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Hurricane Tort

Tomas Kellner, 09.29.05

If some plaintiff lawyers have their way, CO² is the next tobacco.

Six days before Hurricane Katrina hit New Orleans in August, a federal judge in San Francisco unleashed a different kind of monster. The judge granted legal standing to a global warming lawsuit against the U.S. government for the first time, brought by a coalition of cities and environmental groups, including the Friends of the Earth and Greenpeace. The plaintiffs (including the cities of Santa Monica and Boulder) are charging that the U.S. government has provided billions in loans and insurance to oil companies, electric utilities and other emitters of gases like carbon dioxide that may have contributed to global warming. A hearing is scheduled for February 2006.

The legal theory behind climate change tort is very much in flux--and so, of course, is the science. But energy companies and their insurers are starting to worry about their potential liability under global warming theories. "I think there's going to be a lot of ambitious lawyers that try to do a kind of tobacco-type suit," says Christopher Walker, managing director of sustainable business development at Swiss Re, the reinsurance giant that sells policies to many multinationals.

Making these cases stick won't be easy. In the case of Katrina, lawyers would have to link the force of the hurricane to climate change, and climate change to carbon emissions. And as climate change is a global phenomenon, they would have to link damage to the emissions of a particular defendant. All this assumes that a judge agrees that human activity indeed makes the Earth warmer.

Two global warming suits were recently tossed out and are on appeal. In one, eight states (New York, Wisconsin and Iowa among them) and a group of private plaintiffs like the National Audubon Society sued five big carbon dioxide emitters, including American Electric Power and Cinergy, in federal court in New York. They claimed the gas posed "serious threats to our health, economy and environment." The judge ruled the issue was a political matter best resolved by the legislative and executive branches.

In the other, a coalition of states and cities charged that the Environmental Protection Agency and automobile manufacturers failed to curb greenhouse gases under the Clean Air Act. Dismissing it, a Washington, D.C. federal appeals court panel ruled that CO₂ is not regulated by the EPA and therefore emitters can't be sued.

But even corporate lawyers don't take much comfort. "Common law is an evolutionary process that's pushed along in an adversarial way," says J. Kevin Healy, partner at the law firm Bryan Cave, which represents insurance companies and other businesses. "Plaintiff lawyers will be finding whatever they can to hold corporations liable." Ronald A. Shems, who's representing the Friends of the Earth in the California lawsuit, agrees. "As information becomes more available and lines of liability clearer, things will mature," he says.

Scientists are also stoking the fire. Recent papers in journals like Nature and Science that link global warming to carbon emissions could serve as evidence. "In principle it should be admissible," wrote Oxford physicist Myles R. Allen and lawyer Richard Lord in Nature. "Computer simulations are not unknown in the courtroom."

Walker of Swiss Re sounds glum. "[These lawsuits] are certainly a nuisance and bad publicity," he says. "I wouldn't want to be an oil company having to defend myself in New Orleans in a local court with a local jury that's living in Houston."