

Global Warming Litigation— Already Here, But Are You Ready?

By Christina LaRosa and Noel Paul*

A regular glance at headlines of major newspapers reveals a somewhat startling trend: global warming litigation is increasingly appearing commonplace. Just last month, *The New York Times*, among other papers, reported on two major global warming decisions by federal courts. *The Times* also highlighted New York Attorney General Andrew Cuomo's demand that certain energy companies report risks to shareholders of their greenhouse gas emissions ("GHGs"). Given this rise in legal activity, the most pressing question for companies concerned with global warming litigation is not whether suits will come, but how to respond to them. To that end, the issue of insurance coverage should be foremost in their planning.

There are primarily four major areas of global warming litigation: 1) Clean Air Act ("CAA") litigation; 2) compliance suits under the National Environmental Protection Act ("NEPA"); 3) suits seeking damages or claiming nuisance; and 4) suits attempting to regulate emissions at the state level. In the absence of regulation by the federal government, advocates of emissions' regulation appear to be advancing their cause through a variety of legal theories, in a variety of courts.

Clean Air Act Litigation

In what some experts have called the most significant environmental law decision of the past decade, the Supreme Court held in *Massachusetts*

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Absolutely Not— Absolute Pollution Exclusion Shouldn't Apply to Greenhouse Gases

By Diana Shafter Gliedman and Rizwan Qureshi*

With all the increased media attention on the effects of greenhouse gases — thank you, Al Gore! — it should be no surprise that lawsuits alleging damages arising out of greenhouse gases ("GHGs") have already begun to be filed. Given that development, it is likely just a matter of time before some (if not all) insurance companies seek to argue that lawsuits involving GHGs are excluded from coverage under CGL policies by provisions such as the so-called "absolute pollution exclusion." Under the common law of most states, however, policyholders with a reasonable expectation of coverage for liabilities arising out their normal business operations *must be granted that coverage*. Put differently, if a company's normal business operations involve

the release of GHGs, and GHGs are not regulated emissions, then that company can reasonably expect its insurance policy will cover lawsuits relating to GHGs.

Even attorneys representing insurance companies have acknowledged that the "absolute pollution exclusion" is likely not to be applied to global warming claims. Reynolds Porter Chamberlain, a leading insurers' counsel, has urged the insurance industry to address the lack of an exclusion for global warming damages and has stated that the status quo is "unlikely to be effective in meeting claims relating to climate change." See "Climate Change Claims Could Hit Insurers Hard," *Financial Times* (Oct. 25, 2006).

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v. EPA that: 1) the EPA had authority to regulate GHGs; and 2) Massachusetts and other states had standing to bring suit for injuries resulting from global warming. There is no doubt that the first holding will significantly affect the future of global warming regulation, particularly in determining to what degree state governments can address the issue themselves. The holding on standing—in particular, that states had “special solitude” to bring suit, and that they could redress their injuries resulting from climate change—arguably is far more significant. By holding that states—and possibly large landholders—could bring suit for global warming, *Massachusetts* opened federal courts to a host of suits that otherwise likely would have foundered.

Compliance Suits Under NEPA/State Statutes

Another federal court held that environmental groups had standing to sue two government defendants for failing to factor their contributions to global warming into their Environmental Impact Statements. In *Friends of the Earth v. Mosbacher*, the court further denied defendants’ summary judgment motion, stating that it was reasonably probable that emissions from the groups’ projects would adversely affect plaintiffs’ concrete interests.

Significantly, states are beginning to require consideration of climate change under state legislation similar to NEPA. California Attorney General Jerry Brown recently sued San Bernardino County, the nation’s largest in terms of land area, for failing to account for greenhouse gases when updating its 25-year plan for growth. The lawsuit alleged that the California Environmental Quality Act requires regulation of GHGs like any other pollutant, and that counties must account for such emissions for any major development project. (The two parties recently reached settlement.) Massachusetts Gov. Deval Patrick, meanwhile, has ordered state regulators to require developers to calculate GHG emissions before initiating major projects.

Suits Claiming Nuisance Or Seeking Damages

Plaintiffs have initiated several ambitious suits against some of the largest emitters of GHGs in the US, essentially in an effort to “regulate through litigation.” In *Connecticut v. American Electric Power*, eight states, the City of New York, and several land trusts brought nuisance suits against the nation’s five largest utility companies. The suits argued

that these companies’ CO₂ emissions constituted a public nuisance, and asked a federal judge in the Southern District of New York to enjoin each defendant to abate its emissions. The judge demurred, however, finding that regulation of global warming constituted a “political question” that the courts were not suited to address.

Recently, a judge in the Northern District of California used similar reasoning to throw out perhaps the most aggressive litigation brought against corporate emitters of GHGs. California’s suit against six major motor vehicle manufacturers sought billions of dollars in damages to compensate the state for its losses resulting from global warming. The state cited several injuries—including loss of snow pack and coastline, and increased flooding and wild fires—resulting from climate change, as well as costs to prevent further harm.

Like his counterpart in New York’s Southern District, however, Judge Martin J. Jenkins dismissed the suit as a “non-justiciable political question.” Upholding the plaintiff’s theory that the automakers unreasonably “interfered with a right common to the general public,” according to Judge Jenkins, would require a policy determination of the costs to society of CO₂ emission compared to the economic benefit of industrial development. The courts, Judge Jenkins stated, are not suited to make such a determination. Moreover, while *Massachusetts* granted states standing to pursue “procedural” remedies to global warming, Judge Jenkins said the Court’s holding did not necessarily provide standing for suits seeking damages.

Other suits for damages have involved some more unconventional claims. In *Comer v. Nationwide Mutual Insurance*, 14 individuals who lost their homes in Hurricane Katrina filed a class action against eight named oil companies, 100 unnamed oil and refining companies, and 31 coal companies for their historic emissions of GHGs. These emissions constituted a nuisance, plaintiffs argued, because they contributed to the formation of the hurricane.

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State Regulation Of Emissions

Shortly before the decision in favor of the auto-makers, a Vermont district court judge provided a major victory for those seeking increased CO₂ regulation. Along with 11 other states, Vermont had adopted GHG emission limits for cars and light trucks. The regulations, originally conceived and adopted by California, would require auto-makers to cut GHG emissions by up to 37 percent by 2016. Thus, the automakers argued that the regulations were technologically impossible to meet, and that the federal government preempted state efforts to regulate emissions.

Judge William K. Sessions III ruled, however, that the industry surely would be able to adapt to this regulation, as it has to those imposed previously. Moreover, because the EPA had the power to grant California and other states a waiver on federal governance of this issue, the states were not technically preempted from devising their own emissions regulations. In late 2005, California filed a waiver with the EPA regarding the emissions standards. The EPA has promised to rule on the request by the end of the year, though California has promised to bring suit if the agency fails to act promptly.

Conclusion

Impatience with the federal government's decision not to regulate GHGs, along with a handful of highly influential court decisions, appears to have fueled a steady increase in global warming litigation. As plaintiffs bring a variety of legal theories in front of a diverse number of judges and juries, it is probable that several plaintiffs eventually will receive favorable judgments in the form of damages, court injunctions, or policy decisions. Fortunately, corporate policyholders held liable in these proceedings should receive indemnification from various lines of coverage. ▲

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SPOTLIGHT

Federal Courts Dismiss Global Warming Tort Claims

In rapid succession, federal district courts delivered two blows to plaintiffs' efforts to recover in tort for global warming. The courts did not reach the merits of either case, finding instead that they were nonjusticiable.

In *Comer v. Murphy Oil USA, Inc.*, No. 05-CV-436LG (S.D. Miss. Aug. 30, 2007), several private litigants alleged that emissions of greenhouse gases by various companies intensified Hurricane Katrina. Judge Louis Guirola, Jr. dismissed the tort claims against all of the defendants remaining in the case on August 30, 2007. In a two-page decision, the Court determined that the plaintiffs did not have standing to assert their claims and that the claims were not justiciable, pursuant to the political question doctrine. The plaintiffs have appealed the decision.

Less than a month later, Judge Martin J. Jenkins dismissed the California Attorney General's public nuisance claims in *California v. General Motors Co.*, No. C06-05755, (N.D. Cal. Sept. 17, 2007). The State of California sought damages against several automobile manufacturers for creating and contributing to global warming. In an extensive opinion, Judge Jenkins ruled that California's claims presented political questions. Specifically, the Court refused to balance the interests of reducing global warming emissions with the competing interests of economic development. ▲

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In order to carry out the "purpose or object" of the insurance that a policyholder purchases, courts determine a policyholder's reasonable expectations of coverage with reference to three major factors: (1) the type of insurance purchased; (2) whether exclusionary language is "conspicuous, plain and clear" in describing what precisely is excluded from being insured; and (3) the basis of the policyholder's liability, including whether that liability arose out of the policyholder's normal business operations. See *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003). The California Supreme Court, for example, has unequivocally stated that general liability insurance policies of the kind sold to corporate policyholders are intended to provide very broad insurance for a wide variety of circumstances:

The purpose of CGL policies is to provide the insured with the *broadest spectrum* of protection against liability for unintentional and unexpected personal injury or property damage arising out of the conduct of the insured's business.

MacKinnon, 73 P.3d at 1217, quoting Michael W. Peters, *Insurance Coverage for the Superfund Liability: A Plain Meaning Approach to the Pollution Exclusion Clause* 27 Washburn L.J. 161, 166 (1987) (emphasis added).

The court further held that the current pollution exclusion, including the meaning of the word "pollutant," is not plain and clear in what it purports to exclude. *Id.* at 1216. Under the "reasonable policyholder" standard, therefore, the insured must

understand that the cause of the injury or damage for which the policyholder is liable is an "irritant or contaminant commonly thought of as . . . environmental pollution." *Id.* at 263. Whether a reasonable policyholder would consider an irritant or contaminant to be "environmental pollution" can be determined by reference to the laws that regulate the irritant or contaminant at issue, if any, as they are applied to the policyholder's operations. *Id.*

Indeed, of the six separate statutes in which Congress addressed global warming, each states that Congress wished to study the issue but *did not authorize regulation of GHGs*. Even though the CAA does describe GHGs as pollutants, it is evident that a reasonable policyholder would have no reason to believe that such emissions would constitute "environmental pollution" subject to a pollution exclusion. Thus, coverage should be afforded.

It is likely that future insurance policies may explicitly exclude coverage for damage related to GHGs. As for current CGL policies, however, it is highly likely that coverage for global warming lawsuits will not be excluded—regardless of what insurance companies say. ▲

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