

Anticipating and Disclosing Present and Future Commercial Risks

Andrews Kurth LLP/
New Carbon Finance Webinar
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Shemin V. Proctor
sproctor@andrewskurth.com

About Andrews Kurth

- 100+ year history representing energy companies
- Not just a law firm – a strategic business partner
- Over 400 attorneys in nine offices: Austin, Beijing, Dallas, Houston, London, Los Angeles, The Woodlands, Washington, D.C. and New York
- Committed to a national and international energy practice
- Counsel energy companies, leading investment banks, underwriters, lenders and traders on pertinent issues in climate change
- Help clients manage the uncertainty in the scale and timing of **emissions reductions requirements**
- Advise on **carbon reduction capture and sequestration**, and on projects and financings using these techniques
- Equipped to defend the evolving carbon and other **greenhouse gas emissions litigation** based on more than one hundred years of experience helping energy companies succeed and on our litigation experience defending our clients against similar claims
- Advise clients on **key legislative developments** with respect to carbon regulation

Overview

Three areas of focus for commercial risks related to climate change:

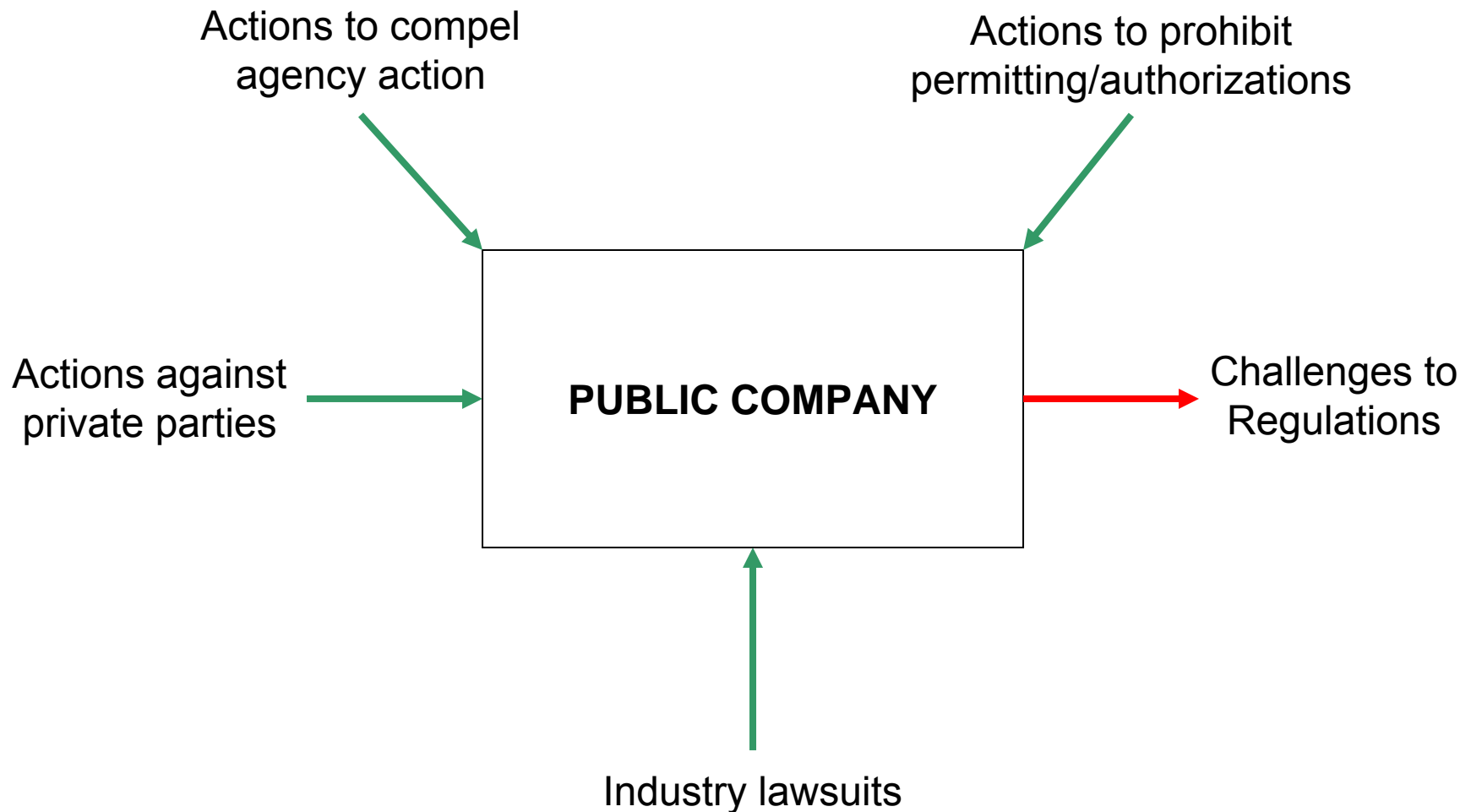
- I. Emerging Trends in Litigation
- II. Regulatory Uncertainty
- III. Disclosure Issues

Emerging Trends in Litigation – Types of Litigation

Four types of litigation seeking different relief:

1. actions against agencies to prohibit permitting/authorizations
2. actions against agencies to compel action
 - National Environmental Policy Act/state NEPAs
 - Clean Air Act
 - Endangered Species Act/Marine Mammal Protection Act
 - Clean Water Act
 - Global Change Research Act
 - Freedom of Information Act
 - Administrative Procedure Act
 - Energy Policy Act
3. actions against private parties, including class actions with multiple defendants
 - Statutory claims (e.g. NY AG subpoenas; Environmental Defense petition to SEC)
 - Common law claims (e.g. state and federal public and private nuisance)
 - Possible future claims (tort liability related to carbon sequestration; tort liability related to consumer creation of renewable energy at their homes)
4. industry lawsuits – e.g. challenging state vehicle standards

Emerging Trends in Litigation – Increased Pressure from Climate Change Litigation



Emerging Trends in Litigation – Commercial Risks

Commercial risks:

prohibiting agency action

- delays at agency level (requests for stay)
- additional review by agency of pending applications/permits
- judicial review of agency action

compelling agency action

- issue regulations
- require additional disclosure
- require review which includes consideration of carbon emissions

actions against private parties

- additional costs
- disclosure issues
- exposure to claims for damages and injunctive relief
- doing business in the face of uncertainty

Emerging Trends in Litigation – Dismissals

Common law claims against private parties: public nuisance cases

- *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp 2d 265 (S.D.N.Y. 2005), appeal pending, No. 05-5104 (2d. Cir): 8 states, private land trusts and the City of New York filed suit against five utilities alleging federal common law and state public nuisance law claims. Plaintiffs alleged that the five utilities were the largest emitters of carbon dioxide in the US and sought a court order to require the utilities to reduce their carbon dioxide emissions by a specified percentage each year for at least a decade. The court dismissed the case as a non-justiciable political question.
- *Comer v. Murphy Oil, USA Inc. et al.* (S.D. Miss. Aug. 30, 2007): Plaintiff alleged oil and coal company's greenhouse gas emissions contributed to damage resulting from Hurricane Katrina. The court dismissed nuisance suit based on political question and lack of standing.

Emerging Trends in Litigation – New lawsuit

- *California v. General Motors Corp. et al.*, 2007 U.S. Dist. LEXIS 68547 (N.D.Cal. Sept. 17, 2007): Attorney General for CA sued auto manufacturers in 2006 for damages for contributing to the alleged public nuisance of global warming. Court dismissed the case finding that an initial policy determination must be made by political branches.
- *Native Village of Kivalina v. Exxon Mobil Corp. et al.*, filed in Northern District of California February 26, 2008: Plaintiff seeks damages for relocation of village as a result of erosion caused by global warming attributable to defendants' emissions; suit is based on nuisance, conspiracy and concert of action claims.

Emerging Trends in Litigation – Additional Causes of Action

Plaintiff – environmental groups

Claims (typical)

- federal common law nuisance
- state law nuisance

Claims (recent)

- conspiracy
- concert of action

Relief – Damages, Injunctive Relief

Emerging Trends in Litigation – U.S. Supreme Court's Opinion

Unresolved issues before the Supreme Court were:

- standing
- greenhouse gases as air pollutants
- EPA's discretion not to regulate

Mass v. EPA, 127 S. Ct. 1438 (2007):

- States should be given special latitude in the standing analysis to sue to force EPA decisions on climate change
- Greenhouse gases such as carbon dioxide are air pollutants under the Clean Air Act
- Clean Air Act as vehicle for climate change regulation

Emerging Trends in Litigation

Plaintiff's obstacles

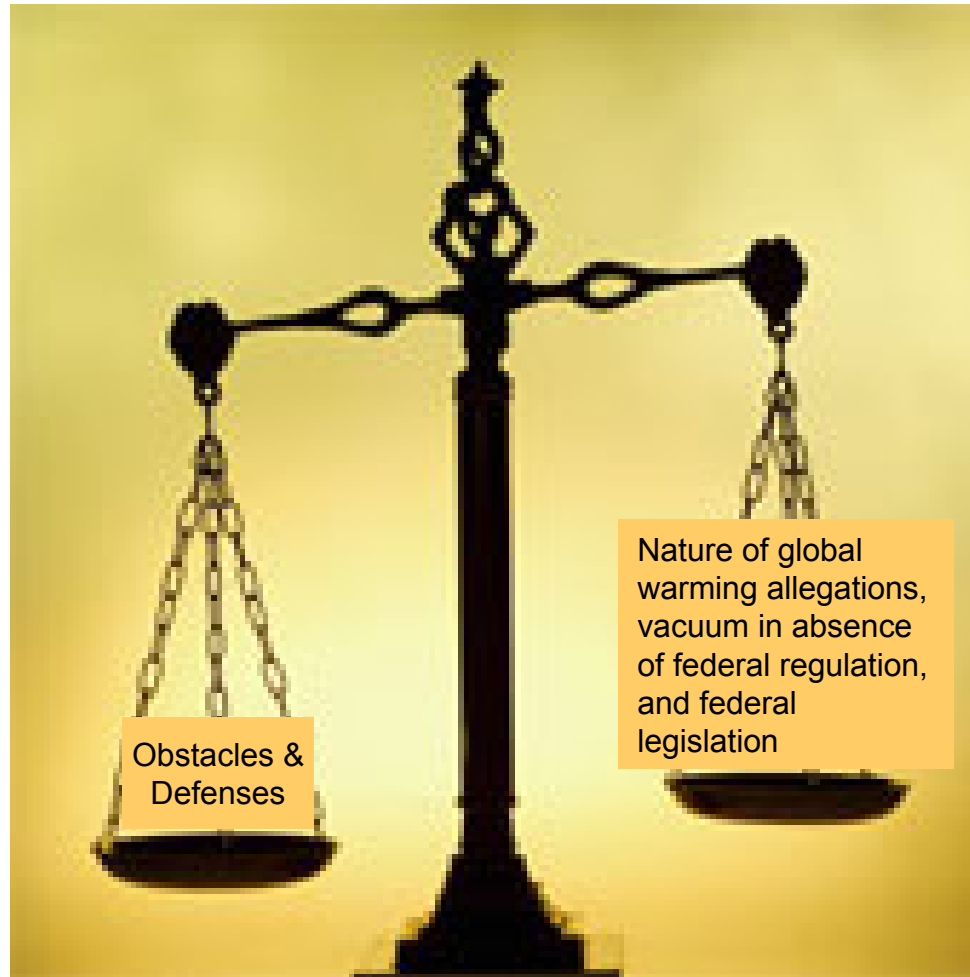
- standing
- political question
- no justiciable controversy

Defendant's defenses

- causation: nexus between Defendant's action and harm
- contributory/comparative fault

Should a company be concerned about climate change litigation?

Emerging Trends in Litigation



Emerging Trends in Litigation – The Costs

Costs/Risks of litigation

- Litigation costs and fees
- Attorneys' fees
- Disclosure
- Discovery
- Publicity

Emerging Trends in Litigation

Science – recent report issued by EPA

Active parties – companies are joining the call to action

Supreme Court's ruling – did not foreclose lawsuits

Role of Counsel – no longer only pro bono assistance by private law firms; prominent plaintiffs' counsel may be involved

Defendants potentially targeted for regulation/litigation – Not just utilities, coal companies; now, includes airlines, marine vessels, oil refineries

Emerging Trends in Litigation

Similarities among the lawsuits against private parties:

claims – federal common law nuisance; state law nuisance

damages – monetary in the hundreds of millions

defenses – not yet reached

resolution – dismissals

Key issues: plaintiffs will adapt to the recent results; plaintiffs may transition from state attorney generals to plaintiff law firms working on contingency fee basis (e.g., natural resource damage claims); and perils of becoming involved in class action suits; be vigilant!

Regulatory Uncertainty

Roles of Federal Agencies

Which agency will take the lead on climate change regulation?

CFTC, DOE, DOT, EPA, FERC, NOAA, SEC

What roles will the various agencies play?

Regulatory Uncertainty– Federal Agency Roles

ENERGY

DOE – National Appliance Energy Conservation Act of 1987

DOT – Corporate Average Fuel Economy Standards (CAFÉ)

FERC – Congressman Waxman’s inquiry to FERC Chairman Kelliher regarding FERC’s climate change policy; how FERC considers potential global warming pollution in its decisions and how FERC is assisting the states in the effort to reduce the effects of climate change.

Commissioner Kelly comments that it will be the CFTC, rather than FERC that will be involved in regulation of carbon emissions.

ENVIRONMENTAL

EPA – California’s Clean Air Act waiver request-EPA denied on 12/19/2007; 1/2/08, California appeals EPA’s denial to the 9th Circuit.

ANOPR – July 2008

New Source Performance Standards for certain utility and industrial power plants will include standards for greenhouse gases?

NOAA

CORPORATE

CFTC-regulation of possible cap and trade

SEC – Possible guidance on climate change disclosures

Disclosure Matters-Questions to consider

Due Diligence- review potential climate change risks/liabilities; consider financial impact and forecast.

Disclosure- Does the company currently address carbon emissions issues in its public securities filings; are the disclosures adequate in light of possible litigation and regulatory costs?

Does the company perform studies to determine carbon footprint; undertake internal verification and third-party verifications?

Does the company include a risk factor that addresses possible carbon emission/climate change costs and risks in each of its areas of operations?

Does someone review the company's disclosure regarding carbon emissions and/or climate change to determine whether such language might give rise to claims against the company?

Disclosure Matters-Questions to consider

Does the company have activist investors who monitor the company's carbon footprint, and if so, does the company have a proactive plan for dealing with investor relations?

Do your directors/officers have a duty to shareholders to do more in this area, including managing risks to the company's business?

Does your current Director & Officer insurance coverage cover suits brought regarding climate change issues?

Disclosure Matters-Subpoenas

NY Attorney General Subpoenas

Subpoenas issued to Xcel, AES, Dominion Resources, Dynegy and Peabody Energy.

Settlement (08/08): Xcel Energy agrees to disclose risks in detail to investors from its stake in coal-fired power plants and any related liability from global warming, lawsuits and new regulations or laws.

Takeaways

Litigation continues to attempt to fill the void in the absence of federal regulation of greenhouse gases.

Litigation against agencies will continue to impact companies on a company specific and industry-wide basis requiring at a minimum pro-active efforts by the company.

Plaintiffs claims will continue to adjust to and build upon prior precedent.

Takeaways

Agencies, whether at the forefront or reluctant latecomers, will have significant roles addressing climate change issues, especially until federal regulation is passed.

Be aware of the changing landscape with regard to disclosure requirements; impetus for increased disclosure comes from several sources.