

Morris Polich & Purdy LLP



CLIMATE CHANGE LITIGATION IN THE U.S.

THEORIES OF LIABILITY AND INSURANCE ISSUES

UPDATE 3

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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 on the subject of Climate Change Litigation in the United States: Theories of Liability and Insurance Issues. The level of interest expressed about that subject at that time combined with ongoing developments relating to climate change litigation suggested the desirability of periodically updating that presentation. This third update complements the initial presentation along with our June and December 2008 updates.

Climate Change Litigation

With notable exception, the key lawsuits discussed in our April 2008 paper continue to progress through the American courts. Recent political shifts have resolved at least one of those cases and may have contributed to delaying another.

Connecticut v. American Electric Power Company, Inc. ([2d Cir. Sept. 22, 2005] No. 05-5104-cv) 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. The appeal was briefed and argued in June 2006; and supplementally briefed in July 2007, in response to the United States Supreme Court's decision in *Massachusetts v. Environmental Protection Agency* ([2007] 549 U.S. 497). Recently appointed Supreme Court Justice Sonia Sotomayor, who was the presiding judge on the circuit court panel who heard the appeal, was asked during Senate confirmation hearings for an explanation of the unusually long delay in resolution of this case. Justice Sotomayor offered that more than a year of the delay was waiting for the *Massachusetts* decision. Others have speculated that much of the more recent delay, however, may be related to Justice Sotomayor's nomination. Regardless the reason, the decision is overdue and greatly anticipated.

As mentioned in our December 2008 update, *California v. General Motors Corp.* ([N.D. Cal.] No. 06-cv-05755-MJJ), an action against the "Big Six" automakers for contributing to global warming and harm to California, was on appeal to the Ninth Circuit Court of Appeals ([9th Cir. Oct. 24, 2007] No. 07-16908). Similar to the *Connecticut* case, the federal district court had granted the defendants' motion to dismiss based on justiciability. In the Ninth Circuit, briefs had been filed and a hearing set for May 2009. In April 2009, California requested, and the Court of Appeals granted, a six month continuance of the oral argument. On June 19, 2009, California filed its unopposed motion to dismiss the appeal. According to the motion, California's decision was based on "recent events," which it identified as: (1) the U.S. EPA's acknowledgement "that carbon dioxide and other greenhouse gases are a public health danger and must be regulated;" (2) President Obama's directive to the U.S. Department of

Transportation (DOT) to establish national fuel efficiency standards in line with those standards California had sought; and (3) Chrysler's and General Motors' recent bankruptcy filings. California maintained, nonetheless, that the district court had erred when it dismissed the underlying action. On June 24, 2009, the Court of Appeals granted California's motion and dismissed the appeal.

Comer v. Nationwide Mutual Insurance ([S.D. Miss.] No. 1:05-cv-436) (*Comer v. Murphy Oil USA* on appeal [(5th Cir. Sept. 28, 2007) No. 07-60756]) is the action arising from Hurricane Katrina. The plaintiffs contend that the damage caused by Katrina was exacerbated by global warming. This case was also dismissed on political question grounds at the trial court level. In the Fifth Circuit Court of Appeals, oral argument was heard on November 3, 2008. The Court has not yet issued a ruling.

In *Center for Biological Diversity v. U.S. Department of Interior* ([D.C. Cir. 2009] 563 F.3d 466), environmental groups and the Native Alaskan Village of Point Hope challenged the U.S. Department of Interior (DOI)'s April 2007 decision to open more lands in the outer continental shelf off the coast of Alaska to oil and gas development. Petitioners alleged, among other things, violations of the Outer Continental Shelf Lands Acts (OCSLA) and the National Environmental Policy Act (NEPA) based, in part, on assertions that DOI failed to consider the effect of global climate change on the lands and the planned program's effect on global climate change. In its April 2009 decision, the U.S. Circuit Court of Appeals for the D.C. Circuit vacated and remanded the DOI decision for reconsideration on grounds not related to climate change. As to the climate change issues, it held that the alleged NEPA violation was not ripe and dismissed as to that claim. However, it held that the OCSLA climate change claim was justiciable. Ultimately, it held that this challenge, nonetheless, lacked merit and also dismissed as to that claim.

The court held that petitioners had no standing under the substantive theory because they neither showed particularized harm nor causation. It stated that,

Petitioners can only aver that any significant adverse effects of climate change “may” occur at some point in the future. This does not amount to the actual, imminent, or “certainly impending” injury required to establish standing. Second, climate change is a harm that is shared by humanity at large, and the redress that petitioners seek – to prevent an increase in global temperature – is not focused any more on these petitioners than it is on the remainder of the world's population. Therefore, Petitioners' alleged injury is too generalized to establish standing.

As to the procedural theory, the court held that the petitioners had standing to sue under both OCSLA and NEPA because DOI did fail to consider the cost and effect on the outer continental shelf lands of greenhouse gas emissions resulting from the consumption of oil and gas extracted under the program. The circuit court held, nonetheless, that the NEPA climate change claim was not ripe because of “the multiple stage nature of the Leasing program,” which had not reached “the point of irreversible and irretrievable commitment of resources and the

concomitant obligation to fully comply with NEPA”” because no leases had been issued at the time of the petitioners’ challenge.

Village of Kivalina v. ExxonMobil ([N.D. Cal. Feb. 26, 2008] No. 04:08-cv-01138-SBA) is a federal court action filed in San Francisco seeking damages based on the allegation that global warming melted the Arctic Sea ice resulting in damage to the Alaskan village of Kivalina. The defendants are major energy and oil companies who are alleged to have collectively contributed to global warming by emitting large quantities of greenhouse gases. The defendants filed extensive motions to dismiss, including arguments that the action presents a non-justiciable political question, that the plaintiffs cannot plead facts to support the causation element of their nuisance claims and that the conspiracy claims are purely derivative of the nuisance claims and must also be dismissed.

In response, the plaintiffs have argued in part that, unlike other climate change cases, the *Kivalina* action seeks monetary damages for specified harm, thus rendering the political question doctrine inapplicable. These motions have been submitted, but the court has not issued a ruling.

Insurance Coverage Litigation

The first insurance coverage action on the subject of climate change is still pending. (*See Steadfast Ins. Co. v. AES Corp.* [Arlington (Va.) County Cir. Ct.] No. 2008-8:58.) In a July 9, 2008 complaint filed in state court in Virginia, Steadfast Insurance Company seeks a declaration that it is not obligated to provide coverage to its insured, the AES Corporation, either for indemnity or for a defense, against claims made against AES in the *Kivalina* case. On August 18, 2008, AES filed a counter-claim seeking coverage, arguing that Steadfast construes the *Kivalina* complaint too narrowly and its policy exclusions too broadly. It amended the counter-claim on May 26, 2009.

Steadfast, which issued five consecutive liability insurance policies to AES during the period 2003-2008, contends that no coverage is afforded by its policies because: (1) the claimed damages were not the result of an “accident”, (2) damages caused by greenhouse gas emissions are excluded from coverage by reason of the pollution exclusion; and (3) the alleged damages incepted long before 2003, and are, thus, barred by a loss in progress endorsement contained in each of the policies.

On March 5, 2009, Steadfast filed a motion for summary judgment. AES filed its opposition to the motion on August 7, 2009. As of this writing, the court has not issued a ruling.

Legislative/Regulatory Developments

As we pointed out before, the United States in recent years has not been supportive of mandatory regulation of greenhouse gas emissions. It declined to ratify the Kyoto protocol, which bound most developed nations to a cap and trade system and the Bush administration had been firmly opposed to regulations placing mandatory limits on greenhouse gas emissions, arguing instead for voluntary reductions using technological advances to reduce the release of

those gases. This approach, however, is changing as a result of the 2008 election of President Obama and the attendant Democratic congressional majorities.

Although his administration has been in the White House for less than one year, President Obama is well on his way to pursuing an aggressive environmental agenda, including the regulation of greenhouse gas emissions, an increase in fuel economy standards and an emphasis on renewable energy sources.

In January 2009, less than one week after taking office, President Obama expressed his desire for tougher CAFE (Corporate Average Fuel Economy) standards for U.S. automobiles. In May 2009, he directed the DOT to establish those tougher standards beginning with the 2012-model year. The new standards will require an average fuel economy of 35.5 miles per gallon by 2016. The White House hailed the new national policy as “an unprecedented collaboration” between DOT, EPA, the automobile industry, the environmental community and the federal and state governments.

In January 2009, President Obama also instructed the EPA to reconsider California’s formerly rejected application to control greenhouse gas emissions. In June 2009, EPA announced that it was granting California’s waiver request which would allow it to regulate greenhouse gas emissions from new automobiles in California beginning with the 2009 model year. Thirteen other states along with the District of Columbia had earlier opted to follow California’s lead in this matter. EPA’s ruling would allow those states to implement California’s more strict emission standards.

On June 26, 2009, the U.S. House of Representatives passed the American Clean Energy and Security Act of 2009 (Waxman-Markey H.R. 2454). The House vote was close with 219 representatives voting for passage, 212 voting against the bill and three abstaining. This bill provides for the imposition of ceilings or caps on emissions of greenhouse gases and creation of a market whereby emission credits may be bought and sold. The bill was sent to the U.S. Senate on July 5, 2009, where it has been read and placed on the Legislative Calendar.

The U.S. Department of Interior announced its continued affirmation of the May 2008 listing of the polar bear as an endangered species. However, Secretary Salazar also acknowledged it would continue to enforce the Bush administration’s policy that maintained the Endangered Species Act would not be used as a tool to fight global climate change. Several environmental groups are maintaining earlier initiated challenges to the Bush administration rule limiting the use of the Act. Those groups have powerful allies, including California’s U.S. Senator Barbara Boxer. On the flip-side, the State of Alaska has initiated a court challenge to the listing arguing that the polar bear’s population is stable and that the listing will severely injure several state industries.

As anticipated in our December 2008 update, the EPA responded to the United States Supreme Court’s opinion in *Massachusetts v. EPA*. In that case, rejecting the EPA’s position that it was without authority to regulate carbon dioxide emissions from motor vehicles under the Clean Air Act, the Supreme Court held that such emissions constituted an “air pollutant” within the

meaning of the Act and ordered the EPA to make a determination whether such emissions endangered public health and, if so, to promulgate standards for those emissions.

In April 2009, the EPA announced its tentative finding that greenhouse gas emissions contribute to air pollution that may endanger public health and welfare. The tentative ruling encompassed carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. The tentative finding public comment period ended in late June 2009. Regulations will only be promulgated after the finding is finalized, which is imminent, and are likely to target motor vehicle emissions.

Some of the framework for comprehensive regulation of greenhouse gas emissions has already been initiated. In March 2009, EPA proposed a rule requiring nationwide reporting of carbon dioxide and other gas emissions that would include facilities which account for 85 to 90% of U.S. emissions – and would exclude small businesses. The proposed rule is targeted at suppliers of fuels and chemicals, vehicle and motor manufacturers and large industrial emitters in cement, iron and steel production and electricity generation. It would require reporting beginning as early as fiscal year 2010. The proposed rule is being authorized under the Clean Air Act and must undergo public comment and hearings before finalization and implementation.

As mentioned in the December 2008 update, a recent decision of the EPA's Environmental Appeals Board (Appeals Board) has given a further boost to the application of the Clean Air Act as a broad mechanism for limiting greenhouse gas emissions. Unlike *Massachusetts v. EPA*, which dealt with emissions from motor vehicles, the decision *In Re Deseret Power Cooperative*, ([U.S. E.P.A. App.Bd. Nov. 13, 2008] No. 07-03) addressed carbon dioxide emissions from stationary sources. Rejecting the EPA's approval of a permit for the power plant, the Appeals Board ordered the EPA to undertake further deliberations concerning whether carbon dioxide emitted from stationary sources was indeed not "subject to regulation" under the Clean Air Act. In January 2009, the Sierra Club petitioned the EPA to reconsider a December 2008 memorandum by then Director Stephen Johnson which interpreted whether the Prevention of Significant Deterioration program applied to carbon dioxide emissions. In February 2009, EPA granted the petition for reconsideration and pointed out that the memorandum did not bind states who issued permits under their own plans. In what may portend the ultimate decision, EPA further noted that implementing agencies should not assume that former director Johnson's memorandum properly interpreted the Clean Air Act.

EPA's reconsideration of the Johnson memorandum and its ultimate determination of *In Re Deseret Power Cooperative* could have wide implications, since the potentially regulated stationary sources could include a broad range of smaller facilities, such as office buildings, schools and hospitals. That determination is being made under a very differently-constituted EPA than reached the initial conclusion that such emissions were not subject to regulation.

We suspect that the pace of legislative and regulatory developments relating to climate change will continue to build momentum and increase at an unprecedented pace and volume. We will identify and update developments maintaining our principal focus on the progress of climate change and related insurance coverage litigation.

Your comments and questions are most welcome and may be addressed to:

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