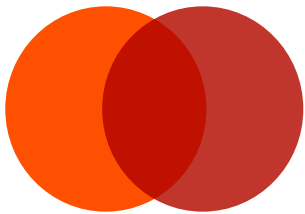


THE HEAT IS ON

Environmental Litigation in the Age of Climate Change

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In short, global climate change will affect every sector of the economy.

The warnings are dire. The world has warmed 1°C since the industrial revolution and is on track for a 1.5°C rise before the end of this century.¹ The Intergovernmental Panel on Climate Change (IPCC) recently estimated that the world must reach “net zero CO2 emissions globally by 2050” to limit warming to 1.5°C and avoid worst case scenario outcomes.² The IPCC suggests reaching that goal through carbon pricing, shifting from fossil fuels to low-carbon technology over the next 20 years, and more radical “Carbon-Dioxide Removal” (CDR) programs – directly removing carbon dioxide and other greenhouse gases from the atmosphere – despite the current dearth of available and reliable methods and technologies for tackling this daunting task.³

The United States Department of Defense has recognized that increased global temperatures will lead to more security risks arising from:

- Persistent drought, flooding, forest wild fires, and higher temperatures;
- More frequent and/or extreme weather events;
- Sea level rise;
- Decrease in Arctic ice cover.⁴

While tying any one storm or weather event to climate change is difficult, the spate of hurricanes during the summer of 2018 in the Gulf of Mexico and Atlantic Ocean were likely fueled by increased ocean temperatures and a wetter atmosphere. The severity of the devastating wild fires raging through California is also tied to climate change.

The IPCC also recognizes these and other detrimental effects: resources such as clean water and habitat that can support human and animal life are dwindling at an alarming rate.⁵ These impacts differ in severity across various regions, and so significant human and animal migration is also expected to occur.⁶ We can anticipate these impacts over the next 20 to 50 years and beyond, regardless of whether the United States alone, or in conjunction with other world powers, begins adopting aggressive strategies to combat climate change.

Taking these reports and predictions at face value, it can be difficult to envision positive outcomes. But new business opportunities may also arise. A survey of some of these potential changes is presented in this paper.

The first and most obvious risk is to life and property. Sea levels will rise, potentially flooding waterfront property,⁷ additional forest fires may burn others,⁸ crops will fail to grow whether through drought, loss of soil, subsidence, or other problems,⁹ and political upheaval may result in property damage.¹⁰ This potentially gives rise to significant interpersonal litigation, law suits against governments, and increases in insurance claims. These are exorbitantly expensive problems. Business interests should study these impacts to avoid being caught off guard.

Regulatory Changes

The current United States presidential administration prosecutes a de-regulatory agenda, despite its own reports warning that climate change may cause a



It will also raise new legal disputes and alter how traditional claims are litigated.

10% contraction in the national economy by 2100.¹¹ Future administrations, armed with this climate data and anecdotal evidence of climate impacts, may pursue an aggressive regulatory scheme to reduce emissions and encourage development of technologies to mitigate and adapt to climate change.

Industries with high carbon output, such as coal, can expect to be targeted by such regulations, as they were under the Obama Administration.¹² These entities will need to pay close attention and, where appropriate, participate in the enactment of like schemes to ensure their perpetuity and profitability.

Latent Risks

Climate change also presents risks that may lie dormant for some time. For example, a recent report on risks associated with the insurance sector arising from climate change by the International Association of Insurance Supervisors (IAIS), suggests the industry may need to reconsider its investments in the fossil fuel sector so that it can ensure sufficient reserves in the future if demand drops sharply.¹³ Indeed, they have already faced requests to do so from California regulators, signifying potential legislative and/or regulatory action in the future.¹⁴ Further risks include increases in weather-related claims, the potential need for risk-based pricing beyond what the market can bear, and even operational risks to an insurer's real property and other assets.¹⁵

Opportunities

Despite the gloomy prospects for the climate change-based future, there are some potential bright spots for commerce. Emerging from the risks into profitability requires creative thinking, innovation, and an understanding of the true nature of potential climate impacts.

Mitigation and Adaptation Projects

Whether coming from the private sector or government actors, increased investment and action toward climate change mitigation and adaptation is widely anticipated.¹⁶ This includes development of infrastructure (e.g. sea walls, clean power

projects, carbon neutral and climate resistant buildings, CDR technology), and the need for investment in those areas. In prior administrations the federal government has played a role in early investment into emerging technologies to incubate development before profitability.

Investment

The investment climate will change too. Not only will the mitigation and adaptation projects described above need financing, carbon-reducing products like low emission vehicles will likely continue to grow compared to traditional commodities.¹⁷ Indeed, such investments may even be a driver of a low-carbon future by identifying drivers of economic growth to replace fossil fuels.¹⁸ Investments will need to be targeted based on varied regional impacts, i.e. regions likely to face greater drought versus those expected to experience increased flooding.¹⁹ Experts suggest caution in investment in all fields, including confirming that individual ventures are planning for reductions in their carbon footprint, determining potential exposure to future regulation and/or liabilities, and ensuring that physical assets are sufficiently protected from, or adaptable to, extreme weather and other complications.²⁰

Risk Management

Returning to the example of the insurance industry, there is a growing recognition of these threats, but also of the potential for new investments and risk management products and pricing changes. ClimateWise, a coalition of leading insurance and related entities calls for the study and commissioning of climate modeling to improve risk analysis, inform public policy, support climate awareness among customers and modified investment strategies.²¹ In its 2016 report, the ClimateWise Principles Independent Review, the coalition highlights the need for an understanding of emerging climate risks, but also notes that, for example, new climate-related technologies will emerge – renewable energy, geoengineering, and others – which will require risk management services.²² All industries and economic sectors should consider not only the risks, but also the potential opportunities presented by a changing climate.

Tips for Practitioners

Specifically:

- When their own real property or data are compromised in climate-related natural disasters, attorneys must have emergency plans in place so they can protect their clients' data and seamlessly manage cases.
- Client data must be stored in the cloud and off-site where it won't be destroyed in floods, earthquakes, or fires.
- Where there is dislocation arising from environmental impacts, there will be hackers trying to exploit the chaos. Therefore, outside counsel should urge clients to make cybersecurity and related insurance coverage top priorities.
- Legal departments must create detailed contingency plans to ensure the health and safety of their employees when company property is damaged or destroyed during climate-related events.
- Companies will need disaster plans in place to defend against customers who could file claims related to a disruption or cessation in services arising from climate-related disasters.

Undoubtedly, attorneys must keep abreast of new and changing laws written to address climate change outcomes predicted by the IPCC and others. Attorneys should focus especially on changes to laws impacting 1) land and natural resources; 2) public infrastructure; 3) business disputes; and 4) health and safety.²³

But they must also account for the unpredictability of future events and changes that lack historical precedent. For example, contract, real estate, family lawyers, and others that seek to establish ongoing relationships, protect and develop land and physical assets, and plan for the futures of estates will need to consider how climate change will affect the basic terms of the agreements and restrictions traditionally made in those fields. Local knowledge may become more valuable as climate impacts will differ depending on the region affected, and local authorities find different solutions to these problems.²⁴ Attorneys may wish to consult with local counsel on matters outside of their knowledge.

Conclusion

Climate change is the biggest problem of our era. Right now, its ramifications are difficult — if not impossible — to accurately predict. Risk managers and business should pay close attention to the dynamics of climate change, and delve into the data and modeling that is available. They should work closely with their attorneys and consultants to analyze emerging trends arising from global climate impacts to see how these risks and opportunities will emerge among industries and economic sectors, as well as in the courtroom.



Attorneys must prepare now to help clients confront the new legal risks they will soon face due to climate change.



¹ “Technical Summary, “Global Warming of 1.5°,” Intergovernmental Panel on Climate Change, IPCC SR1.5, April 6, 2018, available at http://report.ipcc.ch/sr15/pdf/sr15_ts.pdf.

² Id.

³ Id.

⁴ “National Security Implications of Climate-Related Risks and a Changing Climate,” Department of Defense, July 23, 2015, available at <http://archive.defense.gov/pubs/150724-congressional-report-on-national-implications-of-climate-change.pdf?source=govdelivery>

⁵ See note 1, *supra*.

⁶ Id.

⁷ 6.5.2. Economic Costs of Sea-Level Rise, “Climate Change 2001: Impacts, Adaptation, and Vulnerability,” Intergovernmental Panel on Climate Change, 2001, available at <http://www.ipcc.ch/ipccreports/tarwg2/index.php?idp=298>.

⁸ “Statewide Claims for California Wildfires Reach Nearly \$12B,” Insurance Journal, January 31, 2018, available at <https://www.insurancejournal.com/news/west/2018/01/31/479034.htm>.

⁹ “Climate change projected to boost insect activity and crop loss, researchers say,” Science Daily, August 30, 2018, available at <https://www.sciencedaily.com/releases/2018/08/180830143058.htm>.

¹⁰ Flavelle, Christopher, “New Climate Debate: How to Adapt to the End of the World,” Bloomberg Businessweek, September 26, 2018, available at <https://www.bloomberg.com/news/articles/2018-09-26/new-climate-debate-how-to-adapt-to-the-end-of-the-world>.

¹¹ Davenport, Coral and Pierre-Louis, Kendra, “U.S. Climate Report Warns of Damaged Environment and Shrinking Economy,” Davenport, Coral and Pierre-Louis, Kendra, The New York Times, November 23, 2018, available at <https://www.nytimes.com/2018/11/23/climate/us-climate-report.html?rref=collection%2Fsectioncollection%2Fclimate&action=click&contentCollection=climate®ion=rank&module=package&version=highlights&contentPlacement=2&pgtype=sectionfront>.

¹² Friedman, Lisa and Plumer, Brad, “E.P.A. Announces Repeal of Major Obama-Era Carbon Emissions Rule,” The New York Times, available at <https://www.nytimes.com/2017/10/09/climate/clean-power-plan.html>.

¹³ “Issues Paper on Climate Change Risks to the In-

urance Sector,” International Association of Insurance Supervisors (IAIS), at 8.9.1 (July 2018)

¹⁴ Id.

¹⁵ Id. at 3.2.17.

¹⁶ “Closing the protection gap: ClimateWise Principles Independent Review 2016,” ClimateWise, 2016, available at <https://www.cisl.cam.ac.uk/resources/publication-pdfs/Closing-the-protection-gap-ClimateWise-Principles-Independent-Review-2016.pdf>.

¹⁷ “How to Invest in the Low-Carbon Economy,” PRI Association, June 13, 2018, available at <https://www.unpri.org/climate-change/low-carbon-climate-aligned-investment-opportunities/3287.article>.

¹⁸ “Climate change: The investment perspective,” EYGM, Ltd., 2016, available at [https://www.ey.com/Publication/vwLUAssets/EY-climate-change-and-investment/\\$FILE/EY-climate-change-and-investment.pdf](https://www.ey.com/Publication/vwLUAssets/EY-climate-change-and-investment/$FILE/EY-climate-change-and-investment.pdf); “Long-Term Investors: Are You Aware of Your Climate Change Risk Exposure?” Mercer, LLC, 2015, available at <https://www.mercer.com/content/dam/mercer/attachments/global/investments/long-term-investors-are-you-aware-of-your-climate-change-risk-exposure-mercer-2015.pdf>.

¹⁹ Demasters, Karen, “Investment Opportunities Spring from Climate Change,” Financial Advisor, March 12, 2018, available at <https://www.fa-mag.com/news/investment-opportunities-spring-from-climate-change-37609.html>.

²⁰ See note 19, *supra*.

²¹ Id.

²² Id.

²³ Verchick, Robert R. M., “What Lawyers Should Know about Adapting to Climate Change,” American Bar Association, 2013. Available at https://www.americanbar.org/content/dam/aba/events/international_law/2013/08/section-of-international-law-at-the-aba-s-2013-annual-meeting/090-Verchick-Robert-paper.authcheckdam.pdf.

²⁴ Hammond, Celeste M., The Evolving Role for Transactional Attorneys Responding to Client Needs in Adapting to Climate Change (January 7, 2014). John Marshall Law Review, Vol. 47, No. 543, 2013. Available at SSRN: <https://ssrn.com/abstract=2535085> or <http://dx.doi.org/10.2139/ssrn.2535085>