Ignore Climate Change At Your Peril

Law360, New York (March 24, 2009) -- The topic of climate change has become a significant public policy issue that has generated substantial discussion, controversy and debate. Recently, Steven Napolitano and Lincoln Wilson published an arresting article in Environmental Law 360 called “Why Climate Suits May not be ‘Next Big Thing.’”

In the article, they describe some of the key climate change suits filed to date and explain the serious uphill battle that confronts climate change plaintiffs. They conclude — quite sensibly — that climate change lawsuits are unlikely ever to amount to much.

And, indeed, this may turn out to be the case. If it is, we will gladly — in the spirit of hometown mayors betting on sporting events — send Messrs. Napolitano and Wilson two fine hot dogs from the southern tip of Manhattan. On the other hand ...

Although climate change lawsuits have, thus far, met with little success, it is early days yet, and past performance is not necessarily a good predictor of future results. As the last year has demonstrated, change (of all sorts) can happen very quickly.

Plaintiffs’ lawyers, as history has shown, are a crafty bunch. They may find a state or a district that is particularly receptive to climate change suits (as, say, the Eastern District of Texas is considered favorable to patent plaintiffs); they may find a judge or judges who are willing to allow significant fact and expert discovery on climate change issues; and, while there may still be a legitimate debate concerning the sources and impacts of climate change, future government regulation may, in effect, silence that debate and have a significant impact on private climate change lawsuits.[1]

So, while it is certainly unclear what the future holds, corporations and their directors that ignore the potential impact of climate change litigation do so at their own peril.

To date there have only been a few dozen climate change-related lawsuits filed in the United States. Several of the cases have been brought under a “public nuisance” theory
for past and future injuries and have sought injunctive and, in some cases, monetary relief.

The plaintiffs in these cases have focused their claims against “emitters,” such as oil companies, auto manufacturers and power generators, who are alleged to have caused climate change by emitting carbon and other particulates into the atmosphere.[2]

Other claims, most notably, Massachusetts v. EPA, have been brought against governmental agencies for failing to regulate.[3] Still other claims have been pursued against private actors based on environmental statutes, e.g., the Clean Air Act.[4] In all of these suits, similar questions and themes have emerged.

Is Climate Change A Political Question?

Three high profile climate change cases—all public nuisance claims—have been dismissed as non-justiciable political questions. See Connecticut v. AEP Inc.,[5] California v. General Motors Corp.[6] and Comer v. Murphy Oil USA.[7]

In Connecticut v. AEP, plaintiffs brought a public nuisance claim against electric companies for the “‘public nuisance’ of ‘global warming’” and sought injunctive relief in order to cap carbon dioxide emissions and mandate annual reductions.

The court determined that, in order to resolve the case, it would be necessary to make a number of findings that would amount to “initial policy determinations” that should be made by the elected branches of government.[8]

The court recounted the history of the ongoing congressional, executive and international debate on climate change, pointed to the EPA as the political entity that would ultimately need to make these decisions,[9] and noted that, because plaintiffs sought injunctive relief, the court would need to make significant policy determinations — determinations that would have far-reaching implications and that should be determined by the other coordinate branches:

- Given the numerous contributors of greenhouse gases, should the societal costs of reducing such emissions be borne by just a segment of the electricity-generating industry and their industrial and other consumers?

- Should those costs be spread across the entire electricity-generating industry (including utilities in the plaintiff States)? Other industries?

- What are the economic implications of these choices?

- What are the implications for the nation’s energy independence and, by extension, its national security?[10]

Good questions — all.
The courts in California v. General Motors and Comer followed suit and dismissed for non-justiciability under the political question doctrine.[11]

The court in General Motors, which addressed similar claims to those in the Connecticut case, noted, “a judicial determination would improperly place this court into precisely the geopolitical debate more properly assigned to the coordinate branches and would potentially undermine the political branches strategy.”[12]

According to the court, this conclusion was underscored by Massachusetts v. EPA,[13] in which the Supreme Court found that the states “surrendered to the federal government their right to engage in certain forms of regulations” and the federal government had placed that regulatory authority with the EPA.[14]

While these cases appear to have sounded the death knell for climate change suits based on the public nuisance theory, a few points are worth mentioning.

First, all three of these cases are currently on appeal. Second, other courts, most notably in Barasich v. Columbia Gulf Transmission Co.,[15] have found similar claims to be justiciable.

Indeed, the Barasich defendants — oil companies and pipelines accused of damaging Louisiana’s marshlands and increasing the impact of Hurricanes Katrina and Rita — argued strenuously that the case was non-justiciable under the political question doctrine; the court disagreed[16] but, as discussed below, dismissed the case on other grounds.

The court, after an extensive analysis of the political question doctrine, noted that “a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.”[17]

Third, the political question doctrine — which is obscure in both purpose and application — appears to some to be an ill fit for these types of lawsuits.[18]

Fourth, Congress and the Obama Administration may very well — in one form or another — make “initial policy determinations” that would eliminate or curtail the ability of a defendant to rely on the political question doctrine.

That may cause other difficulties such as preemption or the denial of a right to bring a private action, but, at this point, who knows? Stay tuned.

**Causation is Hard**

One of the other impediments pointed out by Messrs. Napolitano and Wilson for plaintiffs in climate change suits is the difficulty in proving — or even alleging — a causal link between a defendant’s conduct and an alleged injury. Barasich illustrates this point very well.[19]
In Barasich, the plaintiffs, Louisiana residents, sought to hold oil and pipeline companies accountable for their construction and exploration activities in and around Louisiana’s dwindling marshlands, alleging that these activities contributed significantly to the loss of marshlands, which act as a natural buffer to hurricanes.[20]

This, in turn, increased the destructive impact of Hurricanes Katrina and Rita.[21] Defendants moved to dismiss, arguing that the case was non-justiciable under the political question doctrine and because plaintiffs failed to state a claim.[22]

The court granted defendants motion to dismiss for failure to state a claim, finding that plaintiffs had not adequately alleged that defendants were the legal cause or the “cause-in-fact” of the alleged injuries.[23]

The court stated that “plaintiffs’ claims are more attenuated because they are suing for hurricane damage from storm surge allegedly magnified by coastal erosion ... not for a direct loss” and that plaintiffs failed to “allege that the actions of any particular defendant were a substantial factor in causing the injuries suffered by any particular plaintiff, nor do they assert a causal connection linking a particular defendant’s operations to a particular plaintiff’s injury.”[24]

While the Barasich case is a clear win for defendants (on the causation issue), the court’s opinion ends with an ominous note:

By all accounts, coastal erosion is a serious problem in south Louisiana. If plaintiffs are right about the defendants’ contribution to this development, perhaps a more focused, less ambitious lawsuit between parties who are proximate in time and space, with a less attenuated connection between the defendant’s conduct and the plaintiff’s loss, would be the way to test their theory.[25]

Indeed, where plaintiffs circumscribe their allegations, the likelihood of getting past a motion to dismiss is greatly enhanced. In Northwest Environmental Defense Center v. Owens Corning Corp., e.g., the plaintiffs brought a private action under the Clean Air Act[26] (the “Act”) arguing that defendant’s construction of a polystyrene foam insulation manufacturing plant in Gresham, Ore., with the potential to emit more than 250 tons per year of particulates and gases, violated various permit and other provisions of the Act along with Oregon state requirements.[27]

Plaintiffs claimed that the plant would deplete the ozone layer and cause illnesses, e.g., lupus, that are associated with elevated levels of ultraviolet radiation.[28] Defendants moved to dismiss the complaint claiming, inter alia, that plaintiffs lacked standing to bring the claim.[29]

In denying the defendants’ motion, the court focused on the localized impact of defendants’ conduct, which plaintiffs alleged would directly cause future injury, and found that plaintiff had standing to pursue its claims:
The complaint at issue here avoids those defects. The challenged emissions source is local, not halfway around the globe. Members of the plaintiff organizations reside, work, and recreate near the partially completed Gresham facility.

Assuming the truth of the allegations in the complaint ... those individuals would suffer some direct impact from emissions entering into the atmosphere from defendant’s facility, as would the local ecosystem with which these individuals constantly interact.[30]

Because the plaintiffs alleged adverse effects within Oregon that were tied to the alleged emission of pollutants by defendants, the court found that plaintiffs had standing to pursue their claims and denied defendants’ motion to dismiss.[31] Thereafter, the parties settled.

The lesson in these cases appears to be that climate change litigation is similar to President Johnson’s famous thoughts on the legislative process: “Congress is like a whiskey drinker. You can put an awful lot of whiskey into a man if you just let him sip it, but if you try to force the whole bottle down his throat at one time, he'll throw it up.”[32]

**Disclosure Related Claims**

Another area that should be of particular concern to companies and directors is the adequate disclosure of climate change risks. Although — to date — no court has directly addressed this issue, there are indications that adequate disclosure will be a hot topic in climate change circles.

This past year, New York Attorney General Andrew Cuomo issued subpoenas to utility companies concerning the adequacy of the companies’ disclosures of the financial risks regarding global warming and climate change.

In late August 2008, Cuomo announced that one such company, Xcel Energy, had entered into a “binding and enforceable agreement” requiring the company “to disclose the financial risks that climate change poses to investors.”[33]

Similarly, numerous public interest organizations have petitioned the SEC to adopt specific climate change reporting guidelines and the number of shareholder resolutions filed have been on the rise.[34]

In 2008, 57 climate change-related shareholder proposals were filed with the SEC for U.S. Companies and 25 other proposals were withdrawn by proponents after the companies agreed to publish additional disclosures.[35]

Likewise, through mid-February 2009, a record 63 climate change resolutions have been filed with 56 U.S. companies and one Canadian company as part of the 2009 proxy season.[36]
These recent developments may increase the pressure on public companies to disclose their financial risks associated with climate change, and it may only be a matter of time before securities fraud allegations stemming from the alleged omission of material information concerning climate change make their way into civil complaints.

**What the Future May (or May Not) Hold**

While Messrs. Napolitano and Wilson may turn out to be correct, we do not share their sanguine outlook. Climate change litigation is still in its infancy, and it certainly has the potential to be the “next big thing.”

While the political question doctrine has rendered high profile public nuisance cases non-justiciable, those cases are still on appeal; and the theory underlying them — that courts should not be making “initial policy decisions” — may soon evaporate as Congress and the Obama administration start making those policy decisions.

The new EPA administrator has announced that the EPA will “review the latest scientific evidence and prepare the documentation for a so-called endangerment finding” noting the need to “lay out a roadmap” for reducing carbon emissions.[37]

- President Obama, only one week into his presidency, issued an order that allows California and other states to adopt emissions standards for new motor vehicles if the EPA, acting on the president’s requested reassessment, waives the prohibition against state regulation, which it declined to waive under the Bush administration.[38]

- On March 10, 2009, the EPA released a draft rule entitled “Mandatory Reporting of Greenhouse Gases,” which requires emitters to monitor and report their greenhouse gas emissions to the EPA beginning in 2010 and appears to be a precursor to more stringent greenhouse gas emissions policies in the future.

- Members of the Senate (along with the White House) have suggested that they are closer to joining the Kyoto Protocol or other international climate treaties than in the past, providing the courts with standards and guidelines set by foreign policy, rather than potentially forcing them to conflict with foreign policy.[39]

- While it is not currently the top priority of Congress or the White House, there is still a strong possibility that we will see significant climate change legislation from the current Congress.

In crafting legislation in response to prior environmental concerns, Congress has often — since the 1970 enactment of the Clean Air Act — included the right for concerned citizens to bring private causes of action.

(Private rights of action or citizen suits also exist in some form in the Clean Water Act, the Solid Waste Disposal Act, the Toxic Substance Control Act, and the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”)).
The possibility of similar far-reaching climate change legislation by the current Congress cannot be discounted.

A major ongoing case that is certainly worth watching is Native Village of Kivalina v. Exxon Mobil Corp., et al., 08-cv-01138 (N.D. CA. 2009).

In Native Village, the plaintiffs are Alaskan villagers in the extreme north of the state who allege that they are being forced to relocate because of increased flooding caused by global warming.[40]

They have named 20 oil, gas and electric companies as defendants, alleging that their greenhouse gas emissions have caused the Artic ice to melt and rendered their village unsustainable.[41]

They are seeking monetary damages and are represented by a crack team, including Susman Godfrey LLP, who recently represented 37 Texas cities in their challenge against TXU over the construction of new coal power generation plants and Seeger Weiss LLP.[42]

The defendants have filed a motion to dismiss, arguing the political question doctrine and that plaintiffs have failed to provide sufficient factual allegations demonstrating a causal link between defendants’ emissions and plaintiffs’ alleged injuries.[43] The matter has been fully briefed and oral argument will be heard in May 2009. This case will be very closely watched.

**Conclusion**

While many of the private climate change cases have thus far met with little success, the future is not at all clear. There are many variables involved in predicting the future — individual judges, jury pools, future legislation, future regulation, ever-craftier plaintiff lawyers and new science — among others.

The potential certainly exists for a climate change case to get past the pleading stage and into discovery. And the potential cost of litigating such a suit to trial — with extensive fact and expert discovery could be monumental.

Given the rapidly changing landscape of this issue, corporations and boards would be wise to take the threat of climate change litigation very seriously.

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[1] On the other hand, if some of the various scenarios that climate change hawks have been predicting do not come to pass, then obviously any potential liability, damages and recovery would be substantially muted.


[3] 549 U.S. 497 (2007) (finding that the EPA has the authority to regulate greenhouse gases and is required to review its contention that the Clean Air Act provides discretion in regulating carbon dioxide and other greenhouse gas emissions).


[8] Id. at 272-73.

[9] Id. at 273.

[10] Id.


[12] Id. at *10.

[13] 549 U.S. 497 (2007). In the Massachusetts decision, the Supreme Court in a 5-4 ruling found that the EPA had the authority to regulate greenhouse gas emissions, including carbon dioxide, as pollutants.


[16] Id. at n.9.

[17] Id. at 684 (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991)).

[18] See, e.g., id.


[21] Id. at 676-678. The court also found that plaintiffs failed to demonstrate that defendants owed a duty to protect them from damage caused by hurricanes.

[22] Id. at 680. As noted above, the court rejected defendants’ “political question” argument.

[23] Id. at 694.

[24] Id. at 692, 694.

[25] Id. at 695.

[26] 42 U.S.C. § 7401

[27] 434 F. Supp. 2d 957, 960 (D. Or. 2006). In particular, plaintiffs argued that defendants failed to obtain the required preconstruction permit, in violation of § 165(a) of the Clean Air Act, 42 U.S.C. § 7475(a), and defendants had also violated the Oregon State Implementation Plan, codified in the Oregon Administrative Code at OAR 340-224-0010 to 340-224-0100, which required defendants to obtain an air contaminant discharge permit from the state.

[28] Id.

[29] Id. at 960.

[30] Id. at 965.

[31] Id. at 967-71 (“It is sufficient for plaintiffs to assert that emissions from defendant’s facility will contribute to the pollution that threatens plaintiffs’ interests.”).

[32] www.weeklystandard.com/Content/Public/Articles/000/000/016/108opjnu.asp

[33] Available at www.oag.state.ny.us/media_center/2008/aug/aug27a_08.html


[40] Complaint at 1, Native Village of Kivalina, v. Exxon Mobil Corp., et al., 08-cv-01138 (N.D. CA. 2009).

