

Publication

A Change in Climate: The Chilling Effect of Global Warming

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In August 2005, Hurricane Katrina ripped through Louisiana and Mississippi leaving behind a wake of destruction that still affects the region.

Classified as the costliest natural disaster in United States history, economic damages resulting from Hurricane Katrina are estimated to exceed \$10 billion (US). Not surprisingly, environmentalists and scientists immediately attributed Hurricane Katrina's severity to one cause – global warming.

Hurricane Katrina is but one example cited by environmentalists and scientists in support of the devastating effects of global warming. In August 2007, eight straight days of torrential rains in the Midwest of the United States resulted in unprecedented flooding, 18 deaths and in excess of \$115 million (US) in property damage. A prolonged heat wave in the western United States this past summer caused temperatures to soar above 100 degrees Fahrenheit, resulting in devastating droughts, wildfires, freeway closures, property damage, and deaths. Similar destruction has occurred across the globe. The Indian Ocean Tsunami of 2004 resulted in approximately 300,000 deaths and in excess of \$10 billion (US) in damage. In each of these cases, global warming was cited as a contributing factor.

The question remains, however, to what extent will the insurance industry feel the economic heat of "climate change litigation," tabbed by plaintiffs' attorneys as the next tobacco litigation? To date, climate change litigation in the United States has been slow to develop. The initial climate change lawsuits were instituted by environmental groups, states and even private citizens against public agencies seeking to secure equitable and legal relief from the effects of climate change in light of legislative inaction. To a lesser extent, climate change lawsuits have been instituted against private entities such as automobile manufacturers, chemical companies and power companies. Inasmuch as the United States is the world's largest global warming polluter, legal prognosticators anticipate an increase in climate change lawsuits against industrial companies whose products, facilities and plants emit greenhouse gases ("GHG"). For those who insure this targeted class, it is with bated breath that they await action by the United States' government and courts as to whether such lawsuits are viable.

The United States Supreme Court's landmark decision in *Massachusetts v. EPA*^[i] has the potential to drastically alter the course and impact of climate change litigation in the United States. As discussed in greater detail below, the Supreme Court's decision could open the door to lawsuits against private entities on the theory that they caused global warming through GHG emissions. If that occurs, the insurance industry can anticipate a landslide of claims by the target defendants seeking coverage for their actions that allegedly contribute to global warming.

In this paper, we discuss the development of climate change litigation in the United States. Our discussion includes a breakdown of the reported decisions against both governmental and private entities, as well as a detailed discussion of the Supreme Court's decision in *Massachusetts v. EPA* and its potential impact on future climate change litigation. Finally, we discuss the imminent influence of climate change lawsuits on casualty insurers. In particular, we discuss the applicability of pollution exclusions to global warming claims and the implications on directors and officers ("D&O") insurance policies stemming from the failure to disclose and/or reduce GHG emissions.

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[i] 127 S. Ct. 1438 (2007).