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Climate Change and Liability: An Overview of Legal Issues

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Abstract

Until recently, climate litigation was usually restricted to claims for injunctive relief. Such litigation was mainly a tool to increase pressure on legislators to introduce stricter regulation in regard to issues relevant to climate change. Lately this started to change, and the first claims for damages to compensate for injuries allegedly caused by global warming were brought to United States (US) courts. These claims gave rise to a lively legal debate. The focus of this debate so far is on whether courts may decide the questions arising out of this litigation (political question doctrine, preemption and displacement); who has the right to bring such claims (legal standing); and which legal doctrines might support them (private and public nuisance, negligence, trespass, civil conspiracy, fraudulent misrepresentation, unjust enrichment). Other legal issues in connection with this litigation are causation (can the specific damage of the plaintiffs be traced back to the specific greenhouse gas emissions of the defendants?); and time-related issues (are the claims barred by statutes of limitations since global warming and greenhouse gas emissions have been going on for so long?).

Apart from the still relatively rare attempts to hold someone liable for global warming and its consequences as such, liability aspects of climate change also seem likely to increase in importance in a more traditional litigation context, e.g. in connection with claims against construction-related professionals for not taking global warming and rising sea levels sufficiently into consideration.

A. Liability for Climate Change?

As public awareness of man-made contributions to ongoing climate change grows, holding someone liable for the consequences of rising sea levels and the increase in frequency or severity of natural catastrophes like hurricanes

and droughts may be seen as an option to shift the loss. However, attempts to do so raise a multitude of legal problems, hardly comparable to any other kind of litigation. Since everyone contributes to climate change and at the same time everyone is influenced by it to some degree, who should have the right to sue whom because of any damage done? Whose responsibility is it to decide who should be allowed to emit how much greenhouse gas? Since greenhouse gas is emitted worldwide, which jurisdiction should deal with which consequences? Does today´s legal doctrine provide adequate mechanisms to decide these issues and, if not, does this rule out liability or should this lead to changes in the legal doctrine?

The legal debate on climate liability is still in its infancy. Courts did begin to struggle with some of the procedural hurdles faced by such litigation, but have not yet had to decide on more substantial issues like causation or public nuisance. Therefore this article on climate liability can only provide a brief overview on the most obvious questions involved, without even trying to answer them.

B. Litigation So Far

The vast majority of ongoing litigation in the climate change context is aimed at some form of injunctive relief, not at damages. Plaintiffs in this kind of litigation usually try to increase the political pressure to introduce stricter regulation in regard to greenhouse gas emissions or simply want to draw media attention to climate change and the impact of human behaviour on its speed and severity.[1]

However, recently a few first attempts to sue for damages in the climate change context have been made. While some of them seem to have been

1 Some examples for this kind of litigation are: US Supreme Court, *Massachusetts v EPA* (2 April 2007); *US Supreme Court, American Electric Power v Connecticut* (20 June 2011); as well as the public trust doctrine lawsuits like *Bonser-Lain v Texas Commission*, *Alec v Jackson*, *Chernaik v Kitzhaber*, *Sanders-Reed v Martinez.* For an overview on past and pending cases see the charts provided by Michael Gerrard (University of Columbia), available at www.climatecasechart.com, last accessed 3 March 2013.

primarily politically motivated as well,[2] others are based on specific damage allegedly caused by global warming or rising sea levels. Two such cases that have received most public attention so far are *Comer v Murphy Oil*[3] and *Kivalina v ExxonMobil*.[4]

I. Comer v Murphy Oil

In *Comer v Murphy Oil,* the plaintiffs, who live close to the Gulf of Mexico, sued several oil companies. They claim that greenhouse gas emissions by the defendants contributed to global warming, thus producing the conditions that fueled Hurricane Katrina, which in turn caused damage to their property. The plaintiffs also try to hold the defendants liable for the increase in insurance premiums they have to pay for their properties and for the decreased resale value of their homes owing to the higher risk of tropical storm activity and flood damage in the future. The plaintiffs´ claims are based on public and private nuisance, trespass and negligence. A first decision by the US District Court for the Southern District of Mississippi in 2007[5] came to the conclusion that the plaintiffs had no standing to bring the lawsuit since their injuries could not be sufficiently traced back to the actions of the defendants. The court also found the claims were non-justiciable, based on the political question doctrine. This decision was partly reversed by the Fifth Circuit in 2009.[6] For procedural reasons, several other decisions followed. In the most recent one, the District Court for the Southern District of Mississippi[7] dismissed the claims based mainly on the political question doctrine, the plaintiffs´ lack of legal standing and a displacement of the claims by the Clean

2 As for instance the claims for damages of the State of California against several US automakers, see US District Court for the Northern District of California, *California v General Motors* (17 September 2007); for more on the motives involved in such claims see Stewart (2009:41).

3 Most recently: US District Court for the Southern District of Mississippi, Southern Division, *Comer v Murphy Oil* (20 March 2012).

4 Most recently: US Court of Appeals for the Ninth Circuit, *Kivalina v ExxonMobil* (21 September 2012).

5 US District Court for the Southern District of Mississippi, *Comer v Murphy Oil* (30 August 2007).

6 US Court of Appeals for the Fifth Circuit, *Comer v. Murphy Oil* (16 October 2009).

7 US District Court for the Southern District of Mississippi, Southern Division, *Comer v Murphy Oil* (20 March 2012).

Air Act. The court also found that the plaintiffs´ claims were barred by the applicable statute of limitations and that the plaintiffs could not possibly demonstrate that their injuries were proximately caused by the defendants´ conduct.

II. Native Village of Kivalina v ExxonMobil

In *Kivalina v ExxonMobil,* a wide range of oil, energy and utility companies are sued by the Alaskan village Kivalina, because the greenhouse gas emissions of the defendants allegedly resulted in global warming, which threatens the land on which the City of Kivalina is situated with imminent destruction by erosion caused by storm waves. The US District Court for the Northern District of California denied the claims, based on the political question doctrine and lack of legal standing.[8] In 2012 the Ninth Circuit dismissed Kivalina´s appeal against this decision[9] by finding that the Clean Air Act and actions by the Environmental Protection Agency (EPA) based on the Clean Air Act displaced Kivalina´s claims.

C. Legal Hurdles for Claimants

I. Political Question Doctrine and Displacement

Several US courts found that climate-change-related matters are not legal questions for which courts are the adequate forum, but rather political questions, which have to be dealt with by other branches of government.[10] Also, the US Supreme Court decided that claims aiming at regulatory action in the climate change context have been displaced by the Clean Air Act and the Environmental Protection Agency´s activities based on it. The Court's response to the fact that the EPA had not yet exercised its regulatory authority

8 US District Court for the Northern District of California, *Kivalina v Exxon Mobil* (15 October 2009).

9 US Court of Appeals for the Ninth Circuit, *Kivalina v ExxonMobil* (21 September 2012).

10 See most recently: US District Court for the Southern District of Mississippi, Southern Division, *Comer v Murphy Oil* (20 March 2012); US Court of Appeals for the Ninth Circuit, *Kivalina v ExxonMobil* (21 September 2012).

in regard to all kinds of greenhouse gas emitters, was: "[t]he relevant question for purposes of displacement is whether the field has been occupied, not whether it has been occupied in a certain manner."[11] The Ninth Circuit has only recently extended these finding to damages claims based on public nuisance: "If Congress has addressed a federal issue by statute, then there is no gap for federal common law to fill."[12] Whether these findings will be upheld, especially if the climate-related regulation and its enforcement will not develop further, remains to be seen.

II. Legal Standing

The question of who is eligible to bring climate-change-related claims to court was already complicated as long as such litigation was limited to injunctive relief claims: after all, everyone worldwide feels some impact of global warming. Among the first plaintiffs whose legal standing was accepted by the US Supreme Court were US coastal states, since the size of their territory could become affected by rising sea levels owing to global warming.[13]

In regard to damages claims the situation is even more complicated since plaintiffs do not only have to prove that they are (potentially) affected by climate change, but have to convince the court that the damage they suffered might be traced back to the activities of the defendants. Not surprisingly, this regularly leads to a denial of legal standing.[14]

III. Causation, Attribution and Time-related Issues

Apart from the procedural issues, the main legal hurdle for damages claims seems to be causation. It may be possible to prove that man-made greenhouse gas emissions contribute to global warming. It may even be possible to prove

11 US Supreme Court, *Connecticut v American Electric Power* (20 June 2011).
12 US Court of Appeals for the Ninth Circuit, *Kivalina v ExxonMobil* (21 September 2012).
13 US Supreme Court, *Massachusetts v EPA* (2 April 2007).
14 US District Court for the Southern District of Mississippi, Southern Division, *Comer v Murphy Oil* (20 March 2012); US Court of Appeals for the Ninth Circuit, *Kivalina v ExxonMobil* (21 September 2012).

that global warming increases the risk of certain natural catastrophes like hurricanes or at least causes a rise in sea levels, an increase in heat waves, droughts, etc. However, at least up to the present date, it is not yet possible to prove that the greenhouse gas emissions by a certain emitter cause a specific damage to any potential specific claimant. Under general tort law doctrine, this would rule out liability. Of course, theoretically, constructions to overcome such causation hurdles could be developed. In very rare, exceptional cases, it has been done before. One way would be to extend the doctrine of market-share liability[15] to climate liability cases. However, market share liability has so far only been applied when there is a very limited number of possibilities of who might have caused a damage and it is completely clear that there are no other possible causes. DES litigation[16] was one of the very few examples where market-share liability was applied.[17] The climate liability scenario is much more complicated and therefore much less suitable for such a solution.

Another aspect is time-related issues. Man-made activities have produced greenhouse gas emissions for a long time, far exceeding any limitation period that might be applicable. Therefore a plaintiff would have to prove that the damage he suffered was caused by greenhouse gas emissions of the defendant occurring within the limitation period, not before.[18]

D. Coverage Issues

Liability claims based on climate change have recently led to first coverage disputes between defendants in such litigation and their liability insurers.[19] In regard to damages claims for greenhouse gas emissions, the focus so far is on the duty of the liability insurer to defend and cover defense costs. The

15 For the background of the market-share liability doctrine see e.g. Scammon & Sheffet (1992).

16 Diethylstilbestrol (DES) is a synthetic estrogen. In 1971 it was discovered that DES can cause cancer in the daughters of women who used the drug during pregnancy. This triggered hundreds of liability claims against pharmaceutical companies that had sold drugs containing this substance.

17 Supreme Court of California, *Sindell v Abbott Laboratories* (20 March 1980).

18 Other limitation period issues are discussed in: US District Court for the Southern District of Mississippi, Southern Division, *Comer v Murphy Oil* (20 March 2012).

19 See Supreme Court of Virginia, *AES v Steadfast* (16 September 2011 and 20 April 2012).

importance of this aspect is enhanced by the fact that almost all of this litigation is pending in the USA, where, unlike for instance in most European jurisdictions, no loser-pays rule exists. This means that the burden of the sometimes staggering defense costs is left with the defendant, even if the plaintiff is completely unsuccessful.

For the duty of the liability insurer to defend, the occurrence clause used in the contract between the liability insurer and its insured is crucial. Quite frequently, an occurrence is defined as an accident, something "neither expected nor intended". If this is the case, the Supreme Court of Virginia has decided (in *AES v Steadfast*[20]) that the liability insurer´s duty to defend is not triggered if the plaintiffs are alleging intentional greenhouse gas emissions by the defendants.

Among other coverage issues that are currently being discussed in the climate change context are the range of the pollution exclusion[21] and the attribution of losses to certain insurance years. However, unlike the duty to defend and the coverage of defense costs, these issues would only be dealt with by courts if plaintiffs in climate-change-related litigation would proceed sufficiently far for those aspects to become relevant.

E. Outlook

Legal hurdles for liability claims based on greenhouse gas emissions as such seem too substantial to be overcome by plaintiffs in the foreseeable future. Nevertheless, liability issues somehow related to climate change are likely to gain in importance. As the consequences of climate change become more obvious, public awareness and political pressure to introduce and enforce stricter regulation in regard to climate-change-related activities will increase. This could open the door to a variety of liability claims, ranging from negligence claims against architects, engineers and other construction professionals to consumer fraud claims and claims against directors and officers based on providing insufficient information for shareholders. One aspect that might strengthen this development is the increased frequency and severity

20 AES is one of the defendants in *Kivalina v ExxonMobil*, see most recently US Court of Appeals for the Ninth Circuit (21 September 2012).

21 The US Supreme Court decided that greenhouse gas emissions were a form of pollution and therefore the EPA was authorised by the Clean Air Act to regulate these emissions in *Massachusetts v EPA* (2 April 2007).

of some natural catastrophes, like hurricanes and wildfires, due to global warming: If victims of natural catastrophes are not sufficiently protected by first-party insurance, they will look elsewhere for deep pockets to cover their losses, at least in more litigious societies like the USA or Australia. Also, first-party insurers might become more likely to try to share the burden of their losses by subrogating against potentially liable parties. Pressure from shareholders to make use of such options could also contribute to this trend.

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