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PERSPECTIVES: Global warming has not inspired wave of lawsuits

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Despite predictions that the next big liability exposure would come from activities that allegedly led to global warming, there have been few cases directly related to climate change. And where suits have been filed, most courts have found them "nonjusticiable" or political in nature, say attorneys Lawrence D. Mason and John A. Lee of Segal McCambridge Singer & Mahoney Ltd.

LAWRENCE D. MASON, LEFT, AND JOHN A. LEE

Many in the insurance industry re-call the Y2K scare and the flood of litigation it was expected to unleash.

More recently, some were predicting that the lawsuits the insurance industry avoided when Y2K fizzled would materialize in response to global climate change claims. "Global Warming: Here Come the Lawyers," warned Businessweek in late 2006, proclaiming, "It's the next wave of litigation—after tobacco, guns, and junk food. Why Detroit, Big Oil, and utilities should worry."

Enough time has passed now since that initial alarm was raised to allow us to look back and gauge to what extent the predicted wave of cases has materialized and to measure any impact it might have made.

While some questions remain unsettled about the effects of global warming and the efficacy of curtailing it by changing human behaviors, few scientists dissent from the idea that the burning of fossil fuels, which releases greenhouse gases such as carbon dioxide and methane, has had an observable impact on Earth's atmosphere and oceans. People skeptical of our political institutions' ability to address this impact recently have begun to turn to the courts for relief.

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So far, the targets of this litigation have been limited to fossil-fuel burning industries and the insurance companies who defend and indemnify them.

To date, only a few cases directly related to climate change have been filed. Of these, *American Electric Power Co. Inc. et al. vs. Connecticut et al.*, *California vs. General Motors Corp.*, *Comer vs. Murphy Oil USA Inc.* and *Native Village of Kivalina vs. ExxonMobil Corp.* are the most significant.

Interestingly, most of these courts have proven reluctant to deal with the underlying issues in the cases, dismissing them as "nonjusticiable" or political in nature, more properly dealt with by the other branches of government.

In *American Electric Power*, eight states, New York City and three nonprofit land trusts sued five major power companies, claiming their carbon dioxide emissions harmed the environment. As relief, they sought an emissions cap, one that would be tightened progressively in following years. The lower court dismissed the case as political, but the plaintiffs appealed to the U.S. Supreme Court, which upheld the dismissal of the underlying

suit because regulation of power plants' carbon-dioxide emissions is under the purview of the appropriate federal agencies and not a subject for private suit.

In *California*, the state sued various automakers under public nuisance law, saying their products' emissions contributed to the public nuisance of global warming. Again, the lower court dismissed the case as centering on political questions. California appealed the ruling but then withdrew the appeal.

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In *Comer*, property owners along the Mississippi Gulf Coast sued several oil companies, claiming that their activities had led to global warming, which had worsened the severity of Hurricane Katrina. Once again, the lower court deemed the case political in nature and dismissed it. After some more legal maneuvering, including a reversal of the initial federal court decision, the case ultimately returned to the Southern District of Mississippi federal district court. It dismissed the action because the alleged injuries were not fairly traceable to the defendants, the lawsuit was displaced by the Clean Air Act, and the complaint was premised on political questions.

The pattern that clearly emerged in these earlier cases continued in the *Kivalina* case. Kivalina is an Inupiat island community in the Arctic waters just off the Alaskan coast. Residents sued ExxonMobil and other energy firms, claiming the companies' activities were contributing to global warming, which damaged the sea ice that protects the island's coast from storms. Shoreline erosion, the suit claimed, ultimately would force the population to relocate.

Once again, the judge dismissed the issue as political, ruling that “Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming.” The court also addressed another issue—the fact that while the plaintiffs admitted they were unable to directly trace their alleged injury to any particular defendant, they claimed the defendants “contributed” to their injuries.

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The judge rejected this argument, reasoning that because there is no federal standard limiting the discharge of greenhouse gases, “it is entirely irrelevant whether any defendant "contributed' to the harm because a discharge, standing alone, is insufficient to establish injury.”

This case is awaiting an appellate decision.

At publication time, Kivalina was the only underlying climate change case that has given rise to a coverage action.

One of the defendants in *Kivalina* was AES Corp., a Virginia-based energy company. AES turned to its insurer, Steadfast Insurance Co., seeking defense and indemnification. Steadfast provided a defense under a reservation of rights and filed a declaratory judgment action seeking a determination of no coverage based on the grounds that the suit didn't allege “property damage” caused by an “occurrence,” as the policy contemplated it; any injury happened before the policy was in place; and the pollution exclusion in the policy precluded coverage.

The Virginia Supreme Court ultimately affirmed a lower court ruling that AES was not entitled to coverage under the Steadfast policies. In reaching its decision, the court focused on the fact that AES' emissions of greenhouse gases were intentional, arguably negligent, and generally known to be contributory to global warming. The court didn't address the pollution exclusion issue.

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In a surprising twist, however, the Virginia Supreme Court on Jan. 17 agreed to set aside its ruling and granted AES' petition for a rehearing. According to AES, the Virginia Supreme Court's *Kivalina* ruling departed from

precedent and basic principles of insurance law by replacing an intentional act standard with an ordinary negligence standard when considering whether there was an occurrence providing coverage, and if allowed to stand, "will eliminate (CGL) insurance coverage in most cases."

On April 20, the Virginia Supreme Court upheld its prior ruling, finding there was no coverage because the underlying complaint alleged damages that were the "natural and probably consequence" of AES's intentional actions. Consequently, the court noted that the complaint did not allege a fortuitous accident or event.

Thus far, the response to climate change lawsuits has been a fairly consistent judicial chorus of, "You've come to the wrong place." Insurers have not been exposed to protracted litigation or been required to pay indemnification costs, and the one coverage case was a win for the industry. Nevertheless, the claims picture remains uncertain for insurers and insureds alike as scientific understanding grows, the regulatory framework continues to evolve, and plaintiffs attorneys inevitably bring additional climate change cases based on different legal theories.

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