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Climate change: Policy via litigation?

By Steven F. Greenwald and Jeffrey P. Gray

David Crane, the CEO of NRG Energy, was recently quoted in a widely disseminated publication as saying: "It is a moral imperative that we take steps to reduce CO_2 concentration in the earth's atmosphere." One might expect those reacting to Crane's comments (made in a February 2007 presentation) to either criticize him for "drinking the climate change Kool-Aid" or praise him for recognizing the issue's urgency and committing his company to be part of the solution. However, his comment was used to fuel neither argument.

Rather, Crane is quoted in a complaint filed against NRG, other electric generators, and oil and coal companies in federal court on behalf of the residents of Kivalina, Alaska. The complaint alleges that the defendants' production of electricity and petroleum have been the primary cause of global warming, which in turn has caused the plaintiffs' native islands in northern Alaska to become uninhabitable, requiring that the approximate 400 residents be relocated.

Guilt by association

The plaintiffs assert that Crane's statement and similar declarations by other of the defendants' representatives constitute "admissions" that the defendants had knowledge that electricity generation is a primary contributor to global warming and that such global warming would ultimately impose great impacts, including rendering the plaintiffs' native land uninhabitable. The complaint seeks up to $400 million in damages.

The lawsuit remains in the preliminary stages. Nonetheless, it raises important issues as to the manner in which this nation best responds to the multiplicity of challenges that the specter of global warming raises. Should the existence of global warming be determined and the range of adverse consequences be resolved through litigation and with remedies potentially determined by juries? Or are these issues better addressed through legislative and regulatory proceedings?

Regardless of the merits of this lawsuit, climate change issues are best resolved in the legislative and regulatory arenas. Assessing liability for past actions—particularly if the alleged tortuous conduct is generating electricity in accordance with federal, state, and local permitting rules—will distract society from the critical objectives of determining the actual scope of the problem, how best to solve it, and how to allocate the costs required to address it.

The multiple costs of climate change

Climate change represents perhaps our greatest regulatory challenge in several generations. Its potential damages to the international community are immense. On the other hand, there is no model for responding to the causes and consequences of climate change that transcend national boundaries. Moreover, the magnitude of dollars and associated wealth transfers inherent in any regulatory program are unprecedented—likely into the trillions, of dollars. *The Wall Street Journal* recently commented that pending climate change legislation portends "easily the largest income redistribution scheme since the income tax."

The unintended consequences of any climate change initiatives (for example, the increased food prices experienced as a result of promoting ethanol) could potentially overwhelm any benefits. A regulatory decision that improperly allocates costs or awards benefits could unnecessarily escalate already unprecedented prices for electricity, food, and other commodities; provide financial windfalls to a few; and yet do nothing to resolve the problems that global warming may present. Even if the world agreed to delegate the task of developing a climate change policy to a small group of the most knowledgeable and unbiased people, that group would be extremely unlikely to agree upon a widely accepted, workable, yet cost-effective program.

Regulatory certainty needed

The Kivalina complaint seeks to employ litigation theories parallel to those successfully used in litigations against tobacco companies. It alleges that the defendants, akin to the tobacco defendants, possessed absolute knowledge of the global warming dangers created by their generation of electricity but nonetheless actively engaged in a conspiracy to deceive the electricity-consuming public and foster its addiction to electricity. The analogy fails, and it underscores the need for legislative and regulatory solutions.

The judicial process does promise the psychic benefit of identifying the "evildoer" that is the cause of the problem confronting this community. In legal theory, imposing the necessary sanctions will restore the status quo that existed prior to the tortuous acts. However, making the defendants responsible to compensate the Kivalina plaintiffs will not change the global temperature one degree. Moreover, a judicial determination that the profit motivation of electricity generators and oil companies is the "proximate cause" of climate change will reinforce the dangerous belief held by many that their individual conduct is not a contributor to global warming.

Any policy that expects to solve global warming by assuming that people will stop driving cars or turn off their air-conditioners and computers will fail. The modern world requires electricity, and any attempt to mitigate the global warming consequences of electric generation must include the active and positive contribution of the generation community. Demonizing generators may grab headlines, but it will not reduce carbon emissions by any amount. We need generator executives, like Crane, who acknowledge the problem and commit their companies to being part of the solution. Distorting such positive statements into courtroom "admissions" will make the already daunting task of developing an effective climate change program even more improbable. ■

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