Legal Backgrounder

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CLIMATE CHANGE TORT SUITS: HOT OR COLD?

by

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The village of Kivalina, Alaska, located eighty miles north of the Arctic Circle on a barrier island, is falling into the sea. Since the early 1980s, sea ice – which protects the island from storm surges – has been forming later and melting earlier. As a result, Kivalina is exposed to more winter storms of increasing severity. In 2006, the U.S. Army Corps of Engineers ("CoE") concluded that the situation in Kivalina had become "dire" and that the entire town would have to be relocated within six years. A group of 400 Kivalina residents have filed suit against twenty petroleum producers, coal-burning utilities, and other energy companies, asserting that their carbon dioxide (CO_2) emissions create a public nuisance and that they conspired to mislead the public about climate change. *Native Village of Kivalina v. ExxonMobil Corp. et al.*, CV 08-1138 (N.D. Cal., Filed Feb. 26, 2008). Citing a CoE report, the Kivalina residents allege that environmental changes associated with global warming have exacerbated flooding and erosion threats to Kivalina and other coastal villages in the Arctic. They seek recovery of the estimated $400 million cost to relocate their village, which they claim is a result of the defendants' climate-changing activities.

The *Kivalina* suit is not the first action in which plaintiffs have sought to recover climate change-related damages from a CO_2-emitting industry. Electric utilities and leading automobile manufacturers have each defended similar actions. They defeated these suits by filing motions to dismiss, asserting that the lawsuits raised a political question – how best to address climate change – which is the type of policy determination that should be reserved for the political branches of government, rather than the courts.

So long as the legislative and executive branches remain undecided on climate change, the political question doctrine promises to keep such litigation in check. Many observers, however, believe that Congress eventually will pass, and the President will sign, climate change legislation. At that point, courts may have less ability to dismiss cases on the ground of the political question doctrine. How will these climate change tort actions fare then? In this LEGAL BACKGROUNDER, we explore the next line of defenses to such actions. In brief, defendants to climate change tort suits likely can assert several other facial challenges, such as lack of standing and preemption, which may stop such litigation in its tracks. Moreover, climate change suits must overcome formidable causation problems. The charge of civil conspiracy adds a new wrinkle: it is the same strategy that forced "Big Tobacco" to settle. There are numerous differences, however, between tobacco and CO_2, which portend a steeper climb for plaintiffs in climate change tort suits.

The *Kivalina* Complaint. On February 26, 2008, the City of Kivalina and the Native Village of Kivalina filed suit in U.S. District Court for the Northern District of California. In their Complaint, the Plaintiffs allege that twenty oil, coal, and electric utility corporations have emitted "large quantities" of CO_2

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from their facilities which produce, develop, refine, process, distribute and burn petroleum, coal and natural gas (among other operations). The Complaint further alleges that the "planet's natural systems take hundreds of years to absorb carbon dioxide" and as a result, "Defendants' past emissions remain in the atmosphere and are contributing now to Kivalina's harms and will continue to do so for years to come." Complaint at ¶ 180. The Complaint alleges that Kivalina has suffered special injuries, different in kind from injuries common to all members of the public. Specifically, global warming has reduced the thickness, extent and duration of sea ice, leaving Kivalina's coast more vulnerable to waves, storm surges and erosion. Id., ¶ 185.

In their first and second counts – public and private nuisance claims, respectively – the Plaintiffs assert that the Defendants' individual and collective CO_2 emissions contribute to global warming, which substantially interferes with the Plaintiffs' public rights to use and enjoy public and private property. The Plaintiffs further allege that the Defendants "knew that their individual greenhouse gas emissions were, in combination with emissions and conduct of others, contributing to global warming and causing injuries." *Id*., ¶ 255. Based on the allegations, the Plaintiffs allege that the Defendants' CO_2 emissions constitute private and public nuisance under federal common law and California state law.

In addition to the nuisance counts, the Plaintiffs plead civil conspiracy and "concert of action." They allege that certain defendants in the oil and power industries "participated . . . in an agreement with each other to mislead the public with respect to the science of global warming and to delay public awareness of the issue – so that they could continue to contribute to . . . the nuisance without demands from the public that they change their behavior." *Id.,* ¶ 269. Kivalina further contends that the alleged civil conspiracy "contributed to and caused Plaintiffs' injuries." *Id.,* ¶ 273. To support their allegations, the plaintiffs allege that the Defendants have "engaged in and/or are engaging in tortious acts in concert with each other pursuant to a common design." *Id.,* ¶ 279. Alleging that their injuries are "indivisible," the plaintiffs seek to hold the defendants jointly and severally liable for monetary expenses and damages resulting from the public nuisance, conspiracy, and concerted action.

Prior Climate Change Nuisance Suits Defeated on Political Question Grounds. The Kivalina Plaintiffs will have to confront the same facial challenges that have doomed prior climate change tort actions, in particular, the political question doctrine. In Connecticut v. American Electric Power Co. et. al., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), eight states, the city of New York, and three land trusts filed nuisance suits against the five largest CO_2 emitters in the United States, all of which operate coal-fired power plants. The plaintiffs alleged that the defendants' operations constitute a public nuisance because they contribute to global warming and that this nuisance threatens their real property because resulting heightened sea levels will inundate land and marsh ecosystems, contaminating them with salt water. Collectively, the plaintiffs petitioned the court to issue an abatement order compelling the defendants to reduce their emissions. Id. The court dismissed the case for lack of subject matter jurisdiction, because the case presented non-justiciable political questions. In this regard, the court noted that it could not grant the relief requested by the plaintiffs without making the types of initial policy determinations that are reserved for the executive and legislative branches (evaluating the impact of restricting CO_2 emissions on US energy security, determining the appropriate level at to cap CO_2 emissions, etc.).

In *California v. General Motors Corp. et. al.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), the State of California filed a public nuisance action against six automobile manufacturers asserting that their vehicles accounted for more than twenty percent of human-generated CO_2 emissions in the United States and more than thirty percent of those in California. The court dismissed the suit based on the political question doctrine. Citing the national and international debate on how to address climate change, the court held that "injecting itself into the global warming thicket at this juncture would require an initial policy determination of the type reserved for the political branches of government." In support of its order dismissing the suit, the court stated: "Because a comprehensive global warming solution must be achieved by a broad array of domestic and international measures that are yet undefined, it would be premature and inappropriate for this Court to wade into this type of policy-making determination before the elected branches have done so." *Id*. at 14.

Defenses to Climate Change Tort Suits Post-Legislation. Assuming climate change legislation is enacted, defendants in climate change tort cases may have less of an argument for prevailing on the political question doctrine defense. Courts would have the type of "initial policy determination" required to adjudicate

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tort claims based on injuries resulting from industrial GHG emissions. What are the next best lines of defense?

Lack of Standing. At least one federal court has dismissed a climate change-related lawsuit on the ground that the plaintiff lacked constitutional standing sufficient to confer federal subject matter jurisdiction to hear the case. In *Korsinsky v. EPA*, 2005 WL 2414744 (S.D.N.Y. 2005), a Brooklyn resident alleged that state and federal environmental regulatory agencies had contributed to global warming due to their CO_2 emissions and by failing to implement plans for eliminating such emissions. The court dismissed the case on the ground that the plaintiff's claimed injuries – increased vulnerability to sickness due to sinus related diseases and mental distress after learning of the danger of pollution – were not sufficient to satisfy the injury in fact or redressability requirements of legal standing.

Preemption. Assuming the United States enacts climate change legislation placing limits on industrial CO_2 emissions, plaintiffs seeking to enjoin defendants from emitting CO_2 may encounter preemption as a defense. In essence, the defendants could argue that the objectives of the federal climate change law would be undermined or compromised by restrictions imposed under state common law. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 ("Even if federal and state laws have the same goal, such as eliminating water pollution, a state law is preempted if it interferes with the method by which the federal law was designed to reach this goal").

Causation. One of the most formidable obstacles to a climate change tort suit would be plaintiff's difficulty in proving causation, i.e., that a specific defendant's GHG emissions are a proximate cause of the plaintiff's injury. Cases arising out of Hurricane Katrina illustrate the causation issues that climate change plaintiffs face. In *Comer v. Nationwide Mutual Insurance Co.*, 2006 WL 1066645 (S.D. Miss. 2006), fourteen landowners whose property was damaged filed a class action suit in Mississippi federal court against eight oil companies and 31 coal companies for climate-related losses. The plaintiffs alleged that the defendants' CO_2 and methane emissions had contributed to global warming, increasing the destructive power of the hurricane. The plaintiffs also included claims unrelated to climate change-related damages against insurance companies and mortgage lenders active in Mississippi. The court dismissed the unrelated insurance and mortgage claims on grounds of improper joinder of parties, and granted plaintiffs leave to amend their complaint to include only those "tort claims that arise independent of any contractual issues and independent of any insurance issues." *Id.* at 2. In dicta, the court warned that the plaintiffs would face "daunting evidentiary problems" in seeking to prove the degree to which global warming is caused by GHG emissions; the degree to which the actions of the oil and gas industry, through GHG emissions, contributes to global warming; and the extent to which GHG emissions intensified or otherwise affect the weather system that produced Hurricane Katrina. *Id.* at 4.

Similar causation problems were noted by the court in another Katrina lawsuit. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006) (property owners' allegations that oil and gas defendants' activities damaged marshlands, a protective barrier against hurricanes, deemed insufficient to establish causation because "plaintiff could collect damages from an industry as a whole without demonstrating any individual connection between any single member of the industry and the plaintiffs' harm, and in which liability would be assessed against industry defendants on a group liability theory"). *See also California v. General Motors et. al.*, at 22 (court stated that it was "left without a manageable method of discerning the entities that are creating and contributing to the alleged nuisance," noting that "there are multiple worldwide sources of atmospheric warming across myriad industries and multiple countries").

Market Share Theory Will Not Cure Causation Problems. The plaintiffs in climate change tort suits may seek to overcome causation problems by urging the court to utilize "market share" theory of liability. Courts first used the concept of market share liability in the 1980s to enable the victims of the generic miscarriage preventative, diethylstilbestrol ("DES"), to recover from DES manufacturers. The daughters of women who took DES later developed certain cancers. The DES daughters, however, could not identify the specific manufacturer of the drug their mothers had taken. In *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), the California Supreme Court granted them relief by apportioning liability among all DES manufacturers according to each one's share of the market. In so holding, the Court held that after the plaintiff proves exposure and injury caused by the product, the burden then shifts to the industry defendants to exculpate themselves by proving that an individual manufacturer's product could not have caused the injury. *Id.*

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Courts are not likely to apply market share liability principles to the climate change tort suits for several reasons. First, market share liability requires joinder of a sufficient number of possible defendants to insure that a substantial share of the market for the allegedly harmful product is represented. AM. L. PROD. LIAB. 3d § 122:7 (2008). The United States emits roughly one-fourth of all CO_2. Thus, the majority of CO_2 emissions come from sources outside the Unites States, and plaintiffs would not be able to establish that a substantial share of the CO_2 emitters had been included as defendants. Second, market share liability applies where all of the defendants produce the same harmful product that caused injury (e.g., the same drug DES). By contrast, in the case of climate change-related injury, there are many different causes (e.g., other greenhouse gases with significantly higher "global warming potential" than CO_2, such as nitrous oxide, sulfur hexafluoride, and methane).

Civil Conspiracy. *Kivalina* illustrates the latest strategy for circumventing the traditional requirement of individual causation in tort cases: to allege conspiracy among the defendants. The State of Mississippi used this strategy in seeking to recoup health-related costs from the tobacco industry. Tobacco companies settled, and paid hundreds of millions of dollars to the State. *See*, *e.g*., *Moore ex rel. State v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994). The State acted as a collective plaintiff, suing in relation to the claims of those victims whose medical expenses had been paid for by state medical assistance programs.

States and other collective plaintiffs in such recoupment actions against manufacturers typically rely on a combination of the concert of action or civil conspiracy theory for holding multiple defendants liable for substantive claims based upon common law fraud or fraud-based statutory claims. For example, the State of Ohio's complaint in the litigation that led to a tobacco settlement alleged that the defendants had manufactured, promoted, and sold tobacco products both "while knowing, but denying and concealing that their tobacco products caused injury and sickness" and while enhancing the addictive properties of their products. Complaint, *State ex rel. Coyne v. Am. Tobacco Co.*, No. 315 249, at ¶ 21A (Ohio Ct. C.P. 1997). Ohio alleged that all this was done while the defendants were "engaged in a conspiracy," *id*., enabling the state to hold the manufacturers jointly and severally liable. Similarly, the State of New York alleged that the defendant manufacturers had conducted a "[c]ampaign of [s]uppression, [d]eceit and [m]isrepresentations." *Id.*

The *Kivalina* plaintiffs are attempting a similar pathway to success. The plaintiffs allege that certain named defendants engaged in a civil conspiracy to distort public perceptions about the causes and effects of climate change. Such allegations have been circulating within the scientific community for the past few years. In January 2007, the Union of Concerned Scientists released a report detailing the similarities between public relations campaigns funded by ExxonMobil and "Big Tobacco" allegedly intended to misinform the public about the scientific evidence linking their business activities to significant threats to public health. Union of Concerned Scientists*, Smoke, Mirrors & Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science* (Jan. 2007). The tobacco comparison appears to be an increasingly popular way for advocates to frame the climate change story.

Conclusion. The defendants in the *Kivalina* suit no doubt will move to dismiss the complaint based on the political question doctrine, and are likely to succeed, assuming the U.S. District Court for the Northern District of California applies the same standards that the court articulated in California v. General Motors, supra. Even assuming the plaintiffs in this case and future cases survive the political question doctrine, they will have to overcome other facial challenges such as lack of standing and preemption. Moreover, causation poses a formidable obstacle to recovery. The conspiracy theory asserted by the Kivalina plaintiffs changes the complexion of the case but probably not the outcome. Absent the type of smoking gun documents that won the day for plaintiffs in the tobacco recoupment cases, it likely will be an uphill battle convincing a jury that power producers should be held liable for damage associated with climate change. Leaving aside whatever parallels plaintiffs may seek to draw between the actions of power companies and those of tobacco companies, a vast gulf separates the relative attributes of energy and tobacco. Quite simply, energy is essential to our way of life. Thus, the success of state recoupment actions against tobacco companies should not be regarded as predictive of climate change tort suits against power companies.

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