

Can Climate Change Litigation Get Past The Starting Gate?

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HOUSTON – Two attorneys from the Houston office of Gardere Wynne Sewell LLP have authored a new paper for Andrews Publications that addresses the emerging issue of who may held responsible in climate change litigation.

The paper, “Defending Against Climate Change Litigation: Threshold Issues,” appears in the August 6 issue of Environmental Litigation Reporter. Authors Richard O. Faulk and John S. Gray are partners in Gardere’s Houston office.

In the paper, Messrs. Faulk and Gray note that, superficially, tort law and climate change seem perfectly matched. As with tort law claims targeting pollution sources, current climate change litigation is focused on assessing liability against major emitters of greenhouse gases on behalf of climate change victims. But, as the paper notes, establishing exactly who is responsible for climate change has caused litigation headaches on many fronts.

Messrs. Faulk and Gray are key members of Gardere’s Climate Change Task Force, which assists businesses across the country with regional, national and international regulation and litigation matters related to climate change issues.

The paper explores the obstacles facing climate change litigation, including the inability to delineate the individual or group of individuals injured by climate change. As noted in the paper “... to the extent anyone is affected by climate change, all people are victims.” Also, since climate change is a cumulative societal problem rather than one that can be traced to a single source, courts are finding it is exceptionally difficult to hold any one group or corporation responsible.

“The questions only compound the controversy,” the authors say. “For example, what standards should be used to transform legal activities, such as releases pursuant to a federal permit, into ‘unreasonable conduct’? When is the threshold crossed between acceptable legal conduct and negligent or unreasonable conduct? Can liability truly be limited to only large corporate defendants, or must other parties be sued – and if so, where does the line of ‘necessary’ or ‘indispensable’ parties end? How can comparative-fault principles be applied to assess the liability and contribution of foreign emitters, especially when they release emissions in different states and different nations and are not subject to the court’s jurisdiction? Courts are justifiably concerned that they are not competent to decide these controversies.”

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Gardere Wynne Sewell LLP, an AmLaw 200 firm, was founded in 1909 and is one of the Southwest’s largest full-service law firms. With offices in Austin, Dallas, Houston and Mexico City, Gardere provides legal services to private and public companies and individuals in areas of energy, litigation, corporate, tax, environmental, labor and employment, intellectual property and financial services.

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