributing to, an alleged public nuisance – global warming."[21] A "public nuisance"

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[15] The Guardian (July 10, 2001) (http://www.guardian.co.uk/world/2001/jul/10/socialsciences.physicalsciences).

[16] Innovest, Carbon Disclosure Project 2003 Report, p. 2.

[17] *See, e.g.,* Hunter, D. & Salzman, J., "Negligence in the Air: The Duty of Care in Climate Change Litigation," 155 U. Penn. L. Rev. 101 (2007); Grossman, D., "Warming Up to a Not So Radical Idea: Tort Based Climate Change Litigation," 28 Colum. J. Env'tl L. 1 (2003); Lipanovich, A., "Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation is Feasible," 35 Golden Gate U. L. Rev. 429 (2005).

[18] Business Week, Oct. 30, 2006.

[19] *See Conn. v. Am. Elec. Power Co., Inc. (AEP)*, 406 F.Supp.2d 265 (S.D.N.Y. 2005); *California v. GMC*, C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007).

[20] *Comer v. Murphy Oil USA, Inc.*, 1:05 CV436-LTS-RHN (S.D. Miss.).

[21] C06-05755 MJJ, 2007 U.S.Dist. LEXIS 68547, *2 (N.D. Cal. Sept. 17, 2007).

occurs when a party unreasonably interferes with a right or property common to the general public, as opposed to the use or enjoyment of individual property.

The complaint alleged that the carmakers' products emit greenhouse gases, which contribute to global warming, which causes personal injury to the state's citizens, and harms California's environment and economy. The Attorney General alleged that the emission of greenhouse gases into the California air contributes to global warming, which in turn causes harm to all the State's citizens. The complaint sought massive monetary damages and injunctive relief.

Similarly, in *Conn. v. Am. Elec. Power Co., Inc. ("AEP")*,[22] eight states sued five power companies, alleging that the companies caused a public nuisance by emitting approximately 650 million tons/year of greenhouse gases as part of their operations. The complaint asked the Court to order an abatement of the alleged nuisance or, in other words, to judicially impose emission reduction requirements.

Both cases were dismissed by the lower courts. The *AEP* Court held that because resolution of the lawsuit required "identification and balancing of economic, environmental, foreign policy, and national security interests," the case was impossible to decide "without an initial policy determination of a kind clearly for non-judicial discretion."[23] Moreover, the Court held that the relief sought by plaintiffs was of such a "transcendently legislative nature" that it was improper for the Court to grant.[24]

Referencing the *AEP* decision, the Court in the auto industry case reached the same conclusion – that resolution of the plaintiff's claim would require the Court to make an initial policy decision of a kind committed to the political branches of government.[25] The *GMC* Court held that the relief sought by California would implicate the federal government's interstate commerce power, and the federal government's power to regulate foreign affairs, in that any relief would "impose damages for the Defendant automakers' lawful worldwide sale of automobiles."[26] The Court also held that the complaint raised a non-justiciable political question because of a lack of judicially manageable standards by which to resolve the plaintiffs' claims.[27]

Private citizens have attempted similar litigation seeking redress for purported harms caused by greenhouse gas emissions, with a similar result. In *Comer v. Murphy Oil Co.*,[28] fourteen individuals filed a class action lawsuit against insurance, oil, coal and chemical companies seeking relief for property damages resulting from Hurricane Katrina. Plaintiffs alleged that defendants' emissions contributed to climate change and thus magnified adverse weather events, including Hurricane

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[22] 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[23] *AEP*, 406 F. Supp. 2d at 274.

[24] *AEP*, 406 F. Supp. 2d at 272.

[25] *GMC*, *id*. at *48.

[26] *Id.* at *41.

[27] *Id.* at *48.

[28] Case No. 05-CV-436 (S.D. Miss.).

Katrina. The Court also dismissed the *Comer* case on constitutional standing and political question grounds**.** All three cases are on appeal.

Even if plaintiffs are able to overcome the political question doctrine that, for the time being, has ended early tort cases, would-be tort plaintiffs must overcome other hurdles, the most significant of which is causation. The plaintiff's challenge in proving specific harms were caused by climate change – measured against traditional standards of admissibility of scientific evidence in a courtroom – is daunting.

To comprehend the scope of this challenge, it is worth considering the types of current and prospective injuries alleged in the tort cases filed to date. These injuries range from heat-related deaths and respiratory illness, to erosion, crop damage, inundation of coastal properties, harm to water supplies from salt water, damage to commercial shipping from reduction in water levels, and prospective harm from impacts of more severe weather events.

Given that climate change may involve the cumulative effects of more than a century of emissions, tying one defendant's emissions (or even an entire industry's) to a localized climate event that caused any one of these individual harms – or, in other words, establishing specific causation – could well be impossible. Even as national and international bodies improve their climate change models, none are focused on tying the emissions of an individual corporation, or even an industry, to a specific local event.

In addition, the key findings on climate change are based on the projections of state, national and international regulatory and quasi-regulatory bodies – including EPA, the National Academy of Sciences and the IPCC. These organizations all have a forward-looking, precautionary focus on future risk rather than a retrospective focus on tort causation. Courts often reject regulatory findings and projections in proving tort damages because an "agencies' threshold of proof is reasonably lower than that appropriate in tort law, which traditionally makes more particularized inquiries into cause and effect' and requires a plaintiff to prove that it is more likely than not that another individual has caused him or her harm."[29] The *GMC* Court signaled this challenge for those who seek recovery in tort for alleged climate-related harms, noting that it could not devise a method to "discern[] the entities that are creating and contributing to the alleged nuisance."[30]

Assuming the results in *GMS*, *AEP*, and *Comer* hold up on appeal, have we seen the end of climate-based tort litigation? Don't bet on it. The CO2 emissions at issue in the *GMC*, *AEP*, and *Comer* cases were unregulated. But as federal and state governments start to craft greenhouse gas regulations, they are beginning to consider – and may answer – at least some of the political questions identified in those cases. Over the next few years, greenhouse gases will move from virtually unregulated to highly regulated. And regulations could create judicially manageable standards or enforcement rights for states or private citizens.

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[29] *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 198 (5th Cir. 1996).

[30] *GMC, id.* at *47

Because of the uncertain risks of future climate litigation and rapid political, regulatory and judicial developments, potential tort defendants should pay close attention to proposed climate statutes and regulations. Apart from the emission standards they set, depending on whether such regulations contain clear preemption provisions or foreclose private rights of action, they could either open or close the door for future climate-based tort litigation by setting standards of conduct against which corporate activities might be measured.

ADMINISTRATIVE LITIGATION BY THE REGULATED COMMUNITY

Tort claims related to climate change litigation are but a small part of the expanding field of climate change litigation. We are seeing significant litigation to force or strengthen government regulation of greenhouse gases, and the corresponding challenges by the regulated community to these types of regulations (including a recently decided case in which a federal judge in Fresno upheld California's first-in-the-nation effort to regulate automobile CO2 emissions). In other words, the political questions identified by courts to date are starting to be addressed, and the political solutions are leading to litigation. Once regulatory standards are set, there will be litigation over their enforcement.

Climate litigation also has been brought by those whose activities or products are subject to climate-related regulations. As an example, automobile manufacturers challenged the California emission regulations that are the subject of the aforementioned lawsuit by California against the EPA. Following a trial on the merits, a Vermont court upheld the regulations.[31] In a related challenge, filed in California, the court rules that California could regulate greenhouse gas emissions from automobiles if the United States granted California's request for a preemption waiver (which it did not, leading to litigation by California against the United States).[32]

On the regulatory side of the spectrum, it is certain that litigation will continue and may grow exponentially as federal and state regulations targeting greenhouse gas emissions are promulgated. There are many federal, regional and state climate change regulatory initiatives currently moving ahead with the strong backing of government and industry leaders — from tax credits to cap-and-trade programs to renewable portfolio standards. Practitioners who keep an eye on percolating regulatory issues can project likely future areas of litigation, whether in challenging regulations or in interpreting and enforcing those regulations. For example, a number of states (including California) have petitioned EPA to regulate greenhouse gas emissions from ships[33] and airplanes. These petitions are signed by state attorneys general, suggesting that future litigation may be in the works if the EPA does not act on the petitions.

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[31] *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (on appeal).

[32] *See* Order On Motions And Counter-Motions For Summary Judgment On Plaintiffs' Claims For Relief On EPCA Preemption And Foreign Policy Preemption, Central Valley Chrysler-Jeep, Inc. v. Witherspoon, 1:04-cv-06663-REC-LJO (http://www.websupp.org/data/EDCA/1:04-cv-06663-656-EDCA.pdf)

[33] *See* Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Ocean-Going Vessels (http://ag.ca.gov/cms_pdfs/press/N1474_Petition.pdf).

SECURITIES LITIGATION RISK

In the securities arena, there is a growing focus on climate change. About five years ago, investor groups began to make climate change a major focus, attempting to force greater disclosure by publicly traded corporations of climate-related risks through shareholder resolutions and other pressure. For example:

- The Coalition for Environmentally Responsible Economies (CERES) -- a group of investor, environmental, labor and public interest groups -- asserted that major corporations "are not adequately disclosing the financial risks posed by climate change and also are failing to deal with global warming issues in other key corporate governance areas."[34]
- Friends of the Earth claimed that its survey of corporate climate change disclosures revealed "compelling and additional evidence that publicly traded companies in the automobile manufacturing, integrated oil & gas, insurance, petrochemicals, and utilities industries are failing to report material environmental issues such as climate change in Securities and Exchange Commission (SEC) filings."[35]
- The World Resources Institute reported that few companies in the oil and gas sector "have disclosed the degree to which they are financially exposed" to climate issues "and no company has attempted to quantify the financial implications for its shareholders."[36]
- Innovest spearheaded the Carbon Disclosure Project, described as a "coordinating secretariat for institutional investor collaboration on climate change."[37] On behalf of institutional investors "who jointly represented assets in excess of $4.5 trillion," Innovest asked the chairs of the world's 500 largest companies "to identify the business implications of their exposure to climate-related risks, and explain what they are doing to address these risks."[38]

Recently, these efforts have picked up even more steam. In September 2007, a coalition of investors, state officials and environmental organizations petitioned the Securities and Exchange Commission to clarify that "material climate-related information must be included in corporate disclosures under existing law." The coalition also asked the SEC to "enforce existing disclosure requirements relating to material risks, such as climate change, which are underreported." Petitions could well give way to litigation as shareholders are asked to focus on the adequacy of climate risk disclosures, including competitive risks and opportunities tied to climate change, physical risk to a company's operations, and regulatory risks with potential financial implications for corporations.

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[34] *See* CERES Press Release, July 9, 2003 (http://ceres.org/newsroom/press/ceresirrcrel.htm); Cogan, D., Corporate Governance and Climate Change: Making the Connection (June 2003) (http://www.ceres.org/pdf/ceres_cg_rprt.pdf) (hereafter "CERES Report").

[35] *Survey of Climate Change Disclosure in SEC Filings of Automobile, Insurance, Oil & Gas Petrochemical, and Utilities Companies*, p. 1 (Sept. 2002) (http://www.foe.org/camps/intl/corpacct/wallstreet/secsurvey.pdf).

[36] World Resources Institute, *Changing Oil: Environmental Risks and Shareholder Value in the Oil and Gas Industry*, p. 2 (2002) (http://climate.wri.org/pubs_description.cfm?PubID=3719).

[37] *Carbon Disclosure Project 2003*, p. 5 (Feb. 2003) (http://www.cdproject.net/).

[38] *Id.*

Enterprising attorneys and interest groups are focusing on securities law as: (1) a basis to identify significant greenhouse gas emissions, and (2) a potential basis for shareholder litigation seeking large damage awards. The focus is disclosures by public companies concerning the economic effects of climate change, including the potential costs of future greenhouse gas regulations, on a company's business. In a recent survey, The McKinsey Quarterly found that nearly nine out of ten executives worry about global warming and climate change, and approximately half of the survey respondents rank the environment as the top social issue that could affect shareholder value.[39] Indeed, there are signs in recent months that investors, legislators and regulators are pushing to require public companies to enhance substantially their disclosure concerning material business risks posed by climate change and that such companies are moving to address climate change. For example:

- On September 14, 2007, the New York Attorney General's office subpoenaed carbon emission information from five of the nation's largest energy companies, while alleging that their financial disclosures were inadequate concerning the financial risk posed by their carbon emissions, and demanded that they disclose such risks to shareholders in their public filings.[40]
- On September 18, 2007, a group of state pension funds and institutional investors, who together represent over $1.5 trillion in assets under management, joined with environmental groups to petition the SEC to clarify that existing law requires a company to disclose material climate change-related risks to the company's business.[41]
- On December 6, 2007, Senator Christopher Dodd, Chairman of the Senate Banking, Housing and Urban Affairs Committee, and Senator Jack Reed, Chairman of the Subcommittee on Securities, Insurance and Investment, sent a letter to SEC Chairman Christopher Cox reporting on a Committee hearing held in October 2007 on "Climate Disclosure: Measuring Financial Risks and Opportunities." The letter requested that the SEC issue an interpretive release to clarify a registrant's obligations to disclose climate change-related risks.[42]
- Also in December 2007, The Corporate Library, an independent corporate governance reporting group, issued a report examining carbon impact disclosures and future D&O liability. The report found "tremendous variety in disclosure practices among the 24 companies" surveyed. According to the survey, some of the lowest-scoring companies in terms of disclosure turned out to be not energy companies but companies like Hasbro, Royal Caribbean Cruise and Corning.[43]
- On January 8, 2006, the Federal Trade Commission began hearings on green marketing and whether claims concerning "carbon offsets" and other "green marketing" were substantiated. Deborah Platt Majoras, chairwoman of the Commission, noted that with the growth of such green programs,

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[39] Sheila Bonini, Jieh Greeney and Lenny Mendonca, *Assessing the impact of societal issues: A McKinsey Global Survey*, The McKinsey Quarterly (November 2007).

[40] Felicity Barringer and Danny Hakim, *New York Subpoenas 5 Energy Companies*, New York Times (September 16, 2007).

[41] *Petition for Interpretive Guidance on Climate Risk Disclosure* (September 18, 2007), available at: http://www.incr.com/NETCOMMUNITY/Document.Doc?id=187.

[42] The letter is available at http://dodd.senate.gov/multimedia/2007/120607_CoxLetter.pdf.

[43] Beth Young, *Whose Carbon Footprint Is Too Big for Their Corporate Boot? An examination of carbon impact disclosure and future D&O liability*, The Corporate Library (December 2007).

"there's a heightened potential for deception." Environmentalists have coined the term "greenwashing" for such misleading claims.[44]

Accordingly, no matter what management's and board members' beliefs may be on the merits of the climate change debate, there is little doubt that climate change-related disclosure will soon be standard procedure for public companies and their shareholders. Companies and their officers and directors who fail to disclose material risks posed by climate change-related issues, or who fail to exercise appropriate care concerning business risks arising from "green" issues, may find themselves the target of litigation.

Sources of Disclosure Obligations for Public Companies

Presently, public companies whose stock is traded in the United States are required to disclose information material to investors in three separate documents as discussed by Regulation S-K of the Securities Exchange Act of 1934.[45] These regulations set forth non-financial disclosure guidelines for a company's annual report to shareholders (Form 10-K), for quarterly reports (Form 10-Q), and for periodic reporting on Form 8-K, which is filed upon the occurrence of a material event. Three sections of Regulation S-K may require disclosure of climate change-related information.

First, Item 101 of Regulation S-K requires a description of the "general development of the business," including an express requirement to disclose material costs associated with environmental law compliance.[46] This disclosure requirement applies to costs associated with compliance with federal, state and even local regulations. Thus, a local carbon tax or regional regulations to curb greenhouse gas emissions may require disclosure in the company's Form 10-K where the cost of compliance is material to the company's financial results.

Another disclosure obligation arises from Item 103 of Regulation S-K. Item 103 requires a registrant to "describe any material pending legal proceeding, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject" as well as proceedings "known to be contemplated" by government entities.[47] As illustrated by the examples above, these risks arise not only from actions by the EPA or other environmental regulators, but also from business-related litigation risks, such at the FTC's inquiries into "greenwashing."

Third, a registrant is required to discuss the results of its operations, its financial condition, and "known trends and uncertainties" to its business under Item 303 of Regulation S-K.[48] This disclosure requires forward-looking guidance concerning material risks. As one survey of disclosure in public

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[44] Louise Story, *F.T.C. Asks if Carbon-Offset Money Is Well Spent*, New York Times (January 9, 2008).

[45] 17 C.F.R. Part 229.

[46] 17 C.F.R. §§ 229.101(a), 229.101(c)(1)(xii).

[47] 17 C.F.R. § 229.103.

[48] 17 C.F.R. § 229.303.

companies' SEC filings notes, "Climate risks can manifest themselves through destruction and business interruption caused by violent and erratic weather, the liabilities of greenhouse gas regulations and lawsuits, higher operating costs through increased energy prices, and impacts on competitive positioning due to changing customer demands."[49] Where such risks were known or should have been known by management though reasonable diligence, but were not disclosed, liability may accrue against the company, its officers and its directors.

Two Sources of Litigation Risks

Litigation risks may arise under both state and federal securities laws. Perhaps the most common vehicle for securities plaintiffs in the past twenty years has been the securities class action complaint asserting claims brought under Rule 10b-5 of the Securities Exchange Act of 1934.[50] Such complaints regularly allege false or misleading disclosure by a public company in the form of allegedly materially false statements or statements which require additional material information to be complete.[51] These actions are filed by plaintiffs' attorneys representing a putative class of shareholders alleged to have been damaged because they purchased or sold the company's stock at a price that did not reflect the "true" value of the company as represented by the price of the stock after the accurate information was disclosed to the efficient market.

In the case of climate change-related disclosure, plaintiffs may allege that the company failed to disclose known material risks to the company's business arising from the cost of compliance with "green" regulations or for liability arising from the company's business or products. Even companies not traditionally thought of as at risk for environmental claims may find that the rising costs of operations in various parts of the globe caused by rising fuel costs, climate change and other environmental factors may lower margins and create disclosure obligations under the federal securities laws.

In another hypothetical example, companies that offer "carbon credits" to consumers may face allegations that the sale of these "credits" was used to inflate earnings rather than to provide advertised environmental benefits. The list could go on, but suffice to say that, as demonstrated by the examples above, climate change disclosure issues are likely to be ripe fodder for plaintiffs' attorneys.

In addition to potential liability under the federal securities laws, a company's directors may be liable under state law for failing to exercise reasonable care in anticipating foreseeable climate change-related risks to the company's operations and for failing to exercise appropriate diligence in overseeing the company's business with respect to such risks. Such claims may arise in derivative litigation alleging a breach of the directors' fiduciary duty of care brought on behalf of the company's shareholders.

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[49] Michelle Chan-Fishel, *Fifth Survey of Climate Change Disclosure in SEC Filings of Automobile, Insurance, Oil & Gas, Petrochemical, and Utilities Companies,* Friends of the Earth (October 2006) at 3.

[50] 17 C.F.R. § 240.10b-5.

[51] *See*, *e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2505-07 (2007).

Strategies to Minimize Litigation Risks

The best way for companies to minimize disclosure and fiduciary-related risks from climate change-related issues is to have management and directors inform themselves about likely material risks posed to the company's business by climate change and to disclose those risks in the company's public filings and in safe-harbored public statements. The company may want to consider engaging in a "green audit" of its operations with the assistance of its outside counsel or consultants. Potential risks should be disclosed in the appropriate risk factor discussion in the company's Form 10-K and Form 10-Q filings. Finally, the company's directors should be certain that they are kept informed of disclosure and regulatory developments with respect to climate change issues that may affect the company's business. The board should charge its audit committee or other appropriate committee to monitor such developments with the help of outside counsel and consultants, and to report periodically to the board about known or anticipated material risks to the company's business.

INSURANCE

A range of climate-related risks – including potential liability exposure -- is on the mind of insurers, for whom climate-related liabilities may present the largest range of litigation. Insurers face risks and possible litigation in areas ranging from property damage and business interruption from adverse weather events, to exposure to climate-based litigation of all kinds against insureds by third parties, to potential environmental liabilities.

To put these risks in perspective, consider the following:

- In a 2007 report entitled "Catastrophe Trends – Rapid Climate Change," Lloyd's warned:

  [T]he latest science presented in this report suggests that climate change is likely to bring increasingly dramatic, and possibly rapid, effects at a local level, which differ in their intensity and even in their outcome. In addition, a growing number of potential feedback mechanisms within the climate have the capacity to cause tipping points in the system and speed change further. While we cannot yet determine what the exact impact of climate change will be, the evidence is increasing to suggest we will see tangible change within our lifetime, and insurers and business should begin to consider and prepare for the range of outcomes now.[52]

- North Carolina economists recently estimated that coastal counties would experience billions of dollars in losses by 2080 as a result of climate change.[53]

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[52] Lloyd's, "Catastrophe Trends – Rapid Climate Change," April 2007 (available for download at www.lloyds.com/NR/rdonlyres/FCA144E6-24D5-425E-B058-3A64E020E18F/0/360_RapidClimateChangeReport.pdf).

[53] Bin, O., Dumas, C., Poulter, B., Whitehead, J., "Measuring the Impacts of Climate Change on North Carolina Coastal Resources," March 15, 2007 (http://econ.appstate.edu/climate/NC-NCEP%20final%20report.031507.pdf).

- Insurance companies face potential claims – and the possibility of litigation – based on a number of legal theories, ranging from tort and product liability, to environmental liabilities created by statute (if any), to litigation defense costs in climate cases, to business interruption claims and others.[54]

Insurance companies are considering and implementing strategies to attempt to reduce their potential exposure. Despite these strategies, or perhaps because of them, we expect that insurance coverage will be an active area of litigation.[55]

INTERNATIONAL

On the international side, legal issues may arise given the competitive implications of a global patchwork of climate regulation. Disputes could involve companies and countries affected by the stringency of climate regulation, or attempts to limit the importation of products into countries with greenhouse gas regulations where those products are manufactured in unregulated countries. Such an approach was advocated recently in a report by the Economic Strategy Institute entitled "Seizing the Opportunity: Using International Trade Regulations to Combat Climate Change."[56]

"PRACTICING" CLIMATE LAW IN AN UNCERTAIN LEGAL ENVIRONMENT

Given the nascent, and somewhat uncertain direction, of climate change litigation, companies face difficult questions about how to weigh and limit future litigation exposure. Law firms similarly face questions about how to best marshal their resources to assist clients in addressing emerging issues that may or may not be enduring practice areas, or might have a short shelf life.

It is critical to monitor and, where appropriate, participate in, the development of climate change regulation. Regulatory programs will dramatically affect a company's business, as well as litigation exposure. For example, California is at the forefront of the development of U.S. greenhouse gas regulations. An understanding of the early phases of the regulatory process — e.g., the regulatory reports and findings, public workshops and requests for public input that will factor in future climate regulation — is a key part of climate readiness. A regulated entity that does not participate in or understand all of the work that leads to a particular proposal will be at a significant disadvantage if it decides to participate in the process only at the time of a judicial challenge to the regulation.

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[54] C. Ross., E. Mills & S. Hecht, "Limiting Liability in the Greenhouse: Insurance Risk Management Strategies in the Context of Global Climate Change," Stanford Env'tl Law J. and the Stanford J. of Int'l Law, Symposium on Climate Change Risk, Vol. 26A/43A: 251, pp. 253-254.

[55] *Id.*

[56] Carliner, B., Perl-Kot, M., Swanson, R. & Prestowitz, C., "Seizing the Opportunity: Using International Trade Regulations to Combat Climate Change," Economic Strategy Institute (Jan. 10, 2008) (available for download at http://www.econstrat.org/images/ESI_Research_Reports_PDF/seizing_the_opportunity.pdf).

CONCLUSION

Climate law is not a practice in itself; it is a legal and political issue that implicates multiple practice areas, including regulatory and administrative practice, environmental and general commercial litigation, government enforcement, complex tort, insurance coverage, securities, and international trade. As a result, both law firms and their clients must carefully evaluate and understand the many component parts of climate change to properly and proactively take action to assess the risks -- and opportunities -- for each company.

ABOUT THE PRESENTER(S)

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Lisa Heinzerling is Professor of Law at the Georgetown University Law Center. She received an A.B. from Princeton University and a J.D. from the University of Chicago Law School, where she was editor-in-chief of the Law Review. She clerked for Judge Richard A. Posner on the United States Court of Appeals for the Seventh Circuit and for Justice William J. Brennan, Jr. on the United States Supreme Court. She served as an assistant attorney general in Massachusetts, specializing in environmental law. She has been a visiting professor at the Yale and Harvard law schools. She is the author, with Frank Ackerman, of *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press 2004). Heinzerling was the primary author of petitioners' successful briefs in *Massachusetts v. EPA*, in which the Supreme Court held that the Clean Air Act grants the Environmental Protection Agency the authority to regulate greenhouse gases.

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Robin Cantor has more than 20 years of consulting and research experience and specializes in environmental and energy economics, statistics, risk management, and insurance claims analysis. In addition, she leads Navigant Consulting's Liability Estimation practice, which helps companies and financial institutions better understand asbestos and other product liability exposures. A partial listing of studies Robin has conducted includes statistical analysis of asbestos settlements, benefit-cost analysis of waste management investments and MTBE, analysis of economic benefits in CERCLA cost contribution disputes, analysis of methods used in natural resource damages, property value diminution, and measurement of environmental externalities from different electricity fuel cycles. She has authored journal articles, books, and expert reports and has submitted analysis, testimony and affidavits in federal arbitration, regulatory and Congressional proceedings, and federal court.