

Morris Polich & Purdy LLP

CLIMATE CHANGE LITIGATION IN THE U.S.

THEORIES OF LIABILITY AND INSURANCE ISSUES

UPDATE 1

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Climate Change Litigation in the US: Theories of Liability and Insurance Issues An Update

On April 30, 2008, Morris Polich & Purdy LLP presented a paper and seminar at the Old Library, Lloyd's Building in London on the subject of Climate Change Litigation in the US: Theories of Liability and Insurance Issues. The level of interest about this subject, as reflected by the attendance at the seminar, the number of inquiries following the seminar and the response of other insurers with whom we have shared our paper, combined with the rapid pace of new developments relating to climate change litigation in the short period since that seminar was presented, suggests the desirability of periodically updating that presentation. The purpose of this brief update is to do just that.

Legislative/Regulatory Developments

We observed in April, 2008 that the United States had been resistant to mandatory regulation of greenhouse gas omissions but that challenges to that policy were being increasingly mounted at both the legislative/regulatory level and in the courts. We also observed that the enactment of regulatory limits was likely to open up the courts to legal action against defenders by way of a private right of action and that, paradoxically, even the failure to enact regulatory controls could lead to the same result, with the tort system becoming a battleground for climate change policy.

As to the first observation, the battle over climate change policy at the federal level has, if anything, intensified over the last two months, marked by the following notable developments:

- The Polar Bears. In May, 2008, the Department of Interior issued its long-delayed response to a request by the U.S. Fish and Wildlife Service, listing the polar bear as a "threatened species" but enraging environmental activists by simultaneously determining that the Endangered Species Act was never intended to regulate global warming and announcing that the Act may not and will not be used as a basis for regulating greenhouse gas emissions.
- Also in May, 2008, responding to a determination by the United States Supreme Court in *Massachusetts v. Environmental Protection Agency* (discussed in our April paper) that it was required by the Clean Air Act to promulgate standards for emissions from motor vehicles, the EPA set the standard at 75 parts per billion, incurring the wrath of many environmental organizations, which had argued for a more stringent standard. On May 27, 2008, several of those organizations filed a federal court action seeking review of that determination.

- Stepping up the pressure on the current Administration, in May, 2008, the Committee on Environment and National Resources of the National Science and Technology Council, a committee of scientists appointed to study climate change under the auspices of the Global Change Research Act of 1990, issued its report, entitled “Scientific Assessment of Effects of Global Change on the United States,” in which it echoed many of the same conclusions reached by the UN-appointed Intergovernmental Panel on Climate Change (IPCC), including the significant contributive effect of human activities on global warming.
- In June, a landmark bipartisan bill, the Climate Security Act of 2008, which would have created a cap and trade program with a goal of reducing greenhouse gas emissions in the United States by 2050 to 70% below 2005 levels, came up for debate and a possible vote in the United States Senate. Amidst a highly charged political atmosphere and widely varying claims about its economic costs and consequences if enacted, passage was ultimately considered so unlikely that it was not brought up for a vote.

The foregoing developments seem to reflect an even more intense continuation of the scenario in recent years, whereby legislative and regulatory attempts to limit greenhouse gas emissions either failed altogether or were deemed inadequate by environmental activists, who then turned to the courts for vindication of their position. It is still too early to say whether the courts will be the ultimate battleground and, if so, whether the strict and comprehensive regulations sought by environmental activists can be co-opted by tort lawyers seeking damages. Even with what is almost certain to be an Administration commencing in 2009 which is more receptive to emission control legislation, the fate of the Climate Security Act of 2008 suggests that comprehensive climate change legislation will be difficult to achieve and it is likely that, in the meantime, the courts will play an increasing role.

Climate Change Litigation

The key lawsuits discussed in our April paper continue to progress through the American courts.

Connecticut v. American Electric Power Company, Inc. remains pending before the United States Court of Appeals for the Second Circuit. The lower court ruled that the action by Connecticut and other states to enjoin the defendant power companies’ contribution to the “public nuisance” of global warming should be dismissed because the climate change issue presents a non-justiciable political question. On appeal, the case was fully briefed and argued in 2006. Thereafter, the Court of Appeals requested supplemental briefing concerning the impact of the United States Supreme Court’s decision in *Massachusetts v. Environmental Protection Agency*. That process now appears to be complete and the Second Circuit’s decision is awaited with widespread interest.

California v. General Motors Corp., an action against the “Big Six” automakers for contributing to global warming and harm to California, is in the early stages of an appeal to the Ninth Circuit

Court of Appeals. Similar to the *Connecticut* case, the federal district court granted the defendants' motion to dismiss based on lack of justiciability.

Comer v. Nationwide Mutual Insurance is the action arising from Hurricane Katrina, which, according to the plaintiffs, was exacerbated by global warming. This case was also dismissed on political question grounds at the trial court level. It is now on appeal to the Fifth Circuit Court of Appeals. With briefing now complete, the case has been tentatively scheduled for oral argument before a panel of the Fifth Circuit during the week of August 4, 2008.

Initial appearances of the parties have been made in the closely-watched *Village of Kivalina v. ExxonMobil*, a federal court action alleging damages due to erosion of an Alaskan village from the effects of global warming. The defendants, which include large oil and power companies, will soon be filing a motion to dismiss the case.

We will continue to monitor and update the progress of these and future cases as they proceed through the court system in the United States. Comments and questions are most welcome and may be addressed to:

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