

## ENVIRONMENTAL LAW

# Climate Change Lawsuits

**U**NWILLING TO WAIT for federal regulatory action to address the perceived risks of global climate change, states, interest groups and individuals are attempting to force emission reductions and win damage awards through litigation. Climate litigation is in its infancy, and pending cases face significant hurdles. But if these cases survive to the merits stage, and others follow, courts will serve as the gatekeepers of climate science.

The U.S. Supreme Court's divided ruling in *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), foreshadows the disputes that are likely to arise in climate cases. Courts will be asked to resolve questions concerning the reliability and admissibility of evidence of cause, effect and remedy. In regulatory disputes, courts will evaluate regulators' use of climate science and wrestle with difficult questions of the deference that regulators are due.

The last few years have brought predictions that U.S. courts would be inundated with large-scale climate litigation akin to asbestos and tobacco litigation. But these predictions have yet to come true and, to date, climate suits have been limited to a few administrative and tort cases. The administrative cases involve challenges to regulatory action or inaction. For example, automobile dealerships challenged the validity

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of California regulations mandating stringent carbon dioxide limits for motor vehicles. See, e.g., *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Calif. 2006). And the Supreme Court's recent climate ruling involved a challenge by Massachusetts and others to the EPA's decision not to regulate carbon dioxide emissions as pollutants under the Clean Air Act.

### Recent climate-change suits by states and individuals

On the tort front, coalitions of state governments have pressed public nuisance claims against power plants and automobile manufacturers, alleging that greenhouse gas emissions from their activities and products contribute to global warming and myriad harms allegedly linked to global warming. See, e.g., *Connecticut v. American Elec. Power Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California ex. rel. Lockyer v. General Motors Corp.*, No. 3:06 Civ. 05755 (N.D. Calif. filed Sept. 20, 2006). Both actions seek to enjoin future emissions.

The *General Motors* suit also seeks billions of dollars in damages. In separate litigation, a putative class of Mississippi property owners sued oil, coal and chemical companies, claiming that their activities contributed to climate change, which, in turn, magnified the effects of Hurricane Katrina. *Comer v. Nationwide Mut. Ins. Co.*, 2006 U.S. Dist. Lexis 33123 (S.D. Miss. 2006).

It is difficult to predict whether these nascent climate cases will mature into larger-scale litigation. While future regulatory challenges are certain, the future of tort claims is less certain. The complaint in *American Elec. Power* was dismissed on the ground that it raised a nonjusticiable question "assigned to the political branches." 406 F. Supp. 2d at 274. Automobile manufacturers have urged the same basis—among others—for dismissal of the claims in *General Motors*. But even as these cases are litigated, other legal theories are under discussion, including negligence, fraud and failure to disclose material financial risks purportedly posed by climate change. While these theories also face significant hurdles, they may be tested in multiple proceedings in multiple jurisdictions.

If and when climate cases are heard on the merits, climate science will take center stage. Based on recent public discourse, one might conclude that the debate over climate change is over. A majority of the Supreme Court has declared "[t]he harms associated with climate change...serious and well recognized." *Massachusetts v. EPA*, 127 S. Ct. at 1442. Environmental groups and major corporations have banded together and embraced the U.S. National Academy of Sciences' conclusion that "the scientific understanding of climate change is now sufficiently clear to justify nations taking prompt action." See U.S. Climate Action

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Partnership, A Call for Action, Jan. 22, 2007, [www.us-cap.org/ClimateReport.pdf](http://www.us-cap.org/ClimateReport.pdf).

But consensus that climate change is occurring and should be addressed by regulators is far different from the showing of cause, effect and remedy required of tort plaintiffs seeking forced emission reductions and significant damage awards. The distinction between these scenarios is important. Information that gives a sound basis for forward-looking regulatory action may not provide a sufficient basis to tag a corporation with liability, or enjoin an alleged nuisance. As one judge explained, “[a] court cannot determine causation...until science has done so. ‘Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.’” *Siharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1374 (N.D. Ga. 2001) (citation omitted).

In contrast to judges, regulators have a forward-looking mission to reduce risk even when risk is speculative. For example, it is part of the EPA’s mission to “look forward to the future to anticipate potential threats to human health and the environment.” See 2003-2008 EPA Strategic Plan—Direction for the Future, at 2. Thus, the regulatory “threshold of proof is reasonably lower than that appropriate in tort law,” which requires a particularized showing of cause and effect. See *Allen v. Pennsylvania Eng’g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996).

In short, while regulators take a forward-looking view of scientific research and information, judges in tort cases are focused on the present state of information. As Judge Richard A. Posner wrote, “The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science, it does not lead it.” *Rosen v. Ciba Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

*Massachusetts v. EPA* illustrates this distinction. The court ruled that Massachusetts had standing to challenge EPA inaction based on Massachusetts’ special position as a sovereign state and its procedural right to challenge “agency action unlawfully withheld.” 127 S. Ct. at 1453. Based on these factors, the court held that Massachusetts could establish a right to proceed “without meeting all the normal standards for redressability and immediacy” and could proceed “if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Id.* The court accepted the state’s claim that agency inaction would contribute to a rise in sea levels and loss of coastal lands.

The showing that the Supreme Court required of Massachusetts to establish standing is far less demanding than that necessary to

establish tort causation. To establish standing, a plaintiff must demonstrate concrete and particularized injury fairly traceable to the defendant. But the requirement that an injury be fairly traceable to a defendant “is not equivalent to a requirement of tort causation” and “does not mean that plaintiffs must show to a scientific certainty that defendant’s [actions], and defendant’s [actions] alone, caused the precise harm suffered by plaintiffs.” *PIRG v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990). See also *Friends for Ferrell Parkway v. Stasko*, 282 F.3d 315 (4th Cir. 2002).

## In the aftermath of ‘Mass. v. EPA,’ courts will need to resolve issues over the admissibility of evidence of cause, effect and remedy.

### Climate cases raise several complex causation issues

Climate-based tort cases present a host of complex causation questions. What is an individual defendant’s contribution to the 150-year inventory of greenhouse gas emissions? How does that contribution affect the climate, if at all, and in what time frame? Can the effects of an individual contribution be segregated from other human and natural sources of greenhouse gases? Is there proximate cause between climate change and the ultimate harm alleged by plaintiffs (for example, increased hurricane activity)? What is the time frame for the harm alleged? Will forced emission reductions mitigate the purported effects of climate change? These are only a few of the questions that will arise in tort cases.

Defendants in tort cases should anticipate that would-be experts will rely on emerging climate science and related regulatory activities. The task of a lawyer who wants to use, or challenge the use of, such information is to determine whether it is independently reliable or of a type typically relied upon by experts in the field. Fed. R. Evid. 702 and

703. That task is complicated because climate science has not been developed with litigation and proximate cause standards in mind. It is likely that experts will rely on research performed by others. Initially, a lawyer should carefully evaluate the third-party “science” relied upon by an expert and the processes used to generate it. By carefully evaluating such information, a lawyer will know whether an expert opinion is based on reliable evidence of the type that a court might independently admit, or information that may support regulatory risk reduction but is too uncertain to form a basis for tort liability.

This is especially true in the case of climate science, where researchers typically acknowledge information gaps and areas of uncertainty. While a regulator might rely on such information on the basis that potential risks to the public outweigh the need for certainty, information gaps may render the same information unreliable as evidence of proximate cause in a tort case. Finally, targets of climate-change litigation should ensure that experts and courts focus on the right questions. A general consensus that humans contribute to climate change, and that it is potentially catastrophic, does not address the questions of specific causation that are the key to tort-based climate claims.

It is not clear whether climate litigation will reach maturity. If it does, courts will face complex scientific questions of cause and effect in an area where the science may not yet be sufficiently developed to supply the answers. **NLJ**