dentons.com

DENTONS

Insights and Commentary from Dentons

The combination of Dentons US and McKenna Long & Aldridge offers our clients access to 1,100 lawyers and professionals in 21 US locations. Clients inside the US benefit from unrivaled access to markets around the world, and international clients benefit from increased strength and reach across the US.

This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Is Past Prologue To Climate Change Liability?

Law360, New York (May 31, 2011) -- In 1987, Bruce A. Levin published an article in the Arizona Law Review that said:

"Tobacco companies boast that they have never lost a case to a consumer, have never settled, and do not expect that picture to change. In the 1950s and 1960s, no cases successfully obtained damages for injuries caused by smoking. Recent cases have been similarly unsuccessful." —Bruce A. Levin, The Liability of Tobacco Companies — Should Their Ashes be Kicked?" 29 Ariz. L. Rev. 195, 200 (1987).

Of course, as predicted by Mr. Levin, things changed.

History reflects that for many years, the tobacco industry insisted that the causal connection between a specific pack (or packs) of cigarettes and an individual's cancer was too tenuous to meet the burden for recovery in a tort action. Even as "the abundance of materials demonstrating the hazards of smoking" mounted, "tobacco companies ... steadfastly maintained that unbiased research [was] needed to resolve the health 'controversy'." Id. at 198.

Indeed, Mr. Levin noted in 1987: "Despite an almost endless supply of evidence documenting the hazards of smoking, tobacco companies continue to deny that their products are harmful." Id. at 195.

If past is prologue, a similar story seems poised to unfold with respect to emerging climate change litigation and the position of greenhouse gas emitters. Ultimately, the tobacco industry succumbed to the mountain of litigation with the payment of billions of dollars in a mega-settlement of claims extending from states to individuals in massive class actions.

With the U.S. Supreme Court about to issue a decision in the first case involving climate change nuisance litigation before the court, few expect the court's decision to be the final word on emerging and adapting climate change litigation. See American Electric Power Co. Inc. v. Connecticut, No. 10-174. Like tobacco, early climate change claimants face seemingly insurmountable odds in their bid to recover from predominant greenhouse gas emitters.

Like tobacco, the combination of a growing consensus among scientists, together with administrative governmental determinations in the face of deliberate congressional inaction, could be creating the

foundation for mega-recoveries in the climate change arena.

For tobacco, the mega-recoveries followed years of near uniformity among researchers (over continuous challenges of bias), culminating in determinations by the Surgeon General that tobacco indeed contributed to cause an increased risk of cancer. Recent endangerment and cause and contribution rulings by the U.S. Environmental Protection Agency establishing from the federal government's perspective a direct connection between the release of greenhouse gases and climate change appear to be following a similar trajectory.

Importantly, neither the Surgeon General nor any court found that tobacco was "the" cause of cancer. Instead, as Mr. Levin noted, "[t]he Surgeon General's reports, both 1964 and 1979, conclude[d] that cigarette smoking is a cause, not the cause." Levin, 29 Ariz. L. Rev. at 223, n.223. Similarly, the center of gravity in the climate change debate is now that greenhouse gas emissions are "a" cause of climate change as opposed to "the" cause.

Increasingly, climate change claimants (and the plaintiffs' attorney bar) will undoubtedly attempt to reframe the climate change issue in the context of collective redress including judicial remedies, as one simple question: Should those who have profited the most from the release of greenhouse gas emissions have to share some of their wealth with those who have suffered the most?

Within the context of this justification for recovery, courts and defendants can expect the evolution of climate litigation to follow a familiar pattern to similar historical mega-recoveries. Typically, mega-exposures like tobacco and climate change (along with asbestos, pollution, etc.) follow a predictable path evolving from isolated, untested claims to huge payments on a class or national basis.

Based on these historical patterns, the five phases of mass tort recoveries are:

Phase I: Prospecting — Unsuccessful, intermittent strike claims based on a myriad of traditional tort recovery theories, designed largely to explore the boundaries for successful recoveries.

Phase II: Defining — Increased regulatory activity supplying standards by which the standard of care and causation can be established, accompanied by increasing numbers of adapted claims.

Phase III: Refining — More sophisticated complaints supported by well-funded plaintiffs' attorneys, causing increased discovery costs and resulting in occasional rulings that permit claims to reach factfinders.

Phase IV: Targeting — Intermittent settlements, as litigation costs begin to systematically exceed discovery costs and vulnerable, targeted defendants are found and fall.

Phase V: Recovering — Plaintiff's attorneys accumulate enough resources and data to evenly battle industry targets, culminating in the ultimate collapse of industry targets.

Insurance industry representatives and regulators are beginning to take note of the potential risks

associated with emerging climate change litigation. In a recent letter, the New York Insurance superintendent noted “climate change litigation is poised to assume major economic importance in the United States.”

Like similar mega-exposures, successful climate change recoveries will not occur overnight. In fact, most commentators do not expect the U.S. Supreme Court to allow the currently formulated "public nuisance" claims to go forward. But, with estimated damages in the trillions of dollars, claimants or plaintiffs’ attorneys likely will not simply pack up and go home.

In fact, just weeks after oral argument in the climate change case currently pending before the nation’s highest court, a new breed of climate change lawsuit was filed in all 50 states based on a public trust theory. When that effort does not succeed, other theories of recovery will follow.

Emitters (and their insurers) can expect a steady stream of probative complaints based on steadily evolving legal theories until one reaches the magic combination or the Congress simply preempts the area. The defense costs alone for these claims are large, and the prospect of facing a jury in an unfavorable jurisdiction unacceptable.

A worrisome trend for emitters and insurers has emerged with more and more frequent climate change claims following a familiar path toward redress on a macro level similar to those of other mega-exposures. The question now is whether history will repeat itself.

--By J. Randolph Evans (pictured), Joanne L. Zimolzak and Christina M. Carroll, McKenna Long & Aldridge LLP

Randy Evans is a partner with McKenna Long in the firm's Atlanta office. Joanne Zimolzak and Christina Carroll are both partners with the firm in the Washington, D.C., office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.