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Climate Change Litigation Threatens to Spread Beyond Oil and Gas

The current political debate about climate change has, predictably, given rise to efforts to drum up litigation against multiple industry groups to recover costs allegedly imposed by global warming and rising sea levels.

The most significant of these encourage political actors—notably State Attorneys General and city authorities—to seek billions of dollars in so-called "climate resilience costs" allegedly incurred by states and cities, and solicit law firms to represent the states and cities on a contingency-fee basis. Although the litigation brought so far has centered on the oil and gas industry, the underlying legal theories could extend to many other industries. The business community as a whole, needs to view this development as a potential threat and take appropriate steps to combat it.

Currently, multiple large cities—including New York City—are suing leading oil and gas companies for damages allegedly arising from climate change, claiming that the production of oil and gas has created a "public nuisance" under tort law principles. Recently, a State Attorney General in Rhode Island filed a similar action, a development that potentially increases the stakes and the concern. These actions are all brought in the state's or city's name by contingency-fee plaintiff's lawyers, to whom the State Attorney General and city authorities have essentially delegated their powers.

In June, a federal district judge in California dismissed one city case—from San Francisco/Oakland—on the ground that Clean Air Act and Environment Protection Agency (EPA) emission standards displace "public nuisance" tort law, and that the city's claims involve non-justiciable political questions that must be left to the legislative and executive branches.

As welcome as that news is, several threats remain: that decision is likely to be appealed; the other city cases remain outstanding; the Rhode Island state case has just been filed; and the U.S. Supreme Court previously split 4-to-4 on the "political question" issue in an earlier climate change case. In addition, multiple State Attorneys General have announced an investigation of a major oil company relating to climate change, and two courts have rejected the company's attempt to block those investigations.

Moreover, the "public nuisance" theory is not limited to oil and gas companies. To the contrary, it could be leveled against any company whose operations or products allegedly contribute to global warming: *e.g.*, against automobile or aerospace companies whose products would be alleged to have had unreasonable or excessive emissions levels, against transportation companies that used those products and gave off the emissions, or against utilities and power plants whose operations gave rise to greenhouse-gas emissions. There would, of course, be multiple, substantial defenses to any such claims. But recent history has shown that state and city claims for "public damages" can be challenging to deal with.

Given that prospect, it is important that all companies take steps to reduce the chances of being drawn into this type of litigation. First, as a general matter, companies should look for opportunities to limit the ability of states and cities to impose liability against legitimate business operations on "public nuisance" theories and the ability of political authorities to cede litigation decisions to contingency-fee plaintiff's lawyers. Amicus briefs or lobbying efforts, including by general

business groups such as the Chamber of Commerce, can help alert courts and legislatures to the abuses created by this kind of litigation and can create a downside for political actors who might otherwise be inclined to bring such cases.

Second, companies should scrutinize their disclosures relating to the effect (if any) that climate change may have on their operations. State Attorneys General have used allegedly inadequate disclosures as a basis to begin climate-change investigations of multiple companies, including in the oil industry.

Third, companies should actively monitor statements relating to climate change made by trade groups and industry associations of which they are a member. Many of the allegations in the city and Rhode Island actions against oil and gas companies arise from climate-change-related positions taken by a petroleum industry association, for which the cities and states are trying to hold member companies liable.

Fourth, companies should factor the potential of this litigation into their review and assessment of the carbon footprints of their products and operations. And of course, if a company learns that a State Attorney General or city that it is contemplating litigation against or an investigation of the company, it is critical both to raise the right defenses and to handle the situation in a way that minimizes the chances that litigation will actually be brought or will spread.

Footnotes

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