



CLIMATE CHANGE LITIGATION – HOW SOON IS NOW?

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Tornado sirens are going off in Kansas City, and this time it's not a drill. Last month, a massive EF-5 tornado struck Joplin, Missouri, resulting in over 130 deaths. Out west, several states had record snowfall. This past April, in the mid-west and south, storm systems dumped record rainfall on the Mississippi River watershed, causing a 500-year flood and billions of dollars in damage. Australia, New Zealand, and Pakistan saw unprecedented floods in 2010 and 2011 as well. For those with allergies, warm seasons are longer, extending pollen seasons. Speculation is abounding that climate change caused these weather events, or made them worse. Whether or not this is true, one thing is certain: increasingly, regulatory agencies, legislatures, and the courts will be asked to address potential causes and impacts of climate change.

Climate change has become a central challenge of our time, affecting all levels of the American legal system – local, state, and national – as well as regulatory, legislative, and judicial bodies throughout the world. Because all people and companies are energy users, this litigation will affect all of us.

Consider the most recent climate change litigation targeting the private sector. These lawsuits allege that energy production is a 'public nuisance', that it causes climate change, and that the companies responsible for producing the energy should be held liable. From threshold questions of standing and jurisdiction to causation and to remedies, climate change litigation stresses our case management capabilities. The temporal and geographic scope of the alleged climate change spans decades and continents. The science of climate change is asked to address causation on a global scale. If human activities become linked to climate change, then nearly all of them – whether participated in as individuals, corporations, NGOs, or governments – contribute. We may all be plaintiffs and defendants in future climate change lawsuits.

US CLIMATE LITIGATION

By the time this article is published,

the US Supreme Court will likely have decided one of the most important private-sector climate change cases, *American Electric Power, et al, v Connecticut, et al* (10-174). This case is a federal common-law claim against six operators of electricity-generating plants, which the complaint says are the nation's largest producers of 'greenhouse gases'. At issue is whether federal law allows

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states and private parties to sue utilities for their alleged contributions to climate change. The Court's questions during oral argument allow for the view that Congress and the Environmental Protection Agency (EPA), rather than the courts, should be the branches of government to address this. The justices also questioned exactly how a district

court judge – acting as a 'kind of super EPA' – would resolve the remarkably complex questions presented by climate change litigation and fashion an appropriate remedy.

Regardless of how the Court resolves *American Electric Power*, climate change litigation in the United States seems sure to expand and evolve. In part, this is because there is no comprehensive federal legislation in the United States that addresses climate change. Plaintiffs are highly motivated and hoping that their claims will fill this perceived gap in the short-term and spur legislation and regulation in the long-term.

Of the over 200 cases (as of 31 December 2010) that have been filed that directly raise an issue regarding climate change, common-law nuisance cases such as *American Electric Power* constitute a very small part. Most are statutory claims seeking to compel or to stop agency action. In those cases, courts apply conventional rules of statutory construction to determine whether and to what extent an agency must consider climate change under existing federal statutes such as the Clean Air Act. Given that most of these statutes are decades old, one might assume the substantial body of case law allows little room for the development of a distinct, climate-change jurisprudence. Yet, in May of

this year, the next round of high-profile "regulation through litigation" suits urged that the federal and state governments have a "public trust" obligation to prevent climate change.

CLIMATE REGULATION IN OTHER COUNTRIES

We have not seen the same lawsuit-based approach outside the United States (with one exception: at the time this went to press, Micronesia had brought an action requesting that the approval of a Czech coal-fired powerplant take into account the impact of rising sea levels on the 600-island archipelago). In lieu of litigation, some industrialised nations have adopted regulatory measures to address the alleged causes and impacts of climate change. In the United Kingdom, for example, the Climate Change Act of 2008 makes it the duty of the secretary of state to ensure that by the year 2050, net UK carbon output (for all six Kyoto greenhouse gases) is at least 80 per cent lower than the 1990 baseline. In 2005, the European Union adopted the European Union Emissions Trading System – a cap-and-trade variant – which is the largest multinational emissions trading scheme in the world. In April 2010, while the nation of Japan delayed adoption of a national policy, Tokyo implemented its own cap-and-trade system, Asia's first carbon-trading initiative, which will require 1,400 of Tokyo's most energy and carbon-intensive organisations to meet legally binding emission targets modeled on those used in Europe's cap-and-trade scheme.

CLIMATE REGULATION IN THE US

In the United States, over 500 cities have

pledged to meet the Kyoto standards; and a host of states have agreed to exceed federal regulatory standards. As discussed, US plaintiffs hope their suits will add pressure for action by legislators and regulators. For example, when the lower court in *American Electric Power* dismissed the suit on political question grounds, many turned to the White House and Congress for a solution. At the same time, the Supreme Court held in *Massachusetts v EPA* that the EPA's current rationale for not regulating 'greenhouse gases' as a

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'pollutant' under the terms of the Clean Air Act was inadequate and required the agency to articulate a reasonable basis in order to avoid regulation. The EPA has subsequently endeavoured to regulate greenhouse gas emissions.

ROLE OF CLIMATE SCIENCE

The integrity of climate science on each side of the debate will strongly influence litigation and regulation. As Judge Posner,

an influential American jurist and legal theorist, noted nearly 20 years ago, "law lags science; it does not lead it." In the legal arena of the courtroom, litigants must present expert opinion supported by scientific principles that can withstand peer review and cross-examination. These questions of science are determined by judges and lay juries on an individual case basis. While legislatures and regulators do not have rules of evidence to guide what can be considered, their decisions are often shaped by scientific experts, and their conclusions are generally subject to public debate and scrutiny.

ROLE OF CLIMATE LAWYERS

Well-poised to handle climate litigation are those international defence lawyers with historical expertise in complex litigation, environmental regulation, insurance coverage, public policy, corporate transactions, advertising and marketing, intellectual property, and construction and design. The key to success with such litigation will likely be a multi-disciplinary approach that prepares companies for new regulatory regimes, handles risk appraisals and management, and protects business assets in litigation, when necessary.

TAKEAWAY

Climate change litigation is well under way in the United States. Elsewhere in the world, governments are addressing climate change primarily through regulation. Whether US or international law will evolve to adjudicate all of the many issues of climate change is an open question. But international companies can anticipate a climate change spotlight on their own theatre of operations soon enough.