

Climate Change Litigation and Insurance Issues

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Coverage From Every Angle

Actions Seeking Imposition Of Carbon Emission Standards

Massachusetts v. EPA, 549 U.S. 497 (2007)

- Plaintiffs alleged EPA had abdicated responsibility under Clean Air Act to regulate greenhouse gas emissions.
- Court held that **Clean Air Act provided EPA with authority to regulate “air pollutants.”**
- Clean Air Act defined “air pollutants” as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”
- Court found that “greenhouse gases fit well within the Clean Air Act’s . . . definition of ‘air pollutant[.]’”

Actions Seeking Relief For Climate Change

Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012)

- Native community on barrier island 70 miles off Alaskan coast sued oil, energy, and utility companies for federal common law nuisance, based on emission of greenhouses gases that contributed to global warming and decreased Arctic sea ice that protected island against winter storms.
- District court noted: “In recent years, much attention has been focused on **the issue of global warming, which is not itself an event so much as it is a sequence of events.**”
- The district court dismissed case:
 - Case presented a **political question**;
 - Kivalina **lacked standing** because **alleged damage not fairly traceable to defendants**; and
 - The court did not consider Kivalina’s state law claims
- Ninth Circuit affirmed in 2012, holding that federal common law claims had been **displaced** by Congressional action / the Clean Air Act.

Actions Seeking Relief For Climate Change

American Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011)

- Rejected federal common law public nuisance claims.
- Held that “the Clean Air Act and the EPA actions it authorizes **displaces** any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants.”
- Did not address state law nuisance claims.

Actions Seeking Relief For Climate Change

Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), ***rev'd & remanded***, 947 F.3d 1159 (9th Cir. 2020)

- Filed by youths ages 8-18, and proposed adult guardian for future generations;
- Asserted fundamental right to a climate system that can support human life;
- The district court denied a motion to dismiss the Complaint, stating:
 - “I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”
 - “This action is of a different order than the typical environmental case. It alleges that defendants’ actions and inactions — whether or not they violate any specific statutory duty — have so profoundly damaged our home planet that they threaten plaintiffs’ fundamental constitutional rights to life and liberty.”
 - No political question presented.
 - Plaintiffs alleged concrete and particularized injury required for standing
- In a 2-1 decision, the Ninth Circuit reversed, concluding that federal court did not have the power to issue the declaratory and injunctive relief sought, and remanded the case back to the district court.
- **Case in district court, waiting on ruling on motion to file an amended complaint.**

Climate Change Insurance Actions

AES Corp. v. Steadfast Ins. Co., 725 S.E.2d 532 (Va. 2012)

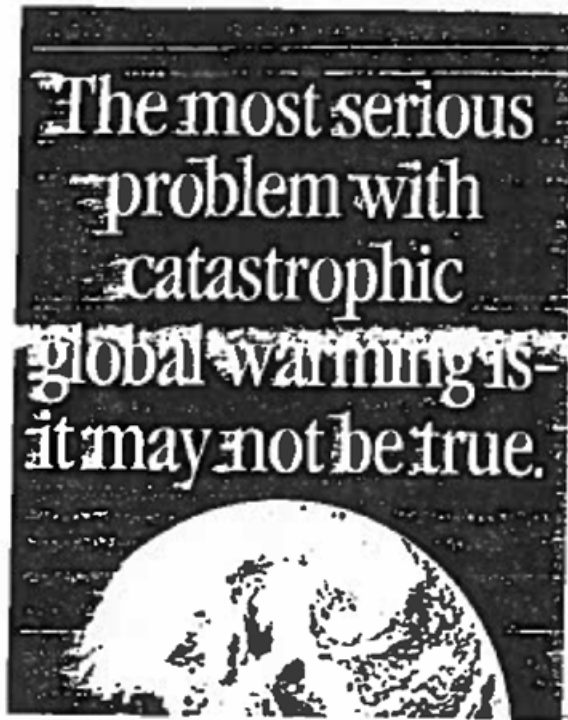
- Case arose out of the action filed in federal court in Feb. 2008 by the Native Village of Kivalina (“Kivalina”) against AES (a Virginia-based electric company) and others, alleging defendants damaged Kivalina by causing global warming through greenhouse gas emissions.
- Steadfast issued GL policies to AES between 1996 and 2008, defended AES subject to an RoR, and filed a DJ in July 2008 alleging:
 - Complaint did not allege “property damage” caused by an “occurrence”;
 - any alleged injury arose prior to inception of the Steadfast policies; and
 - claims alleged fall within the pollution exclusion because greenhouse gases are a pollutant.
- The trial court granted summary judgment to Steadfast finding that “Steadfast has no duty to defend AES in connection with the underlying *Kivalina* litigation because no ‘occurrence’ as defined in the policies has been alleged in the underlying Complaint.”
- Virginia Supreme Court affirmed; no “accident” because:
 - Complaint alleged the damages sustained were the natural and probable consequences of AES’s intentional emissions; and
 - “When the insured knows or should have known of the consequences of his actions, there is no occurrence and therefore no coverage.” Natural and probable consequences of intentional acts are not a fortuitous event or an accident.

Current Climate Change Litigation Trends

- Climate change claims in federal court based on federal common law have not been successful.
- State and local government plaintiffs recently began filing actions in state courts pleading state law claims, alleging that fossil fuel companies knowingly contributed to climate change and conducted misinformation campaigns to downplay the severity of climate change.
- The claims pled include public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, and violation of state consumer protection acts.
- The defendants tried to remove these cases to federal court, but in most cases the federal district courts determined that the actions were improperly removed, and remanded the cases back to the state courts.
- Since February 2022, three Circuit Courts have affirmed district court orders remanding cases back to state courts:
 - *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd*, 25 F.4th 1238 (10th Cir. Feb. 8, 2022)
 - *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 31 F.4th 178 (4th Cir. Apr. 7, 2022)
 - *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2019), *aff'd*, 2022 WL 1151275 (9th Cir. Apr. 19, 2022)

Current Climate Change Litigation Trends

The following are examples of allegedly misleading representations highlighted in the state court complaints:



Current Climate Change Litigation Trends

The following plaintiffs have filed state court actions asserting state law claims:

Anne Arundel County, MD

Board of County Commissioners
of Boulder County, CO

City & County of Honolulu, HI

City & County of San Francisco, CA

City of Annapolis, MD

City of Charleston, SC

City of Oakland, CA

City of Hoboken, NJ

City of New York, NY

City of Richmond, CA

City of Santa Cruz, CA

County of San Mateo, CA

County of Maui, HI

District of Columbia

Marin County, CA

Mayor & City Council of Baltimore, MD

Pacific Coast Federation
of Fishermen's Assocs., Inc., CA

Santa Cruz County, CA

State of Connecticut

State of Delaware

State of Minnesota

State of Massachusetts

State of Rhode Island

Current Climate Change Litigation Trends

The following companies are named as defendants in one or more of these state court actions:

Aloha Petroleum	Consol Marine Terminals LLC	Marathon Oil	Rosemore, Inc.
American Petroleum Institute	Crown Central LLC	Marathon Petroleum	Royal Dutch Shell P.L.C.
Anadarko Petroleum Corp.	Crown Central New Holdings LLC	Motiva Enterprises, LLC	Shell Oil Co.
Apache Corp.	Crown Central Petroleum Corp.	Murphy Oil Corp.	Shell Oil Products Co. LLC
Arch Coal, Inc.	Devon Energy Corp.	Murphy USA Inc.	Speedway LLC
BHP Group	Devon Energy Prod. Co., L.P.	Occidental Chemical Corp.	Statoil ASA
BHP Hawaii	Encana Corp.	Occidental Petroleum Corp.	Total E&P USA Inc.
BP America, Inc.	Eni Oil & Gas Inc.	Ovintiv, Inc.	Total S.A.
BP P.L.C.	Eni S.p.A.	Peabody Energy Corp.	Total Specialties USA Inc.
BP Products North America Inc.	Enmark Stations, Inc.	Phillips 66	XTO Energy Inc.
Brabham Oil Co., Inc.	Exxon Mobil Corp.	Piedmont Petroleum Corp.	
Chevron Corp.	ExxonMobil Oil Corp.	Repsol Energy North Am. Corp.	
Chevron U.S.A. Inc.	Flint Hills Resources LP	Repsol S.A.	
Citgo Petroleum Corp.	Flint Hills Resources Pine Bend	Repsol Trading USA Corp.	
CNX Resources Corp.	Getty Petroleum Marketing, Inc.	Rio Tinto Energy America Inc.	
Colonial Group, Inc.	Hess Corp.	Rio Tinto Ltd.	
Colonial Pipeline Co.	Koch Industries, Inc.	Rio Tinto Minerals, Inc.	
ConocoPhillips	Louisiana Land & Exploration Co.	Rio Tinto P.L.C	
Consol Energy Inc.	Lukoil Pan Americas, LLC	Rio Tinto Services Inc.	

Current Climate Change Litigation Trends

- These state court actions seek costs for:
 - Analyzing and evaluating impacts of climate change;
 - Responding to, managing, and mitigating various climate change impacts, including:
 - Drought (water management; stress on electrical infrastructure);
 - Wildfires;
 - Flooding (coastal flooding due to sea rise; river and stream flooding due to heavy rain events);
 - Public health risks from extreme weather events (heat illness / stroke; respiratory issues);
 - Repair and replacement of critical infrastructure threatened by flooding and sea level increases (e.g., roads, bridges, sea walls, sewers, subways, tunnels, police and fire stations, water purification and waste processing plants);
 - Storm surge, beach and coastal erosion control; and
 - Saltwater intrusion into groundwater / aquifers; and control.

Current Climate Change Litigation Trends

- On Feb. 22, 2022, the Hawaii state court in the Honolulu action denied a motion to dismiss the complaint, stating:
 10. **The common law adapts.** . . . Here, the causes of action may seem new, but in fact are common. They just seem new -- due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. **Common law historically tries to adapt to such new circumstances.**
- This decision is significant because it permits to the action to proceed in state court.

Current Climate Change Litigation Trends

- The battlefield for climate change response cost actions has shifted to the state courts.
- Expect to see new climate change cases filed in state courts asserting state law claims.
- The complaints in these actions are reminiscent of past “bet the company” litigation involving environmental pollution, asbestos, tobacco, and other product claims.
- Insurance policies issued to climate change defendants (potentially companies that extracted, sold and/or used fossil fuel, or otherwise supported those industries) likely will be the subject of coverage disputes raising similar issues to those presented in the types of cases noted above.
- Such issues likely will include: is there a duty to defend; are “damages” sought; is there an “occurrence” and, if so, what is the number of occurrence(s); is there “property damage” and/or “bodily injury” caused by an “occurrence”; the applicability of deductibles / SIRs; trigger of coverage and allocation issues; expected or intended; foreseeability; notice; and applicability of exclusions, including the pollution exclusion.

Climate Change Corporate Governance / Disclosure Issues

- Another category of climate change litigation involves corporate governance actions, including securities class actions and stockholder derivative actions, premised on alleged failed to disclose or misrepresentation of business risks, including:
 - Failure to disclose climate change risks;
 - Greenwashing (disinformation to present an environmentally responsible public image) and other misleading statements;
 - Overstating biodegradability of products in oceans and landfills;
 - Failure to adopt wildfire mitigation measures (PG&E investor action);
 - Compel inclusion of climate change-related shareholder proposals in proxy materials; and
 - Divestiture of stock in fossil fuel companies.
- No comprehensive climate change disclosure requirements in place.

SEC Proposed Disclosure Rules -- Categories Of Climate Change Risks

SEC's Proposed Climate Change Disclosure Rules (proposed 3/22/2021; comments due 5/20/2022)

- **Acute physical risks:** Event-driven risks related to shorter-term extreme weather events (e.g., wildfires; hurricanes; floods; tornadoes; extreme hot and cold temperatures).
- **Chronic physical risks:** Harm from gradual impacts (e.g., long-term temperature increases; drought; sea level rise; and decreased arability of farmland, habitability of land, and availability of fresh water).
- **Transition Risks:** Market change risks to address mitigation of, or adaptation to, climate risks, including:
 - Increased costs due to climate-related changes in law or policy;
 - Reduced market demand for carbon-intensive products;
 - Abandonment of assets;
 - Legal liability and litigation defense costs;
 - Competitive pressures associated with the adoption of new technologies; and
 - Changes in consumer preferences or behavior.

Transition Risks include “upstream” and “downstream” climate risks:

- Upstream: Companies that source, supply and/or process materials or product components; and
- Downstream: Companies that deliver, transport or maintain sold products to or for end purchasers.

Coverage Litigation Involving Future Climate Risk Exposures

- Future litigation over insurance coverage for climate-change-induced losses is likely. For example:
 - What is the “occurrence” for a wildfire? The wildfire or the drought that precedes it?
 - Are mudslides following rain in a fire-ravaged area a separate occurrence?
 - What is the “occurrence” for losses caused by extreme temperatures? The failure to protect critical systems against extreme heat or cold, or the failure of those systems when temperatures fall or rise to extreme levels?
 - If two tornadoes strike the same town hours apart during the course of an hours-long thunderstorm, are there two “occurrences” or just one?

Coverage Litigation Involving Future Climate Risk Exposures

- If two wildfires converge before they reach a town, is there one “occurrence” or two?
- As climate-change-induced losses increase in frequency, do they become “expected”?
- Which policy periods are potentially triggered? The period when the ultimate loss occurs, or a number of policy periods in the years leading up to the loss? The period in effect at the time of the wildfire, or the 10 years of drought preceding the fire?