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FOCUS

FORECASTING THE FUTURE

By Joanne Lichtman and Gil Keteltas

Although it may have taken an Academy Award, a Nobel Prize and apocalyptic predictions of climate-related catastrophes, climate change has by all accounts captured the attention of the American public. Underlying this public attention 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. Governments, nongovernmental organizations and corporations at the local, regional, national and international levels are analyzing and debating possible approaches to address climate change. But potential solutions are complicated by 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.

Although California’s state Legislature and the Air Resources Board are at the leading edge of this country’s legislative and regulatory response, California’s attorney general is at the leading edge of a different response: the use of tort litigation in an attempt to obtain monetary damages and injunctive relief against industries that emit greenhouse gases. The attorney general’s office recently expanded its Web site to “include valuable information about the fight against global warming.” For California and other states dissatisfied with the pace of national climate-change regulation, that fight specifically includes tort litigation against companies whose activities result in the emission of greenhouse gases. In addition, private plaintiffs also are using tort theories to try to recover damages for individual harms allegedly resulting from climate change caused by industrial greenhouse gas emissions. Indeed, many have predicted

waves of litigation that could equal or overshadow other mass tort litigation, such as asbestos and tobacco.

Relying on the theory of public nuisance, California is a plaintiff in two of the three major climate-based tort cases brought to date. In *California v. General Motors Corp.*, C06-05755 (N.D. Cal. Sept. 17, 2007), California sued six of the major automakers for “creating, and contributing to, an alleged public nuisance — global warming.” A “public nuisance” 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.

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California’s attorney general said 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 said 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.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), California joined seven other states in suing five power companies for causing a public nuisance by emitting 650 million tons a year of greenhouse gases as part of their operations. The power-company case also 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 recently by the lower courts. The *AEP* court held that, because resolution of the suit 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.” Moreover, the court held that the relief sought by the plaintiffs was of such a “transcendently legislative nature” that it was improper for the court to grant.

Referencing the *AEP* decision, the court in the auto-industry case reached the same conclusion: Resolution of the plaintiff’s claim would require the court to make an initial policy decision of a kind reserved for the political branches of government. 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.” The court also held that the complaint raised a nonjusticiable political question because of a lack of judicially manageable standards by which to resolve the plaintiffs’ claims.

Private citizens have attempted similar litigation to obtain redress for purported harms caused by greenhouse gas emissions, with a similar result. In *Comer v. Murphy Oil Co.*, 05-CV-436 (S.D. Miss. Aug. 30, 2007), 14 individuals filed a class action against insurance, oil, coal and chemical companies, seeking relief for property damages resulting from Hurricane Katrina. The plaintiffs said that defendants’ emissions contributed to climate change and thus magnified adverse weather events, including the hurricane. The court also dismissed the *Comer* case on constitutional-standing and political-question grounds. All three cases are on appeal.

Even if the plaintiffs are able to overcome the political-question doctrine that, for the time being, has ended these early tort cases, future climate-change litigation faces other hurdles, the most significant of which is causation. The plaintiffs’ challenge in proving that 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, consider the types of current and prospective injuries listed 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 a century of emissions, tying one defendant's emissions (or even an entire industry's) to a climate event that caused any one of these individual harms could well be impossible. Many of these allegations are based on the projections of state, national and international regulatory and quasi-regulatory bodies, including the Air Resources Board, EPA, the National Academy of Sciences and the Intergovernmental Panel on Climate Change. These organizations all have a precautionary focus on future risk rather than a retrospective focus that guides a traditional tort-causation analysis. In fact, courts often reject plaintiffs' attempts to admit regulatory findings and projections in proving tort damages on the basis that "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." Information that may provide a reasonable basis for forward-looking regulatory action often will not be

reliable courtroom evidence and meet evidentiary standards. 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."

Now that the early results are out, have we seen the end of climate-based tort litigation? Surely not. The CO₂ emissions at issue in the *GMC*, *AEP* and *Comer* cases were not restricted by state or federal regulations. As federal and state governments start to craft greenhouse gas regulations, the political landscape will change considerably and may address at least some of the questions identified by the courts in those cases. Over the next few years, greenhouse gases will move from virtually unregulated to highly regulated. And, depending on how they are crafted, regulations could create judicially manageable standards or enforcement rights for states or private citizens.

Because of the uncertain risks of 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 pre-emption provisions or foreclose private

rights of action, they could either open or close the door for climate-based tort litigation by setting standards of conduct against which corporate activities might be measured.

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 as well as the corresponding challenges by the regulated community to these types of regulations. In other words, the political questions identified by courts to date are starting to be addressed, and the political solutions are leading to litigation. And once regulatory standards are set, litigation over their enforcement will start. This litigation will be joined by other types of lawsuits, including climate-based insurance litigation, securities and shareholder litigation over disclosures related to climate change and its potential impacts and costs, and other legal theories, such as product liability.

Joanne Lichtman (LichtmanJ@howrey.com) and **Gil Keteltas** (keteltasg@howrey.com) are partners in Howrey's global litigation group in the firm's Los Angeles and Washington, D.C., offices, respectively, where they litigate commercial, environmental, product liability and complex tort cases.