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## GLOBAL WARMING

### CIVIL LIABILITY

In this article, attorneys James G. Derouin, Fredric D. Bellamy, and Mark E. Freeze, all with Steptoe & Johnson in Phoenix, argue that while some commentators predict that the intensified debate about global warming may cause more and more plaintiffs to file tort suits against public utilities and other alleged emitters of greenhouse gases, a review of common law tort principles and a look at the very few cases filed to date on the issue reveals that “global warming plaintiffs” face daunting legal obstacles to winning such suits. Such an uphill fight, the authors say, mean that global warming tort litigation won’t be heating up anytime soon.

### **Global Warming Litigation: The Phantom Menace**

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**T**he global warming debate is intensifying. This is especially true for the public at large. In the last few years, global warming has been blamed for Hurricane Katrina, the tsunami that hit Asia, and the 2003 summer heat wave in Europe. It has also been the subject of a major Hollywood motion picture, *The Day After Tomorrow*. Just within the last few months, USA Today did a week-long series on global warming and the Albert Gore documentary, *An Inconvenient Truth*, has been released in theaters across the nation. In the midst of all of this, a few global warming-related tort lawsuits have been filed in the United States. Some commentators predict that this trickle of lawsuits will develop into a tidal wave and litigation concerning

greenhouse gases could soon resemble litigation concerning asbestos or tobacco.<sup>1</sup> However, as set forth below, substantial legal hurdles facing potential global warming plaintiffs exist, making it extremely unlikely that significant global warming litigation will develop.

## Background

The term “global warming” refers to an increase in the Earth’s temperature that is claimed to be brought about by the emission of greenhouse gases such as carbon dioxide.<sup>2</sup> Specifically, heat from the sun enters the Earth’s atmosphere and is absorbed by the Earth’s surface.<sup>3</sup> The heat then radiates from the surface and, rather than escaping into space, this heat is trapped in the Earth’s atmosphere by greenhouse gases.<sup>4</sup> Many greenhouse gases occur naturally in the Earth’s atmosphere. These include water vapor, carbon dioxide, ozone, methane and nitrous oxide.<sup>5</sup> Carbon dioxide is also the most important man-made greenhouse gas and is produced by the burning of fossil fuels such as coal and gasoline.<sup>6</sup> The amount of carbon dioxide present in the Earth’s atmosphere has increased significantly in the past several decades and global temperatures have also increased.<sup>7</sup> Among the claimed impacts of global warming are rising sea levels, melting ice caps, reduced water supplies, intensified summer heat waves, and increased storm intensity.<sup>8</sup> The effects of climate change are global and are not limited to the area surrounding the emission of specific greenhouse gases.<sup>9</sup> In addition, to the extent that global warming is caused by man-made greenhouse gases, those effects are cumulative as greenhouse gases persist in the atmosphere for several years.<sup>10</sup>

The global warming issue is not new to the federal government. In 1987, Congress passed the Global Climate Protection Act, directing the Secretary of State to coordinate U.S. international negotiations concerning global warming.<sup>11</sup> In 1990, Congress passed the Global Change Research Act, establishing a research program for global warming issues.<sup>12</sup> In 1992, President George H. W. Bush signed, and the Senate ratified, the U.N. Framework Convention on Climate Change.<sup>13</sup> This convention committed signatory nations to work together to address the international issue of global warming. Thereafter, the Kyoto Protocol to the U.N. Framework Convention on Climate Change was negotiated. The

Kyoto Protocol called for the mandatory reduction of greenhouse gas emissions in developed nations.<sup>14</sup>

President Clinton signed the Kyoto Protocol but the protocol was not presented to the Senate because it was understood that the Senate would not ratify the treaty. In fact, the Senate unanimously passed a resolution stating the United States should not be a signatory to any protocol that did not include binding targets and timetables for developing as well as industrialized nations, or would result in serious harm to the economy of the United States.<sup>15</sup> Thereafter, Congress passed legislation that effectively barred the Environmental Protection Agency from implementing the Kyoto Protocol.<sup>16</sup> Subsequently, the EPA ruled that it does not have the authority under the Clean Air Act to regulate carbon dioxide emissions.<sup>17</sup> President George W. Bush has stated that the administration opposes the Kyoto Protocol because it does not impose restrictions on developing nations such as China and India and because it does not regulate other greenhouse gases. Instead, the policy of the current administration “emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change.”<sup>18</sup>

Recently, there have been a few tort lawsuits filed concerning global warming.<sup>19</sup> Perhaps the most famous of these is *Connecticut v. American Electric Power Company*.<sup>20</sup> In that suit, filed on July 22, 2004, eight states, three environmental organizations, and New York City brought suit against five electric utilities. The complaint alleged that the defendants are the largest emitters of carbon dioxide in the United States and that emissions of carbon dioxide have caused global warming that has caused various injuries to the plaintiffs and their populations.<sup>21</sup> The complaint alleged a federal common law and a state law cause of action for public nuisance and sought a court order requiring the defendants to reduce their carbon dioxide emissions.<sup>22</sup> The defendants moved to dismiss the complaint under civil procedure rule 12(b). On Sept. 22, 2005, the U.S. District Court for the Southern District of New York dismissed the complaint for lack of subject matter jurisdiction, finding that the case presented a non-justiciable political issue.<sup>23</sup>

In another lawsuit, filed Jan. 25, 2005, a New York resident brought a public nuisance claim against the EPA, the New York State Department of Environmental Conservation, and the New York City Department of Environmental Protection.<sup>24</sup> The complaint alleged that

<sup>1</sup> See e.g., Sarah Kellogg, *Confronting Global Warming*, DC Bar, May 2005, at 9 (“I think this is the first of what could easily be a wave of litigation,” quoting Mark Wenzler, Director of Global Warming and Energy Programs, National Environmental Trust).

<sup>2</sup> [www.epa.gov/globalwarming](http://www.epa.gov/globalwarming); Benjamin P. Harper, *Climate Change Litigation: The Federal Common Law of Intra-state Nuisance and Federalism Concerns*, 40 Ga. L. Rev. 661, 670-671 (Winter 2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> [www.epa.gov/globalwarming](http://www.epa.gov/globalwarming).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Harper at 672.

<sup>10</sup> *Id.*

<sup>11</sup> 15 U.S.C. § 2901 note.

<sup>12</sup> 15 U.S.C. §§ 2931 *et seq.*

<sup>13</sup> [www.unfccc.int](http://www.unfccc.int)

<sup>14</sup> *Id.*

<sup>15</sup> S. Res. 98, 105th Cong. (1997).

<sup>16</sup> See Pub.L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub.L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub.L. No. 106-377, 114 Stat. 1141, 1141A-41 (2000).

<sup>17</sup> 68 Fed. Reg. 52,922 (Sept. 8, 2003).

<sup>18</sup> 68 Fed. Reg. at 52,933.

<sup>19</sup> There have also been global warming lawsuits brought under, among other statutes, the National Environmental Policy Act and the Clean Water Act. These lawsuits are not the focus of this paper.

<sup>20</sup> *Connecticut v. American Electric Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

<sup>21</sup> *Id.* at 267-68.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 273-74.

<sup>24</sup> *Korsinsky v. EPA*, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005).

the defendants contributed to global warming by emitting carbon dioxide and by failing to implement emission controls for carbon dioxide. The complaint sought an order requiring the defendants to eliminate their emissions.<sup>25</sup> The defendants moved to dismiss under civil procedure rule 12(b). On Sept. 29, 2005, the court dismissed the complaint because of plaintiff's lack of standing. The court held that the injury that the plaintiff complained of was conjectural and hypothetical.<sup>26</sup> The court also held that the claimed injury would not be redressed by the relief sought.<sup>27</sup>

Finally, on Sept. 20, 2005, a class action lawsuit was filed in the U.S. District Court in the Southern District of Mississippi.<sup>28</sup> The first part of the lawsuit alleges insurance-related claims against several insurance carriers. The second part of the lawsuit alleges a negligence cause of action and seeks damages from oil and refining companies.<sup>29</sup> The complaint alleges that the actions of those companies contributed to global warming which intensified the strength of Hurricane Katrina. The hurricane, in turn, caused damage to the plaintiffs.<sup>30</sup> The case is still pending.

### Causes of Action That Global Warming Plaintiffs Would Consider

In order to fully understand the significant obstacles that potential global warming plaintiffs face, it is first necessary to identify and discuss the legal requirements of the potential causes of action that plaintiffs would have to rely on. We know from the trickle of global warming lawsuits that have been filed that these causes of action are the common law torts of public nuisance, private nuisance, and negligence. There are two types of nuisance claims: public nuisance and private nuisance, and despite the similar names, important differences distinguish the two. In order to prevail on a claim for private nuisance, a plaintiff must prove by a preponderance of the evidence that the defendant has caused an unreasonable interference with the plaintiff's use and enjoyment of his real property.<sup>31</sup> The determination of whether a defendant's interference is unreasonable involves balancing the gravity of the harm to the plaintiff with the utility of the defendant's conduct.<sup>32</sup>

In contrast, a public nuisance claim is not rooted in an interference with the use and enjoyment of real property. In order to prevail on a public nuisance claim, a plaintiff must prove that the defendant's conduct is the cause of an unreasonable interference with a right common to the general public.<sup>33</sup> Circumstances that may warrant a finding that the defendant's conduct constitutes an interference with a right common to the general public include (1) whether the conduct interferes with public health or safety, public peace, public comfort or public convenience; (2) whether the conduct is prohibited by statute, ordinance or regulation; or (3) whether the conduct is of a continuing nature or has

produced a long lasting effect, and the defendant knows or has reason to know that such conduct has a significant effect on a public right.<sup>34</sup> Ordinarily, it is the government that brings a public nuisance claim. Significantly, private parties may only bring such claims if they have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference.<sup>35</sup> The other cause of action that has been used is negligence. In order to prevail on a negligence claim, a plaintiff must prove that the defendant owes a duty to the plaintiff to act with reasonable care, that the defendant has breached that duty, and that the defendant's breach of that duty has caused damage to the plaintiff.<sup>36</sup>

### Significant Legal Hurdles to Global Warming Tort Claims

Plaintiffs must overcome several legal hurdles in order to prevail on a global warming tort claim. This paper does not address all of them. It only addresses the most significant ones which are: (1) the difficulty in proving causation; (2) the inability to join all necessary parties; (3) a lack of standing resulting from the inability to allege a concrete injury or the inability of the court to redress the injury; (4) the inappropriateness of proceeding as a class action; and (5) the fact that global warming lawsuits often present non-justiciable political issues. These significant legal hurdles, which are addressed in turn, will likely dissuade plaintiffs from bringing global warming tort claims.

#### 1. The Difficulty in Proving Causation

Perhaps the most significant hurdle faced by global warming plaintiffs is the requirement that they prove that it was the actions of the defendant that caused the harm complained of. The causation analysis is first divided into determining whether the defendant's action is the cause in fact of the plaintiff's injury, and whether it is the legal cause of the plaintiff's injury.<sup>37</sup> The act of the defendant is the cause in fact of the plaintiff's injury if the injury would not have occurred "but for" defendant's act.<sup>38</sup> The term "legal cause" is sometimes referred to as "proximate cause." The doctrine of proximate cause recognizes that in some situations the injury may be so far removed from the reasonably foreseeable consequences of an action that liability should be barred even though the action may have been a cause in fact of the injury.<sup>39</sup>

The cause in fact inquiry is further subdivided into determining whether there is general causation and specific causation.<sup>40</sup> General causation refers to whether the circumstances could have caused the injury in question, and specific causation refers to

<sup>25</sup> *Id.* at \*1.

<sup>26</sup> *Id.* at \*2.

<sup>27</sup> *Id.* at \*3.

<sup>28</sup> *Cox v. Nationwide Mutual Insurance*, 05-CV-0436 (S.D. Miss., filed Sept. 20, 2005).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Restatement (Second) of Torts, § 821D.

<sup>32</sup> *Id.*, §§ 826-828.

<sup>33</sup> *Id.*, § 821B(1).

<sup>34</sup> *Id.*, § 821B(2).

<sup>35</sup> *Id.*, § 821C.

<sup>36</sup> *Id.*, §§ 281-283.

<sup>37</sup> See, e.g., *Redlands Soccer Club v. Department of Army*, 55 F.3d 827, 851 (3rd Cir. 1995); *Dameron v. City of Scottsburg*, 36 F. Supp. 2d 821, 835 (S.D. Ind. 1998).

<sup>38</sup> See, e.g., *Talkington v. Atria Reclamelucifers Fabrieken*, 152 F.3d 254, 264 (4th Cir. 1998).

<sup>39</sup> See, e.g., *Id.*; *Lamarca v. United States*, 31 F. Supp. 2d 110, 127 (E.D.N.Y. 1998).

<sup>40</sup> See, e.g., *Ruggiero v. Warner-Lambert*, 424 F.3d 249, 252, n. 1 (2nd Cir. 2005); *Goebel v. Denver & Rio Grande Western Railroad*, 346 F.3d 987, 990 (10th Cir. 2003).

whether the circumstances did, in fact, cause the injury in question.<sup>41</sup> For example, in the toxic tort context, general causation would refer to the ability of exposure to a chemical in general to cause a particular disease. The requirement of specific causation recognizes that while a chemical may be able to cause a particular disease, that does not necessarily mean that it did in this particular instance. Alternate causes of the plaintiff's injury could exist.

In the context of global warming litigation, a plaintiff would have to prove not only that the emission of greenhouse gases causes global warming, but also that global warming is capable of causing the particular incident resulting in damages (i.e. a hurricane), and that it did, in fact, cause the incident in the particular case. Plaintiffs stand a chance in being able to prove that global warming has occurred, and that the emission of greenhouse gases contributes at least in part to this warming. However, it will be very difficult for plaintiffs to link a particular event to global warming, given the potential for other natural causes.

For example, a great deal of debate has focused recently on whether global warming is causing an increase in hurricane activity in general and whether it caused Hurricane Katrina in particular. It appears that there has been an increase in surface sea temperatures in the Atlantic in recent years and this increase in surface sea temperatures contributes to hurricane frequency and intensity.<sup>42</sup> However, it is not clear that this increase in surface sea temperatures is caused in whole or in part by global warming. Rather, other factors are at play. One such factor is the Atlantic Multidecadal Oscillation. Every 20 to 30 years, since records have been kept, shifts in the frequency of hurricanes in the Atlantic have been recorded.<sup>43</sup> The 1940s and 1950s were a time of relatively frequent hurricanes. In contrast, the 1970s and 1980s were relatively quiet years. A new active period began in about 1995.<sup>44</sup> Another factor contributing to a rise in surface sea temperatures is the El Nino effect.<sup>45</sup>

Because it is easily verified that the frequency of hurricanes has not increased when taking the Atlantic Multidecadal Oscillation and El Nino effects into account, some scientists have argued that the intensity of hurricanes, as opposed to the frequency, has increased in recent years and that this is evidence of a new, global warming impact.<sup>46</sup> However, those scientists who have reached this conclusion have likely improperly manipulated the data. Early hurricane data often came from ships' captains. Some scientists speculate that these ship captains probably overstated wind speeds, and therefore the scientists have adjusted downwards the estimated intensity of past hurricanes.<sup>47</sup> Therefore, the data simply may not exist to determine whether there

<sup>41</sup> *Id.*

<sup>42</sup> *Atlantic Multidecadal Oscillation*, National Oceanic and Atmospheric Administration, United States Department of Commerce, [www.noaa.gov](http://www.noaa.gov).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *El Nino*, National Oceanic and Atmospheric Administration, United States Department of Commerce, [www.noaa.gov](http://www.noaa.gov).

<sup>46</sup> Richard Black, *Hurricanes and Global Warming – a Link?*, BBC News, Sept. 23, 2005; *Did Global Warming Power Katrina?*, World-Science.net, Sept. 15, 2005.

<sup>47</sup> Sandi Doughton, *Did Global Warming Cause Katrina?*, Knight Ridder, Oct. 22, 2005.

has been a recent increase in the intensity of hurricanes. The point is that, in the words of a recent scientific article, with other factors affecting both the frequency and intensity of hurricanes, it is "fundamentally impossible" to prove that any one hurricane was affected by global warming.<sup>48</sup>

## 2. The Inability to Join All Necessary Parties

Rule 19 of the Federal Rules of Civil Procedure provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction must be joined as a party to the litigation if in the person's absence "complete relief cannot be accorded among those already parties."<sup>49</sup> If the person cannot be made a party, then the court should determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."<sup>50</sup> A court must consider four factors when weighing whether a party is indispensable: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or those already parties; (2) the extent that any such prejudice can be lessened; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed.<sup>51</sup>

Presumably, plaintiffs would argue that global warming defendants should be subject to joint and several liability on the theory that the defendants have all acted to cause an indivisible harm.<sup>52</sup> The general rule is that joint tortfeasors are not indispensable parties, and the plaintiff may obtain full recovery from the defendant of its choice.<sup>53</sup> This is not a hard and fast rule though and courts have recognized exceptions.<sup>54</sup> In holding that a joint tortfeasor is not an indispensable party courts generally reason that a joint tortfeasor may protect itself as a practical matter by naming the other joint tortfeasors as third-party defendants or by bringing separate contribution claims.<sup>55</sup> A global warming tort case will be different in that the global warming defendant will not be able as a practical matter to protect itself through third-party practice or separate contribution actions due to the sheer numerosity of joint tortfeasors.

One of the primary greenhouse gases is carbon dioxide.<sup>56</sup> Carbon dioxide is released to the atmosphere when fossil fuels are burned. Coal-fired power plants are typically mentioned as sources of carbon dioxide emissions. But, they are far from the only source. Automobiles are also a major source of greenhouse gas

<sup>48</sup> Stefan Rahmstorf, *et. al.*, *Hurricanes and Global Warming – Is There a Connection?*, [realclimate.org](http://realclimate.org), September 2005.

<sup>49</sup> Fed. R. Civ. P. 19(a).

<sup>50</sup> Fed. R. Civ. P. 19(b).

<sup>51</sup> *Id.*

<sup>52</sup> Matthew F. Pawa and Benjamin A. Krass, *Behind the Curve: The National Media's Reporting on Global Warming*, 33 B.C. Envtl. Aff. L. Rev. 485 (2006).

<sup>53</sup> Fed. R. Civ. P. 19 advisory committee's note; 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1623 (3d ed. 2001).

<sup>54</sup> See e.g., *Thurston v. Page*, 168 F.R.D. 655 (D. Kan. 1996); *Estrella v. V & G Management Corp.*, 158 F.R.D. 575 (D. N.J. 1994).

<sup>55</sup> See e.g., *United States v. Marisol, Inc.*, 725 F. Supp. 833, 843 (M.D. Pa. 1989); *Michigan v. Thomas Solvent*, 714 F. Supp. 1439, 1450 (W.D. Mich 1989).

<sup>56</sup> [www.epa.globalwarming.gov](http://www.epa.globalwarming.gov)

emissions.<sup>57</sup> More than 100 coal-fired power plants operate in the United States and more than 100 million automobiles fill the nation's streets. But the analysis does not end with the United States. Sources of greenhouse gas emissions are worldwide. There are more than 600 million automobiles in the world.<sup>58</sup> In addition, China currently produces more carbon dioxide from the burning of coal than the United States and it is estimated that by 2025, China will account for approximately 40% of the world's total emissions of carbon dioxide from the burning of coal.<sup>59</sup> Finally, significant sources of greenhouse gases exist including agriculture and deforestation.<sup>60</sup>

Given the foregoing, even a very large coal-fired power plant would be a source of only a fraction of one percent of total greenhouse gas emissions worldwide. If such a defendant were held jointly liable for all of the damages caused by a violent storm, the defendant would have to sue thousands of power plants across the globe and hundreds of millions of car owners in an attempt to obtain contribution. Even if this could be done, and it cannot as a practical matter, such a defendant still could not obtain full recovery. In such a situation, a court may elect to dismiss such a case for failure to join indispensable parties. The foregoing may also be a reason for the court to deny the imposition of joint liability in the first place.<sup>61</sup>

### 3. The Difficulty in Establishing Standing

As a threshold matter in every lawsuit, a plaintiff must establish that he has standing in order to confer on the court the power to hear the case.<sup>62</sup> In general, the issue of standing is concerned with the question of whether the plaintiff's interest in the outcome of the litigation is sufficient to warrant consideration by the court.<sup>63</sup> Standing is a requirement in both state and federal courts. In federal courts, the standing issue is rooted in Article III of the U.S. Constitution.<sup>64</sup> Standing is generally a jurisdictional requirement open to review at all stages of the litigation including on appeal.<sup>65</sup> The plaintiff must establish three elements in order to establish standing: (1) an injury in fact that is concrete and particularized and actual and imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the alleged conduct; and (3) the likelihood that the injury will be redressed by a favorable decision.<sup>66</sup>

The first element may be an issue where the plaintiff's only claim of injury is an increased risk of harm due to greenhouse gas emissions. While courts have in fact conferred standing in some cases where the plain-

tiff claims an increased risk of harm, such an allegation may be too tenuous in the global warming context to confer standing. In *Korsinsky*, the case was dismissed because of a lack of standing with regard to the first element as well as the third element.<sup>67</sup> The issue was raised in *American Electric Power*, but the case was decided on other grounds. Even if the plaintiff were to allege a concrete injury, a claim may be dismissed because of a lack of a causal connection between the actions of the defendant and the injury alleged. The difficulty in establishing such a causal connection was discussed earlier in this paper.

Finally, if the plaintiff is seeking injunctive relief to halt or reduce the defendant's greenhouse gas emissions, standing may be denied because of a failure to show that such relief would redress the claimed injury. The reduction or elimination of a handful of sources would be insufficient to remedy the claimed injury because of the sheer number of global sources of greenhouse gases. For example, according to the complaint in the *American Electric Power* case, the U.S. electric power sector's carbon dioxide emissions are only responsible for 10% of worldwide emissions from human activities.<sup>68</sup> Further, the five largest such sources in the United States account for 25% of the U.S. power sector total, or only 2.5% of the world total.<sup>69</sup> Thus, any court-ordered reduction in greenhouse gas emissions arguably would not make a dent in global warming. This is especially true when it is considered that any reduction in U.S. emissions would quickly be offset by increased emissions from the new coal-fired plants coming on line every year in emerging countries like China.<sup>70</sup>

### 4. The Inappropriateness of Proceeding as a Class Action

Private party plaintiffs would want to bring class actions, as opposed to individual actions, in order to increase potential damage awards. Indeed, the *Cox v. Nationwide Mutual Insurance* case is a recent attempt at a class action by Hurricane Katrina victims. However, significant obstacles exist blocking global warming suits from proceeding as class actions. Under the rules of civil procedure, one or more members of a class may sue as representatives on behalf of all class members if four conditions are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>71</sup>

The second and third elements, which contain the requirements referred to as "commonality" and "typicality," would create the greatest obstacles to a global warming class action. Courts have historically been reluctant to certify classes in mass tort cases on the grounds of lack of commonality and typicality.<sup>72</sup> In such cases, even though some common issues exist among class members, court have denied certification if

<sup>57</sup> *Id.*

<sup>58</sup> [www.chevron.com/news/archives](http://www.chevron.com/news/archives)

<sup>59</sup> Keith Bradsher and David Barboza, *Pollution From Chinese Coal Casts Shadow Around Globe*, N.Y. Times, June 11, 2006, at A15.

<sup>60</sup> [www.epa.gov/globalwarming](http://www.epa.gov/globalwarming)

<sup>61</sup> See *Ammond v. Pennsylvania Railroad Co.*, 125 F.2d 747, 749 (6th Cir. 1942); *Albers v. Great Central Transport*, 59 N.E.2d 389, 392 (Ohio App. 1945).

<sup>62</sup> Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531, p. 347 (2d ed. 1984); *Korsinsky*, 2005 WL 2414744 \*2.

<sup>63</sup> See Wright, Miller & Cooper at 340-41; *Federal Practice and Procedure* § 3531.

<sup>64</sup> *Id.* at 345.

<sup>65</sup> *Id.*

<sup>66</sup> See Wright, Miller & Cooper at 347; *Korsinsky*, 2005 WL 2414744 \*2; *Federal Practice and Procedure* § 3531.

<sup>67</sup> *Korsinsky*, 2005 WL 2414744 \*2-3.

<sup>68</sup> *American Electric Power*, 406 F. Supp. 2d at 268.

<sup>69</sup> *Id.*

<sup>70</sup> See Bradsher and Barboza, *supra*, at A15.

<sup>71</sup> Fed. R. Civ. P. 23.

<sup>72</sup> 5 James Wm. Moore *et al.*, *Moore's Federal Practice* §§ 23.23[4][h]; 23.24[8][h] (3d ed. 2006).

the need for an individualized determination outweighed the common questions.<sup>73</sup> Issues requiring individualized determination in mass tort actions generally concern damages and causation. For example, a court denied class certification in a Dalkon shield case because, even though there were common issues with regard to design, testing, manufacturing, labeling and inspection of the Dalkon shield, this commonality was obscured by the individual case histories.<sup>74</sup> Similarly, in a global warming case, the need for an individualized determination on issues such as damages, alternate causation, and assumption of the risk would arguably predominate over common issues of liability and causation.

### 5. The Fact That Such Lawsuits Often Raise a Non-Justiciable Political Issue

For those cases where the plaintiff seeks injunctive relief, such as a court order requiring a reduction in greenhouse gas emissions, the defendants have a good argument that the case presents a non-justiciable political issue. This argument was successful in the *American Electric Power* case. In that case, various states and non-profit land trusts sued five electric utilities. The plaintiffs sought an order requiring the utilities to reduce their carbon dioxide emissions. The court first explained that cases presenting political questions are consigned to the political branches of government and the courts are without power to resolve them.<sup>75</sup>

The court next stated that six situations have been recognized as indicating the existence of a non-justiciable political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially

discoverable and manageable standards for resolving the case; (3) the impossibility of deciding the case without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of the court's undertaking independent resolution without expressing a lack of respect due coordinate branches of the government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>76</sup>

In *American Electric Power*, the court determined that the third indicator was particularly pertinent to the case. Specifically, the court said that in order to decide the case, the court would be required to strike a balance between competing environmental, economic, foreign policy, and national security concerns.<sup>77</sup> Such a weighing, the court said, would be impossible without an initial policy determination by the elected branches of government. The court pointed out that the elected branches have been in the process of dealing with such issues over the past several years.<sup>78</sup> For the foregoing reason, the court granted the defendants' motion to dismiss, holding that the case presented a non-justiciable political question consigned to the political branches.<sup>79</sup>

### Conclusion

Some predict that global warming litigation will soon become as active as asbestos litigation has been. However, significant legal obstacles exist that will likely dissuade plaintiffs from bringing global warming tort claims. Rather than being resolved in the judicial arena, global warming issues will likely be resolved in the international political arena.

<sup>73</sup> *Id.*

<sup>74</sup> *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982).

<sup>75</sup> *American Electric Power*, 406 F. Supp. at 267.

<sup>76</sup> *Id.*, at 271-72.

<sup>77</sup> *Id.* at 272.

<sup>78</sup> *Id.* at 273.

<sup>79</sup> *Id.* at 273-74.