

Litigation: An Antidote for Democracy

IN HIS GETTYSBURG ADDRESS, Abraham Lincoln described our constitutional form of government as “government of the people, by the people and for the people.” However, for some of the people, the opinions of the majority sometimes do not move rapidly enough in a particular direction on a particular topic. At least in the last

half-century those dissatisfied with the political opinions of the masses of voters and potential voters (and the legislative actions or inaction of their elected representatives) have turned, with increasing frequency, to litigation as an instrument by which to obtain a result that they have been unable to persuade a majority of their fellow citizens or their legislators to endorse.

Recently, some of those who are frustrated by their inability to persuade the political machinery to take national action to reduce human contributions to global warming have either advocated or pursued litigation in an attempt to compel what they see as appropriate remedial action. Such litigation has taken the form not only of proceedings to force the federal government to adopt standards limiting certain industries’ alleged contributions to greenhouse gases,¹ but also of litigation seeking to impose damage liability upon certain disfavored generators of such gases or aiders and abettors of the generation of such gases. The attorney general of California, for instance, has filed an action in federal court in the Northern District of California alleging that the defendant automobile manufacturers and distributors have created a global warming “public nuisance” under federal common law or state law. The complaint seeks damages for present and future damages that the state has allegedly incurred or will incur as a result of global warming.²

In 2005, a group of states, the city of New York, and certain environmental groups filed an action in federal district court against a group of electric utilities asking the court, also on a public nuisance theory, to “(i) hold[] each of the [d]efendants jointly and severally liable for contributing to an ongoing public nuisance, global warming and (ii) enjoin[] each of the [d]efendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade.” The district court dismissed the complaint on the ground that the claim

presented to the court a political question that could not be adjudicated.³

Nevertheless, professional publications and seminars have been devoting an increasing amount of attention to an exploration of litigation options for obtaining damages or injunctive relief against private parties allegedly responsible for global climate change. Even though litigation against government bodies is explicitly designed to compel politically responsible and politically responsive government entities to regulate the emission of greenhouse gases by making public choices about alternative control strategies, litigation against private parties is ostensibly intended to affect private behavior in the absence of such government decisions.

The factual allegations underlying such proposed claims against private parties is generally that the global average surface of the Earth has increased approximately 1 degree Fahrenheit in the last century or 1.26 degrees Fahrenheit between the late 1800s and 2000. During the last three decades, the average surface temperature has increased at a rate of .36 degrees Fahrenheit per decade and is supposedly projected to continue to increase at that rate or at one that is greater. A substantial portion of such global warming has allegedly been caused by a human-generated increase in carbon dioxide and other greenhouse gases, which trap in the Earth’s atmosphere heat from the sun that has been absorbed and reradiated by the Earth. Absent the increased concentration of greenhouse gases, a larger portion of this reradiated heat would escape into space.⁴

It is not the intention of this column to evaluate the evidence of rising global temperatures, the accuracy of projections of future temperature increases, the balancing of global harms and potential benefits of such warming, or the allocation of causation between natural and human-induced phenomena. Rather, assuming the truth of the allegations of substantial harm caused by human-induced global warming, the question is whether, in the absence of government regulation of private activities that allegedly contribute to global climate change, litigation against such private parties is, in a democracy, an appropriate avenue for pursuing a remedy for widely shared consequences.

The basis for the allegations that human activities contribute to global climate change is not unknown to federal authorities who have been either democratically elected or constitutionally appointed. Congress

has enacted legislation dealing with the issue, including measures to provide for research, data collection, and assessment of the various activities contributing to the problem. Congress has mandated international negotiations regarding the subject but has also passed bills barring the implementation of the Kyoto Protocol, which was negotiated and executed by the executive branch and would have established national targets for limiting carbon dioxide emissions. Moreover, the U.S. Environmental Protection Agency has declined to impose limitations on levels of carbon dioxide emissions from new motor vehicles.⁵ Thus, even though constitutionally elected and appointed federal authorities have recognized the issue, they have thus far declined to select a remedy or to specify appropriate limitations on private conduct.

Both the deleterious and any beneficial effects of global warming are examples of what economists refer to as “externalities”—defined as the impacts that one person’s behavior has on others. Externalities can be positive or negative; for example, when an individual increases his or her productivity through education or training, the individual will benefit, but society at large may also benefit from the enhanced output from that individual’s labor. Similarly, the value of the initial telephone subscribers’ investment in procuring a telephone increased as more households and businesses subscribed to the telephone service. On the negative side, a manufacturer’s emission of pollutants into a nearby stream may lower the quality of water sufficiently to reduce the fish population in the stream and thereby diminish the enjoyment by local fishermen.

Many externalities exist without the law’s imposing a charge on third-party beneficiaries or providing compensation to third parties who have been adversely affected. For example, each commuter who chooses to drive to work on the freeway during rush hour increases the congestion and the delays for every other commuter, resulting in traffic delays, extending commuting time, and increasing air pollution. The law could impose those enhanced costs on each commuter by charging a rush-hour toll for using the highway in an amount equal to the social costs of the increased congestion, delay, and pollution. But in most cases, no such toll is imposed on commuters. Thus, the presence of negative externalities produced by greenhouse gas emissions does not necessarily mandate judicial sanctions on the behavior.

Advocates for litigation that restrains or imposes liabilities on disfavored sources of carbon dioxide or other greenhouse gases frequently liken such litigation to the use of litigation to stimulate the recognition of equal civil rights or to obtain compensation for cancers caused by asbestos or cigarettes. Such comparisons, however, ignore significant factual distinctions. First, carbon dioxide, the leading greenhouse gas, is not harmful in and of itself. Indeed, carbon dioxide

SIDEBAR continued on page 28

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Financial Institutions and the Economy Section

The Banking Law Committee of the Financial Institutions and the Economy Section held its annual event entitled “An Evening with the General Counsels of the Federal Banking Agencies” on Nov. 15, 2006, at the University Club in Washington, D.C. The speakers included Scott Alvarez of the Federal Reserve Board, John Bowman of the Office of Thrift Supervision, Robert Fenner of the

National Credit Union Administration, Douglas Jones of the Federal Deposit Insurance Corporation, and Julie Williams of the Office of the Comptroller of the Currency. The moderator and program chair was Paul Pilecki of Winston & Strawn LLP. The sold-out audience heard a discussion of significant current legal issues affecting the regulation of depository institutions. James Sivon of Barnett, Sivon & Natter and chair of the committee’s Executive Council paid a

special tribute to Richard Peterson, a longtime participant in the development of the law in this area. **TFL**

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SIDEBAR *continued from page 9*

is an essential component of the basic food cycle by which green plants produce oxygen and sugars. And greenhouse gases are necessary for maintaining Earth at habitable temperatures.

The second distinction is that the sources of carbon dioxide and other greenhouse gases are ubiquitous. Every breath a human being takes produces carbon dioxide. Residential heating through natural gas, heating oil, or propane produces carbon dioxide. According to a recent editorial in the *New York Times*, greenhouse gases produced by livestock raised primarily for food produce 18 percent of the global warming effect—a larger proportion than the fuel used for transportation produces.⁶ There is no intrinsic basis for imposing a greenhouse gas surcharge on some producers of greenhouse gases and not on others, or imposing a surcharge on some producers more heavily than on others. One of the principal reasons that the widely expressed concern regarding possible human contributions to global climate change has not resulted in government controls on the generation of greenhouse gases is the absence of a popular consensus on which of the many offending activities should be given priority and what human activities should be curtailed. The inactivity of the government “of the people, by the people and for the people” largely reflects the absence of an effective consensus among the people about how much of a burden society should currently bear to prevent future consequences and how those costs should be apportioned. Absent a collective ordering of priorities, one would expect each molecule of carbon dioxide to be taxed with the same surcharge—whether it is produced through the burning of fossil fuels for transportation or power generation, through the raising of livestock, or through human respiration. Thus, the only democratic basis for allowing some production of greenhouse gases to proceed freely while limiting or imposing a surcharge

on other processes producing such gases is for the democratically elected government to reach a collective value judgment on which processes should be free and which should be taxed, and what tax rate should apply to each use. Any such rational ordering of priorities would require a detailed evaluation of what alternative modes of transportation, power generation, heating, food production, and other economic activities are available; the costs and effectiveness of greenhouse gas absorption technologies; the long-term greenhouse effects of each alternative; and the ultimate economic and social impacts of restraining the atmosphere concentration of such gases.

A third factor overlooked by those advocating the use of litigation to impose controls on private behavior to alleviate global warming is the global character of any human contribution to global warming. Because gases emitted into the atmosphere do not remain fixed in any municipality, state, country, or continent, litigation arbitrarily imposing liability on those emitting greenhouse gases in any single state or country will neither solve the supposed problem nor apportion the costs equitably.

It may be unfortunate and even frustrating that no one has yet devised a set of priorities among greenhouse gas-generating activities that they can persuade a majority of the electorate to accept. The recent change in control of Congress may produce significant developments on this front. If not, as Winston Churchill observed, “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.” **TFL**

Thomas A. Donovan is a partner in the Pittsburgh office of Kirkpatrick & Lockhart Preston Ellis & Gates LLP and a member of the FBA editorial board.

Endnotes