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In this issue…

Global Warming Litigation: Just a Bunch of Hot Air?

R. Bruce Barze, Jr. and Alexia B. Borden report on cases filed around the country attempting to place liability on defendants for "global warming."

About the authors…

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Attorneys in the Balch & Bingham LLP Environmental Litigation Practice Group are monitoring developments in these "global warming" cases and advising clients accordingly. As an aside, the firm's Gulfport, Mississippi office sustained extensive damage during Hurricane Katrina.

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"Everybody talks about the weather, but nobody does anything about it."

Charles Dudley Warner, 1829-1900

You can't read the newspaper, watch television or search the internet without seeing a reference to global warming and related issues. The same is true in the court system. In the past year, courts have seen a flurry of activity in the way of lawsuits attempting to place liability for "global warming," also known as "global climate change" on a variety of defendants. This article surveys the litigation landscape across the United States, providing the reader with a summary of some of the more interesting cases.

I. Massachusetts v. Environmental Protection Agency, No. 05-1120 (U.S. 2007)

The most notable global warming case is *Massachusetts v. Environmental Protection Agency*, where the United States Supreme Court is currently deciding whether the Environmental Protection Agency ("EPA") is authorized and required to regulate greenhouse gases, such as carbon dioxide, methane, nitrous oxide and hydrofluorocarbons, from motor vehicles. Twelve states along with multiple environmental groups allege that Section 202 of the Clean Air Act, which governs emissions from motor vehicles, requires EPA to regulate greenhouse gases because these pollutants can "reasonably be anticipated to endanger public health or welfare." *See* Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1). The following are the specific questions the Court will address:

1. Whether the EPA Administrator has authority to regulate air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act, 42 U.S.C. 7521(a)(1).

2. Whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1) of the Clean Air Act.

See 05-1120 *Massachusetts v. EPA*: Questions Presented, *available at* http://www.supremecourtus.gov/qp/05-01120qp.pdf. If the Court agrees with Massachusetts and the other petitioners, EPA may be required to regulate greenhouse gas emissions. Oral argument was heard on November 29, 2006 and a decision is expected soon.

II. New York, et al. v. EPA, No. 06-1131 (D.C. Cir. 2006)

In April 2006, Coke Oven Environmental Task Force and ten northeastern states challenged EPA's decision declining to regulate greenhouse gas emissions, such as carbon dioxide from new, modified, and reconstructed power plants and industrial-commercial-institutional steam generating units. The case has been stayed pending a decision from the U.S. Supreme Court in *Massachusetts v. EPA.*

III. Central Valley Chrysler-Jeep v. Witherspoon, No. 04-6663 (E.D. Cal. 2006)

Rather than trying to force regulation of greenhouse gas emissions, the plaintiffs

in *Central Valley Chrysler-Jeep* are trying to prevent enforcement of a California regulation that would require reductions in greenhouse gas emissions. Specifically, Central Valley Chrysler-Jeep and other automobile dealers brought an action against the California Air Resources Board's executive director to prevent enforcement of the regulations adding greenhouse gas emission standards to California's existing motor vehicle standards. The plaintiffs allege that the California state regulation is preempted by the Energy Policy and Conservation Act, which established federal fuel economy standards for new vehicles. California, along with other environmental intervenors, argues that preemption is inapplicable because of California's special status under Section 209(b) of the Clean Air Act. In September 2006, the U.S. District Court for the Eastern District of California allowed the case to move forward with discovery by denying the State's motion for judgment on the pleadings. *See Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006). The trial was originally scheduled for January 2007; however, the case has been stayed until a decision is released in *Massachusetts v. EPA*.

IV. California v. General Motors Corp., No. 06-05755 (N.D. Cal. 2006)

While the auto industry attempts to invalidate California's global warming regulations curbing tailpipe emissions, California Attorney General Bill Lockyer filed a lawsuit against the leading U.S. and Japanese auto manufacturers including Chrysler, General Motors, Ford, Toyota, Honda, and Nissan, seeking to hold them liable for damages caused by the greenhouse gases that their products emit. Specifically, the complaint alleges that the auto makers have created a public nuisance by producing vehicles that collectively emit "massive" quantities of carbon dioxide. On December 12, 2006, defendants filed a motion to dismiss, arguing that the complaint raises nonjusticiable issues properly reserved for resolution by the political branches of the federal government and that the complaint fails to state a valid state or federal claim. California filed its response on February 1, 2007. Oral argument was held on March 6, 2007.

V. Connecticut v. American Electric Power, No. 05-5104 (2d Cir. 2006)

Nuisance suits also have been filed on the East Coast, but against electric utilities rather than the motor vehicle industry. Five states and three land trusts filed a nuisance suit against five major U.S. power companies claiming that these utilities emit large quantities of carbon dioxide, which are contributing to an elevated level of carbon dioxide in the atmosphere. Plaintiffs allege that global warming is a public nuisance, which in turn harms their property. The U.S. District Court for the Southern District of New York dismissed the case, holding that the question of global warming is a nonjusticiable political question and should be addressed by legislation. The plaintiffs appealed to the Second Circuit, where the case is pending.

VI. Korsinsky v. Environmental Protection Agency, No. 05-00859 (S.D.N.Y. 2005)

New York resident, Gersh Korsinsky, brought suit against the EPA, the New York State Department of

Environmental Conservation and the New York City Department of Environmental Protection seeking relief under a public nuisance theory. The complaint claimed that the defendants contributed to global warming by emitting carbon dioxide and by failing to implement viable options to eliminate carbon dioxide emissions, thereby creating a public nuisance. Korsinsky claimed he was more vulnerable than the general public to disease-causing environmental pollution that may become more ubiquitous from global warming. The District Court, however, found that this injury was not sufficient to confer standing and granted the defendants' motion to dismiss. Korsinsky appealed the decision, and the Second Circuit agreed that his claim was too speculative to establish standing. *See Korsinksy v. EPA*, 192 Fed. Appx. 71 (2d Cir. 2006).

VII. Comer v. Murphy Oil, No. 05-00436 (S.D. Miss. 2005)

On August 29, 2006, Hurricane Katrina slammed into the United States mainland, causing extensive damage to many areas, including the Mississippi Gulf coast. Two weeks later, plaintiffs' attorney Gerald Maples filed a class action suit on behalf of fourteen Mississippi landowners in the U.S. District Court for the Southern District of Mississippi. The suit was originally brought against insurance, mortgage, and oil companies; however, the Court dismissed the insurance and mortgage company defendants. The plaintiffs amended their complaint to add additional oil companies, as well as numerous new coal, utility, and chemical company defendants. Plaintiffs claim that these defendants: (1) burn or supply coal that releases CO_2 or emits CO_2; (2) that the CO_2 has contributed to global warming; (3) that global warming caused Hurricane Katrina to form and intensify; and (4) that Hurricane Katrina caused damage to the plaintiffs' lives and properties. In December 2006, the plaintiffs filed a motion for leave to file another amended complaint seeking to name for the first time a Mississippi company (thereby destroying complete diversity jurisdiction) and seeking to assert a claim under an alleged federal common law of nuisance as a new basis for jurisdiction. Plaintiffs also seek to add seventeen new oil company defendants and ninety new coal and utility companies as defendants. The motion for leave to amend is pending, and a decision is expected soon.

VIII. Barasich v. Columbia Gulf Transmission Co., Nos. 05-4161, 05-4569 (E.D. La. 2006)

In the weeks after Hurricane Katrina and Rita, two other lawsuits were filed in Louisiana alleging that activities of oil- and gas-producing companies and oil and gas pipeline companies contributed significantly to the hurricanes' destructive impact. The nine plaintiffs, who are residents of Jefferson, Orleans and St. Bernard Parishes, "assert[ed] that defendants damaged the marshland that lies between Louisiana's habitable regions and the Gulf of Mexico, thereby weakening a protective barrier against hurricanes and exposing Louisianans to the prospect of greater harm from these storms." *See Barasich v. Columbia Gulf Transmission Co.*, 2006 WL 3333797 at *1 (E.D. La. Sept. 28, 2006). Ruling on a motion to dismiss, the Court noted that it "is aware that from the face of the plaintiffs' complaint this could be a complex case to adjudicate. But that does not necessarily turn the plaintiffs'

lawsuit into a nonjusticiable political question." The Court ultimately determined that the plaintiffs failed to state a claim and would be unable to establish that defendants owed them a duty or that defendants' conduct was a cause-in-fact of their injuries.

IX. Friends of the Earth, Inc. v. Mosbacher (Overseas Private Investment Corp. and the Export-Import Bank), No. 02-4106 (N.D. Cal. 2005)

Unlike the other lawsuits mentioned above, this case revolves around the National Environmental Policy Act ("NEPA") and whether a proper analysis was conducted about the impacts on global warming before any "major Federal action" is undertaken. Environmental groups brought suit against Overseas Private Investment Corp. ("OPIC") and Export Import Bank of the United States ("Ex-Im") pursuant to the NEPA and the Administrative Procedure Act ("APA") alleging that the defendants provided assistance to particular projects that contribute to global warming without complying with NEPA and the APA. Specifically, plaintiffs challenged Ex-Im's and OPIC's determinations that the projects they support do not have significant environmental impacts and thus, do not require any environmental assessments. Plaintiffs presented evidence that the projects supported by the defendants were directly or indirectly responsible for approximately 1,911 million tons of carbon dioxide and methane emissions annually, which equals nearly 8% of the world's emissions. In 2005, the defendants filed a motion to dismiss based on plaintiffs' lack of standing, which the Court denied. Oral argument was heard on April 14, 2006 on cross-motions for summary judgment and the motions are still under submission.

X. Center for Biological Diversity v. Kempthorne, No. 07-00894 (N.D. Cal 2007)

On February 13, 2007, the Center for Biological Diversity, Earthjustice, and Pacific Environmental brought a lawsuit against the U.S. Fish and Wildlife and other government entities for failing to comply with NEPA and the Marine Mammal Protection Act in promulgating regulations authorizing the "incidental take" of otherwise protected polar bears and Pacific walrus due to industrial oil and gas exploration, development and production activities in the Artic. The plaintiffs allege that global warming over the past decade has dramatically altered the Artic, causing significant reductions in sea ice, and adversely affecting ice-dependent species such as the Pacific walrus and polar bears. Specifically, the plaintiffs claim that FWS promulgated its incidental take regulations for these species without seriously analyzing the effects of global warming on them and their habitat. The case is in its preliminary stages, and on March 22, 2007, the parties agreed to have a United States Magistrate Judge conduct any and all further proceedings in the case.

XI. Conclusion

Whether this litigation will ever rise to the level of asbestos or tobacco litigation remains to be seen. *Business Week* concluded a recent article in this ominous fashion:

> Even more litigation could be in the offing. Stanford University and others plan symposiums on legal responses to global climate change. And Stephen D. Susman, one of the nation's top trial lawyers, is making the issue a personal crusade. His firm is representing Texas cities *pro bono* in their effort to assure cleaner power plants, and he's looking for other opportunities to help the cause. In the 1990s, Susman defended Philip Morris Cos. in the tobacco lawsuits filed by state attorneys general and thought his opponents' legal theories were so "bizarre" that they didn't have a chance. "It turns out that I was the fool, and I'm not going to let that take place again," Susman says.