

Mainstreaming of Climate Risks and Opportunities in the Financial Sector

# Expert elicitation on climate change related litigation risks: issues and implications

Peter Roderick

Climate Justice Programme

on behalf of Germanwatch





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## Abstract

This paper provides a general overview of climate litigation risks in the US and Europe; considers the main legal issues and implications that arise for various actors; and makes recommendations. The paper is based on an online survey of legal and insurance experts conducted by Germanwatch in October 2009 which found that an increase in claims for damages directly and indirectly related to climate change is expected over the next few years.

One of the main impacts on the insurance sector will be through comprehensive or commercial general liability insurance under which the insurer agrees to indemnify the policyholder who is sued for damages for causing property damage, and to defend legal actions for such damages. Already one US insurer has brought a legal action against a defendant in a climate damages case, seeking to avoid the latter a duty.

## Imprint

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## Contents

<b>Executive Summary .....</b>	<b>6</b>
<b>1 Introduction.....</b>	<b>8</b>
<b>2 Development of climate change litigation .....</b>	<b>10</b>
<b>3 Private law cases for direct climate damage.....</b>	<b>11</b>
<b>4 Private law hurdles for direct climate damages claims .....</b>	<b>14</b>
<b>5 Private law claims for indirect climate damage .....</b>	<b>17</b>
<b>6 Legal implications for the insurance industry.....</b>	<b>18</b>
<b>7 Conclusion .....</b>	<b>20</b>
<b>Annex: Summary of results of October 2009 survey on climate change related litigation risks .....</b>	<b>22</b>

## Figures

Figure 1: Development of claims directly related to climate change.....	11
Figure 2: Present legal hurdles for damages .....	14
Figure 3: Development of claims indirectly related to climate change based on different breach of duties .....	17

## Boxes

Box 1: The US tort cases.....	12
Box 2: The insurer's duties to defend and indemnify.....	18

## Executive Summary

This paper provides a general overview of climate litigation risks in the US and Europe; considers the main legal issues and implications that arise for various actors; and makes recommendations. The paper is based on an online survey of legal and insurance experts conducted by Germanwatch in October 2009 which found that an increase in claims for damages directly and indirectly related to climate change is expected over the next few years.<sup>1</sup>

Private law cases, such as those alleging nuisance and negligence, affect the corporate and insurance sectors as they involve the possibility of damages and/or injunctions against specified companies. To date, four cases as a result of direct climate damage have been filed in the US against a wide range of industries. All of them are introduced in this paper. On the two occasions so far that appeal courts have considered them, the cases have been allowed to proceed. No private law case has been decided on its merits yet. The largest hurdle for now appears to be proof of causation, but it is interesting to note that the expert survey found that of the identified potential hurdles - causation, legality of conduct and extent of liability, non-justiciability and standing - all were expected to be surmounted - some earlier, some later.

At present claims for damages indirectly related to climate change, for example, as a result of a failure by a particular professional, can be expected to face similar hurdles. Even so, survey respondents expected such claims, especially for breach of duties to inform and report, to be the basis for future lawsuits up to 2020. This development might influence the companies' current reporting practice as well as the services offered by insurers.

One of the main impacts on the insurance sector will be through comprehensive or commercial general liability insurance. Under these contracts, the insurer agrees to indemnify the policyholder who is sued for damages for causing property damage or bodily injury, and to defend legal actions for such damages. The duty to defend has been described as "the immediate problem", and already one US insurer has brought a legal action against a defendant in a climate damages case, seeking to avoid such a duty. As damages cases proceed, and new ones are commenced, financial exposure will increase and coverage disputes can be expected to increase.

Increasing litigation risks should be a driver for companies to reduce emissions without delay. It can be expected that those who suffer damage from global warming will increasingly try to enforce their rights to receive compensation. From the viewpoint of society it is problematic if insurers don't stand by their commitments to cover tort claims, and increase premiums, or modify or withdraw coverage in a piecemeal fashion. If they are concerned that they will not be able to afford to pay compensation later, they should be upfront about that now, in good faith, so that society can properly decide where the

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<sup>1</sup> The results of the survey are more fully available and discussed in the Technical Paper prepared by Germanwatch, entitled 'Results of October 2009 expert elicitation on climate change related litigation risks' and available here: <http://www.climate-mainstreaming.net/litrisktp.htm>. The expert elicitation was conducted using the online tool PCXquest, developed by the Potsdam Institute for Climate Impact Research within the project.

burden of paying such compensation should lie. It is also argued, that within developed countries, it should not be left to the public purse to compensate those who suffer from climate damage, which is what would happen if those who have benefited most from the activities that have led to such damage are not in some way held accountable. It can be expected that civil society will stand in solidarity with those who have suffered, and who will suffer, the impacts of climate change.

Climate change damages litigation is a story that has hardly begun. Much is yet to unfold. The failure of a legally binding outcome of COP 15 at Copenhagen in December 2009 will doubtless help it along its way.

# 1 Introduction

The strengthening of climate science over many years, and the inadequate political and corporate responses to greenhouse gas emissions, have led to a number of private legal cases in the US. These cases, such as those alleging nuisance and negligence, affect the corporate and insurance sectors as they involve the possibility of damages and/or injunctions against specified companies.

Several uncertainties arise from these developments. When will the first successful claim arise? What are the largest legal hurdles at present, and when are they expected to be overcome? What does this mean for companies and insurance business? As past data cannot be used to judge the likelihood of climate change related litigation risks, their future development is very difficult to predict. For problems involving uncertainty, tools based on expert judgement have proved to be very helpful.<sup>2</sup>

In October 2009 an expert elicitation on climate change related litigation risks was conducted by the development and environment organisation Germanwatch. It took place in the context of the three year research project “Mainstreaming of climate risks and opportunities in the financial sector”.<sup>3</sup>

The expert elicitation was conducted using the online tool PCXquest<sup>4</sup>, developed by the Potsdam Institute for Climate Impact Research within the project. 32 experts participated in the online survey. A proportion of about 50% of the participants are lawyers. 30% of the experts originate from science. Others reported to work in an NGO (11%), the insurance business (5%), the financial market (3%) and as consultant (3%).

The survey posed questions relating to damages and injunction claims arising directly and indirectly from CO<sub>2</sub> and other greenhouse gas emissions, and to the relevance of these actions for the insurance business. It found that an increase in claims for direct and indirect climate change damage is expected over the next few years, and identified the

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<sup>2</sup> See e.g. Morgan, M. G. & Henrion, M. (1992), *Uncertainty: A Guide to Dealing with Uncertainty in Quantitative Risk and Policy Analysis*, Cambridge University Press, O'Hagan, A.; Buck, C. E.; Daneshkhan, A.; Eiser, R. & Garthwaite, P. H. (2006), *Uncertain Judgements: Eliciting Expert Probabilities*, John Wiley & Sons Inc.

<sup>3</sup> The project “Climate Mainstreaming” ([www.climate-mainstreaming.net](http://www.climate-mainstreaming.net)) is funded by the German Federal Ministry of Education and Research (BMBF) It encompasses the project partner Germanwatch (consortium leader) University of Potsdam, German Institute for Economic Research (DIW), Wuppertal Institute for Climate, Environment and Energy, Potsdam Institute for Climate Impact Research (PIK), European Climate Forum (ECF). Previous project outputs included an analysis of the need for listed companies to publish direct and indirect climate risks in annual reports, and within this focus, studies on reporting obligations of German, French and Italian automobile companies have been published.

<sup>4</sup> PCX is based on pertinent empirical social research



main legal hurdles facing the different claims. The main results are summarised in the Annex of this paper<sup>5</sup>

The purpose of this paper is to provide, in the light of that survey, a general overview of these legal issues and implications. It starts by describing briefly the development of these risks in the US and Europe. After that it summarizes the most prominent private law suits for direct climate damages, such as the Kivalina - Exxon case. In Chapter 4 the hurdles for direct climate damages claims in private law are addressed, focussing on causation, extent of liability and non-illegality. Chapter 5 deals with claims for indirect climate damages. Based on these risks, implications for the insurance industry, based mainly on the insurer's duty to defend and indemnify, are discussed. At the end a conclusion and an outlook are given, as well as recommendations for the involved actors.

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<sup>5</sup> The results of the survey are more fully available and discussed in the Technical Paper prepared by Germanwatch, entitled 'Results of October 2009 expert elicitation on climate change related litigation risks' and available here: <http://www.climate-mainstreaming.net/litrisktp.htm>. Several academic articles have also been published on this issue. For example: Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation; Grossman, David A., 28, Colum. J. Envtl. L. 1 (2003); Negligence in the Air: The Duty of Care in Climate Change Litigation; Hunter, David; Salzman, James 155 U. Pa. L. Rev. 1741 (2006-2007); Climate Change, Insurability of Large-Scale Disasters, and the Emerging Liability Challenge; Kunreuther, Howard C.; Michel-Kerjan, Erwann O. , 155 U. Pa. L. Rev. 1795 (2006-2007); Lytton, Timothy D., Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits (August 20, 2008). Texas Law Review, Vol. 86, p. 1837, 2008; Tort-Based Climate Litigation, Grossman, David A., Chapter 9 in Adjudicating Climate Change: state, national and international approaches, Burns, William C.G., & Osofsky, Hari M. (eds.) (Cambridge University Press, 2009).

## 2 Development of climate change litigation

The first decade of this century has seen the increasing emergence of climate change litigation around the world. The dominant driver for litigation is the failure of politicians, and of large fossil-fuel based corporations, either sufficiently or even at all, to implement policies and activities to decarbonise the world's economy and their operations on a scale necessary to prevent dangerous climate change (the ultimate objective of the UN Climate Convention) and to ensure that those who will suffer the impacts of climate change are held whole.

The earliest climate change cases were public law cases. These were cases that challenged the unlawful behaviour of public bodies in relation to their legal climate duties. Examples include: the failure of the US export credit bodies to consider the climate impact of their financial support for fossil fuel projects<sup>6</sup>; the failure of the US Environmental Protection Agency to regulate greenhouse gas (GHG) emissions under the Clean Air Act<sup>7</sup>; the failure of the German Ministry of Economics to ensure disclosure of the climate impacts of its export credits<sup>8</sup>; and the failure of the relevant public body in Australia to include in the environmental impact assessment of a large new coal mine the GHG impacts of burning coal<sup>9</sup>.

Alongside these and many other public law cases<sup>10</sup>, international law petitions have also been filed, for example to protect against human rights violations of the Inuit<sup>11</sup> and to protect several world heritage sites<sup>12</sup>.

Public law cases have some implications for the corporate and insurance sectors, particularly as a result of consequent regulatory decisions. However, in the context of the survey, of more direct relevance to these sectors will be private law cases, as these involve the possibility of damages and/or injunctions against specified companies. These are considered in the next Chapter.

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<sup>6</sup> *Friends of the Earth v. Mosbacher*. The judgment of the US District Court for the Northern District of California, dated 30<sup>th</sup> March 2007, is available here: <http://www.climatelaw.org/cases/case-documents/us/NEPA-decision-Mar07.pdf>. The settlement documents in this case, dated 6<sup>th</sup> February 2009, are available from here: <http://www.climatelaw.org/cases/country/us/eca/settlement/>.

<sup>7</sup> *Massachusetts v. EPA*. The judgment of the US Supreme Court, dated 2nd April 2007, is available here: <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>.

<sup>8</sup> *BUND and Germanwatch v. Federal Republic of Germany*. The order (*Beschluss*) of the Berlin Administrative Court (*Verwaltungsgericht Berlin*), dated 10<sup>th</sup> January 2006, is available from here in its original German, and unofficially translated English, forms: <http://www.climatelaw.org/cases/country/germany/exportcredit/2006Feb03/>

<sup>9</sup> *Gray v The Minister for Planning and Ors*. The judgment of the Land and Environment Court of New South Wales, dated 27<sup>th</sup> November 2006, is here: <http://www.lawlink.nsw.gov.au/lecjudgments%5C2006nswlec.nsf/2006nswlec.nsf/WebView2/DC4DF619DE3B3F02CA257228001DE798?OpenDocument>

<sup>10</sup> For more cases, see: [www.climatelaw.org](http://www.climatelaw.org), and [www.globalclimatelaw.com](http://www.globalclimatelaw.com).

<sup>11</sup> The petition to the Inter American Commission on Human Rights by Sheila Watt-Cloutier with the support of the Inuit Circumpolar Conference against the US, dated 7th December 2005, is available here: [http://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf). More information on the Commission hearing into the issue is here: <http://www.earthjustice.org/news/press/007/global-warming-human-rights-gets-hearing-on-the-world-stage.html>.

<sup>12</sup> Information relating to these petitions to the UNESCO World Heritage Committee is available from here: <http://www.climatelaw.org/cases/country/intl/unesconepal/>.

### 3 Private law cases for direct climate damage

In the survey, 45% of participants considered that there would be a ‘strong’ or ‘very strong’ increase until 2020 in legal claims for both damages and injunctions as a result of damage directly related to GHG emissions (see Figure 1 below).

**Figure 1: Development of claims directly related to climate change**



These results clearly suggest that the possibility of an increase in legal actions as a result of direct climate damage is real. Private law, particularly tort, cases would be the obvious legal track for such claims (although human rights actions might also play a part). Public nuisance, negligence and private nuisance are considered the most promising tracks for damages cases by survey participants.

Whilst the survey answers are not jurisdiction-specific, it is possible to envisage four groups of jurisdictions: the US; other common law countries (such as the UK, Canada and Australia); European civil law countries (such as France and Germany); and developing countries where damage is suffered or threatened. The legal issues that arise will differ between, and amongst, these groups. To date, the only tort cases that have been filed for climate damage have been in the US.

Four tort cases have been filed in the US [see Box 1]. The defendants have covered a wide range of industries – power companies, car manufacturers, energy, fossil fuel and chemical companies. No court has yet heard a tort climate case on its merits. All of the claims have been dismissed at the first level courts, on grounds of non-justiciability and, sometimes, of standing. However, on the two occasions so far that appeal courts have considered the cases, they have reinstated them: they have held that the cases are justiciable and that the plaintiffs do have standing. If successful appeals are not made against these appellate court rulings, the disclosure of documents that will follow are likely to shed more light on several issues, including the defendants’ knowledge of climate risks.

**Box 1: The US tort cases***The power companies' injunction case***Connecticut v AEP**

In July 2004, eight US States, the City of New York and three non-profit land trusts filed this case in the US District Court for the Southern District of New York against the top 5 US emitters of CO<sub>2</sub>, the power companies American Electric Power, Southern, Tennessee Valley Authority, Xcel and Cinergy. They are asking the court to hold "each defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance"; and seek an injunction against "each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade".

On 15th September 2005, District Judge Loretta A. Preska dismissed the case, applying the so-called 'non-justiciable political question' doctrine:

"cases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases."<sup>1</sup>

On 21st September 2009, the US Court of Appeals for the 2nd Circuit held that the claims do not present non-justiciable political questions and that the States, the City of New York and the land trusts have standing to bring their case.<sup>2</sup>

<sup>1</sup>Judgement available at:

<http://climatelaw.org/cases/case-documents/us/nuisance/nuisance-sept05.pdf>

<sup>2</sup> Judgement available at:

<http://www.climatelaw.org/cases/country/us/case-documents/us/aep.092109.pdf>

*California's damages case***California v General Motors**

On 20th September 2006, the State of California filed a case in the US District Court for the Northern District of California against General Motors, Toyota, Ford, Honda, Chrysler and Nissan.

California alleged that the vehicle emissions in the US from the defendants' motor vehicles accounted for about 9% of the world's carbon dioxide emissions and over 30% of emissions from Californian sources.

California asked the court to hold "each defendant jointly and severally liable for creating, contributing to, and maintaining a public nuisance", and sought damages.

On 17th September 2007, US District Judge Martin J. Jenkins dismissed California's claim,

on the basis of the non-justiciable political question doctrine.<sup>1</sup>

California appealed to the 9th Circuit Court of Appeals. On 19th June 2009 it withdrew its appeal, citing in its motion the Environmental Protection Agency's acknowledgment that carbon dioxide and other greenhouse gases are a public health danger and must be regulated; the President's direction to the Department of Transportation to establish higher national fuel efficiency standards in line with the standards California has sought to implement for the last several years; and Chrysler's and General Motors' seeking protection from creditors under Chapter 11 of the Bankruptcy Code.

<sup>1</sup> Judgement available at:

[http://ag.ca.gov/globalwarming/pdf/California\\_GeneralMotors\\_Decision\\_Dismiss\\_2007Aug17.pdf](http://ag.ca.gov/globalwarming/pdf/California_GeneralMotors_Decision_Dismiss_2007Aug17.pdf)

*The Hurricane Katrina damages case***Comer v Murphy**

Following Hurricane Katrina in August 2005, fourteen individuals filed a putative class action in the US District Court for the Southern District of Mississippi against many defendants operating energy, fossil fuel and chemical industries in the United States. They seek compensatory and punitive damages as a result of harm to their private property, and to public property useful to them, based on common law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy.

On 30th August 2007, District Judge Louis Guirola, Jr. dismissed the case on both

standing and non-justiciable political questions grounds.<sup>1</sup>

On 16th October 2009 the US Court of Appeals for the 5th Circuit reinstated the actions based on nuisance, trespass and negligence, holding that these claims were justiciable and that the plaintiffs have standing.<sup>2</sup>

<sup>1</sup>Judgement, given in a transcript of the proceedings, available at:

[http://www.abanet.org/litigation/committees/environmental/docs/0907\\_comer\\_transcript.pdf](http://www.abanet.org/litigation/committees/environmental/docs/0907_comer_transcript.pdf)

<sup>2</sup> Judgement available at:

<http://climatelaw.org/cases/country/us/case-documents/us/katrina.oct09.pdf>

*The Kivalina damages case***Kivalina v Exxon**

On 26th February 2008, the native village of Kivalina and the village of Kivalina, Alaska, filed a case in the US District Court for the Northern District of California against 24 oil companies (such as Exxon, BP and Shell), electricity utilities (such as AEP), and Peabody coal (the world's largest private sector coal company), alleging public nuisance, civil conspiracy and concert of action, and seeking damages. The plaintiffs allege that global warming is destroying the village through the melting of Arctic sea ice that

formerly protected the village from winter storms, and that the village must be relocated at an estimated cost of \$95 - \$400 million.

On 30th September 2009, District Judge Sandra Brown Armstrong dismissed the claims on the basis of the non-justiciable political question doctrine, and for lack of standing.<sup>1</sup> Her judgment is being appealed.

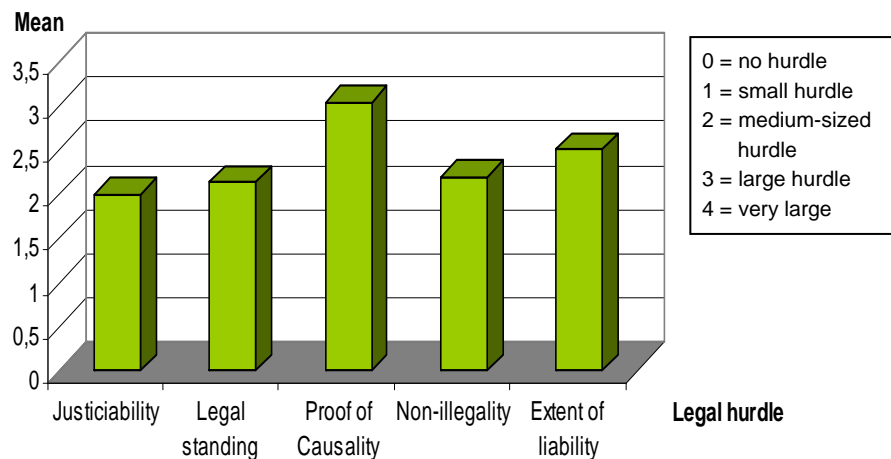
<sup>1</sup> Judgement available at:

<http://climatelaw.org/cases/country/us/cases/case-documents/us/kivalina.dismissed.pdf>

## 4 Private law hurdles for direct climate damages claims

The survey asked participants to rank five hurdles, which those bringing private law claims for direct climate damages would face: causation, legality of conduct and extent of liability, as well as non-justiciability and standing. The responses are shown in Figure 2 below.

**Figure 2: Present legal hurdles for damages**



Three of these hurdles are considered briefly below – all of which most participants expected to be surmounted.<sup>13</sup>

**Causation<sup>14</sup>:** Most survey participants see causation as a ‘large’ or ‘very large’ hurdle for plaintiffs. Given the unprecedented nature of these cases, and the complexity of climate change, this is not surprising. At the same time, most of the participants who believe that overcoming the hurdle is possible, expected the causation hurdle to be surmounted by 2015 for both damages and injunction cases.

Causation is the hurdle which stands or falls, initially, on the science of climate change. Whilst the precise question to be answered will depend on the particular cause of action and jurisdiction, broadly plaintiffs will need to show initially that the damage sustained by them has arisen as a result of greenhouse gas emissions. If this can be shown, the question then becomes one of the extent of the defendants’ contribution to those emissions – which is, firstly, a factual, and secondly, a legal issue (and will be considered under ‘extent of liability’).

<sup>13</sup> For reasons of space, and as they have been rejected by two US appeal courts, non-justiciability and standing are not discussed in this paper.

<sup>14</sup> In the survey, the term ‘causality’ was used to refer to the more usual term ‘causation’. This paper uses the term ‘causation’ to refer to ‘causality’.

The extent of the causation hurdle for plaintiffs in any given case will depend on the nature of the damage they have sustained. The closer the nature of the damage is to a variable where the consensus scientific evidence on human influence is strong – or indeed very strong, for example, on temperature increase (leading, for example, to snow and ice melt) – the stronger would be the plaintiffs’ case. Defendants can be expected to raise several causation-related arguments<sup>15</sup>.

**Extent of liability:** More than half of the participants consider ‘extent of liability’ to be a ‘large’ or ‘very large’ hurdle facing plaintiffs for damages (with 40% for injunction cases), though most expect this hurdle to be overcome by 2015.

We all contribute to climate change. Every person on the planet cannot be sued. And it would be highly unlikely that a court would find one individual company liable for direct climate damages. But it is important to continue the thought process.

If the defendants before the court in any particular direct damages case are those, or are amongst those, corporations which have made the largest contributions to emissions (for example, from their production of fossil fuel, direct emission or facilitation of the emission of GHGs) – a factual question – then a number of legal considerations that help plaintiffs come into play, at least in common law jurisdictions. For example, it is not necessary under usual tort rules to have all the wrongdoers before the court; those before the court can be held 100% liable to the plaintiffs (and it is they who must seek contributions from other wrongdoers not before the court, not the victims); and one of the aims of tort law is to allocate losses arising out of the numerous conflicts that arise in society. It can fairly be said that those who have benefited most from the emission of GHGs should also accept their share of the burden of compensating those who have suffered from those emissions.

**Non-illegality:** Around 40% of participants consider the fact that companies have not been prohibited from emitting GHGs to be a ‘large’ or ‘very large’ hurdle facing plaintiffs, but most also consider that this potential hurdle will be overcome.

There are several reasons why this should be possible. There is a general common law principle that rights to sue cannot be taken away unless there is an express statutory provision saying so. No such provision in relation to GHGs has come to the author’s attention. In the US, there is the linked doctrine of ‘pre-emption’, under which the federal common law can be displaced by statute in certain circumstances. Civil law countries may approach the issue differently.

In the power companies’ injunction case, the appeals court noted that no US Supreme Court case has held that the Clean Air Act has displaced federal common law in the area of air pollution, and held that, at least at the time of its judgment, no displacement had occurred. The EU’s Emissions Trading scheme raises similar, if slightly different, questions. Apart from the absence of any provision displacing common law rights, it is questionable whether a ‘cap-and-trade’ scheme in itself amounts to a statutory authority

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<sup>15</sup> See, for example, David A. Grossman’s chapter entitled *Tort-Based Climate Litigation in Adjudicating Climate Change: state, national and international approaches*, William C. G. Burns & Hari M. Osofsky (eds.), Cambridge University Press, 2009.

to emit. And a leading UK commercial lawyer, Richard Lord QC, has written that “it seems unlikely that implementing and complying with current and proposed emission regulations will take away anyone’s right to sue.”<sup>16</sup> It might also be noted, in any event, that most of the emissions responsible for current climate change damage occurred before the emissions scheme was introduced.

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<sup>16</sup> The blame game: who will pay for the damaging consequences of climate change?, Allen and Lord, *Nature*, Vol. 432, 2 December 2004, page 551-552.

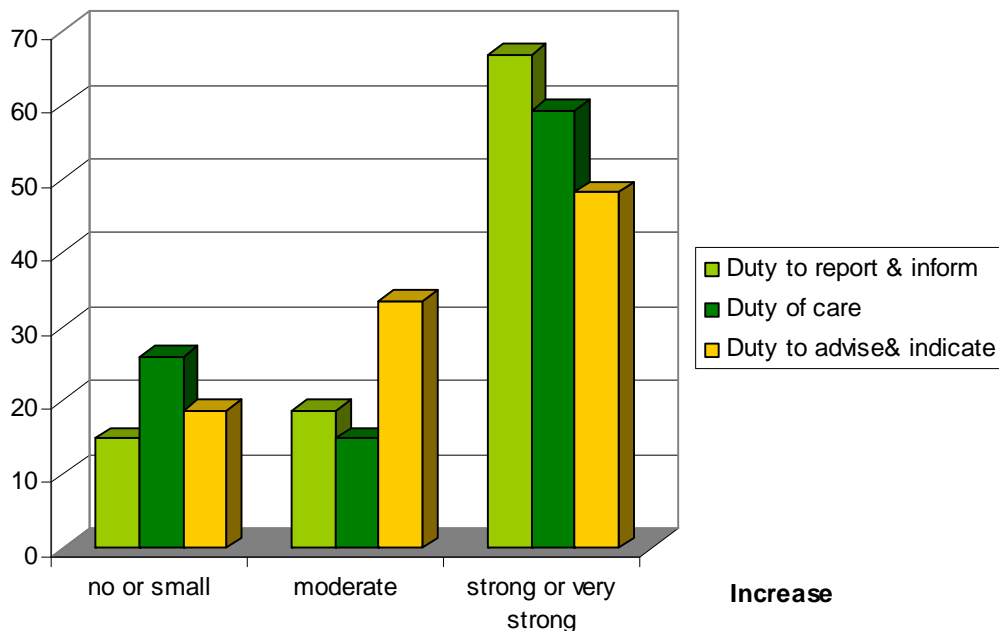


## 5 Private law claims for indirect climate damage

It is possible to conceive of legal claims for damages as a result of a failure by a particular professional (such as an architect or engineer) to take into account potential climate impacts in performing their services. These could arise, for example, where such professionals fail in their duties of care, or to advise and indicate, inform and report. Survey participants expected an increase in the frequency of such claims across the board. A two-thirds majority consider there to be a ‘rather strong’ or ‘very strong’ possibility of more actions for failing to inform and report, for example (see Figure 3 below).

**Figure 3: Development of claims indirectly related to climate change based on different breach of duties**

Answers in %



As with claims for direct climate damages, causation was considered the largest hurdle, with two thirds of participants rating it as ‘rather large’ or ‘very large’. Though participants expected on average that the hurdles in these cases would fall slightly earlier than for direct damages cases.

Asked about the relevance of indirect damage claims for the insurance business, experts ascribe these claims a ‘low’ to ‘moderate’ relevance on average at present and see their relevance increasing substantially by 2020. Finally, all those answering the question said they thought that demand for insurance products related to climate change, and for specific climate change policies for damages indirectly caused by climate change, would increase.

It would seem that if insurance policies are to cover these risks they would do so under commercial general liability policies, which are discussed further in the next section.

## 6 Legal implications for the insurance industry

Climate change damages cases have obvious implications for the defendants sued. They also have implications for the insurance industry, and also for the relationship between actual and potential defendants and their insurers.

One of the main ways in which the insurance sector can be impacted by climate damages cases is through comprehensive or commercial general liability (CGL) insurance. Under these contracts, the insurer ordinarily agrees to indemnify the policyholder who is sued for damages for causing property damage or bodily injury – as opposed to ‘simple’ injunction cases or those involving regulation of GHGs. CGL insurance also usually carries with it an obligation on the part of the insurer to defend the legal action (the duty to defend). An example of the US standard obligation clause is provided (see Box 2).

### Box 2: The insurer's duties to defend and indemnify

*“We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages... We may, at your discretion, investigate any ‘occurrence’ and settle any claim or ‘suit’ that may result.”*

Insurance Services Office,  
Commercial General Liability Form CG 00 01 10 01 (2000).  
The Insuring Agreement in Section 1, Coverage A

In the opinion of a leading insurance industry lawyer Theodore A. Howard, “the immediate problem we foresee for general liability insurers is not the duty to indemnify but *the duty to defend*”<sup>17</sup> (original emphasis). A leading insurance law academic has written that “[t]he ironclad legal rule in all states is that the presence of a single allegation creating a potential for coverage requires the insurer to defend the entire lawsuit against the policyholder.”<sup>18</sup>

The duty to defend climate change damages cases has already led to legal action in the US by an insurance company against a defendant in one of these cases. In July 2008, the Steadfast Insurance Company (apparently a subsidiary of Zurich Financial Services) filed a case against the AES Corporation, a mayor energy company, denying that its CGL policy with AES required it to defend the Kivalina damages case or to indemnify AES in the event that damages were awarded against AES<sup>19</sup>.

<sup>17</sup> Theodore A. Howard, Wiley Rein LLP, Washington, D.C., February 2008, see here at page 25: [http://www.climateandinsurance.org/news/legal\\_howard.pdf](http://www.climateandinsurance.org/news/legal_howard.pdf)

<sup>18</sup> Professor Jeffrey W. Stempel, in his chapter entitled *Insurance and Climate Change Litigation* in *Adjudicating Climate Change: state, national and international approaches*, William C. G. Burns & Hari M. Osofsky (eds.), Cambridge University Press, 2009.

<sup>19</sup> The Complaint filed on 9<sup>th</sup> July 2008 is available here: <http://www.globalclimatelaw.com/uploads/file/AES%20Complaint.pdf>

The CGL policy cover only applies where the bodily injury or property damage is caused by “an occurrence”, which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful condition”. The insurer argues that the Kivalina damage was not caused by an accident, but as a result of CO<sub>2</sub> emissions having long been considered an inevitable by-product of electricity generation, longstanding corporate knowledge relating to CO<sub>2</sub> emissions and, especially, AES' recognition in its 2002 Annual Report that it was “one of the largest emitters of CO<sub>2</sub> in the world”.

Moreover, Steadfast also argues that the policy does not apply to “any injury or damage which incept prior to the effective date” of the policy (5th September 2003, for one year, though AES asserts there are 9 policy periods from 1996-2008), and assert that the damages alleged in Kivalina incepted prior to that date<sup>20</sup>. Thirdly, they argue that the (common) pollution exclusion applies because carbon dioxide is a ‘pollutant’, and that the exception to the pollution exclusion, relating to a “pollution incident”, does not apply. AES is resisting each of these arguments, and has alleged that its insurer has failed to pay for the Kivalina defence, contrary to its initial promise to do so<sup>21</sup>.

As these climate change damages cases proceed, and new ones are commenced, coverage disputes can be expected to increase, with defendants caught in the middle between attacks from the plaintiffs and from the defendants’ own insurers. According to one US business law commentator “[i]nsurance carriers view climate change liability as a massive potential risk, and are revisiting longstanding Comprehensive General Liability (CGL), Directors & Officers (D&O), and Pollution Liability policy language”<sup>22</sup>. One leading insurance lawyer has raised the possibility of insurers introducing an ‘ABCDE’ – an absolute carbon dioxide exclusion in CGL policies<sup>23</sup>. And needless to say, if these damages cases succeed on their merits, the prospect of even larger financial exposure can be expected to intensify insurers’ attempts to wriggle out of their contracts.

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<sup>20</sup> The verb “to incept” means to begin, derived from the Latin “*incipere*”.

<sup>21</sup> AES’ Answer and Counter-Claim filed on 18<sup>th</sup> August 2008 is available here: [http://www.nuisancelaw.com/sites/default/files/uploads/AES\\_Answer\\_and\\_Counterclaim\\_re\\_Insurance\\_Issues.pdf](http://www.nuisancelaw.com/sites/default/files/uploads/AES_Answer_and_Counterclaim_re_Insurance_Issues.pdf). AES’ Opposition Brief to Steadfast’s Motion for Summary Judgment filed on 7<sup>th</sup> August 2009 is available here: [http://www.mccarter.com/new/files/8089\\_AES\\_Opposition\\_Brief1.pdf](http://www.mccarter.com/new/files/8089_AES_Opposition_Brief1.pdf)

<sup>22</sup> *Bracing for Climate Change Exposure*, February 2009, Law 360, available here: <http://www.kslaw.com/Library/publication/2-09%20Law%20360%20Tatum,%20Magruder,%20Stonbreaker.pdf>

<sup>23</sup> See here: <http://www.climatelawyers.com/pt/blog/default.aspx>

## 7 Conclusion

Both direct and indirect climate change damages claims are expected to increase, and ultimately to succeed, over the coming years. Private law cases have been filed in the US, and it is possible that they will extend to other common law countries, and also to developing countries<sup>24</sup>. The initial implications for insurers will be mainly through CGL policies taken out by corporate defendants from a wide range of industries, and in particular the duty to defend. One insurer has already resisted this duty in court.

The difficulty in reaching agreement at Copenhagen in December 2009 reflects the continuing failure of politicians internationally to make legally binding decisions about deep cuts in GHG emissions, to provide adequate adaptation funding and to ensure that those who suffer from climate damage should be compensated. This failure is likely to lead to more companies involved in fossil fuel production, in GHG emissions and in the facilitation of such emissions being brought before the civil courts. In the short term, defendants will continue to seek to invoke the duty to defend against their insurers. In the longer term, if cases succeed on their merits, the implications for the corporate defendants and the exposure of the insurance sector would be considerable (and further resistance on their part likely). As insurers become more concerned about their exposure, increases in premiums and modified, or even the withdrawal of coverage, can be expected.

- The urgent need to reduce GHG emissions significantly has been well made. Global emissions must peak by 2015 if average temperature increases are to be limited to 2.0<sup>0</sup> C – 2.4<sup>0</sup> C<sup>25</sup>. Even this may be too high an increase for many countries. Companies in the energy and utility sector particularly should reduce their emissions and their fossil fuel production without delay.
- Those who suffer from climate change damages should not have to go to court to seek compensation. They should be held whole, but litigation is too ‘hit-and-miss’ to achieve this holistically. And for those suffering in developing countries it is probably more ‘miss-than-hit’. One way forward would be to agree internationally a legally binding instrument guaranteeing compensation (such as a Compensation Protocol to the United Nations Framework Convention on Climate Change)<sup>26</sup>. If the insurance industry saw a commercial opportunity in delivering that compensation, no doubt it will bring forward its own proposals. Until there is such an agreement, or until there is a fresh entitlement to compensation enshrined in national law, it is difficult to see a reason to take away the rights of those suffering from climate change damages to sue in the courts.

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<sup>24</sup> On the possibility of such actions in countries such as France and Germany, civil law experts should be consulted.

<sup>25</sup> IPCC, Fourth Assessment Report, 2007; Synthesis Report, Summary for Policymakers, Table SPM-6, available here: [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf). Statement of Dr. R. K. Pachauri, Chairman, IPCC, to UN Summit on Climate Change, 22nd September 2009, available here: <http://www.ipcc.ch/pdf/presentations/rkp-statement-unccs-09.pdf>

<sup>26</sup> See *Beyond Adaptation: the legal duty to pay compensation for climate change damage*, a paper written in 2008 by Roda Verheyen and Peter Roderick for WWF UK, available here: [http://assets.wwf.org.uk/downloads/beyond\\_adaptation\\_lowres.pdf](http://assets.wwf.org.uk/downloads/beyond_adaptation_lowres.pdf)

- It can be expected that those who suffer damage from global warming will increasingly try to enforce their rights to receive compensation. From the viewpoint of society it is problematic if insurers don't stand by their commitments to cover tort claims. If insurers consider that they will not be able to afford to pay out under insurance policies, it would be better for them to be upfront about that now, in good faith. This would enable society to decide properly where the burden of paying such compensation should lie. In contrast it would seem problematic, if insurance companies try - step by step - modifying or withdrawing coverage in a piecemeal fashion. This would prevent the necessary public debate about how those who have benefited most from the activities that have led to climate damage can be held accountable.<sup>27</sup>
- Within developed countries, it should not be left to the public purse to compensate those who suffer from climate damage, which is what would happen if those who have benefited most from the activities that have led to such damage are not in some way held accountable.
- Civil society can be expected to stand in solidarity with those who have suffered, and who will suffer, the impacts of climate change; and to do what it can to alleviate their suffering, whether through supporting scientifically-backed damages claims, lobbying for new compensation laws, or otherwise.

Climate change damages litigation is a story that has hardly begun. Much is yet to unfold. The appalling outcome of COP 15 at Copenhagen in December 2009 will doubtless help it along its way.

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<sup>27</sup> Comment by the editors:

Increasing litigation risks are supposed to be a driver for companies to reduce emissions without delay. The high risk for damages based on the breach of duty to report and inform suggests that companies might be well advised to review their reporting system and if necessary adjust. Only reporting in an adequate and comprehensive manner about all principal risks and uncertainties – including climate change related risks like oil price rises or potential climate regulations – which they might face in the future, can mitigate this risk. In this respect, annual reports must also include information related to environmental matters, to the extent necessary for an understanding of the company's development, performance or position. See for example Verheyen, R. et al. (2008) 'A Brief Legal Opinion: Minimum Benchmarks for Reporting of Companies on (Climate) Risks under European Law' published by the project consortium available here: <http://www.climate-mainstreaming.net/autoeu08.htm>

## Annex: Summary of results of October 2009 survey on climate change related litigation risks<sup>28</sup>

### *I. Claims in relation to damage directly related to CO<sub>2</sub> / GHG emissions*

#### **I.1. Frequency of claims**

Is the number of claims for injunctive relief and claims for damages going to increase until 2020 and if so, how much?

Results:

Type of claim	Increase		
	none or rather slight	Rather moderate	rather strong or very strong
Injunction	27,6	27,6	44,8
Damages	34,5	20,7	44,8

#### **I.2. Success of claims**

Do you expect claims will be successful until 2020? If so, when approximately you expect the first claims to be successful?

Results\*:

Type of claim	Years chosen			
	2009-2012	2013-2015	2016-2020	> 2020
Injunction	52,6	26,3	15,8	5,6
Damages	44,4	22,2	22,2	11,1

\*100% corresponds to sum of those who consider a success possible, not to sum of respondents. Approx. 30% of respondents don't expect successful claims until 2020.

#### **I.3. Present hurdles for plaintiffs**

To what degree are justiciability, legal standing, proof of causality, non-illegality and evaluating the extent of liability at present a hurdle for successful claims for injunction relief and for damages?

<sup>28</sup> These are aggregate results, all them expressed as % figures. The complete results are presented in the 'Technical paper' prepared by Germanwatch, entitled 'Results of October 2009 expert elicitation on climate change related litigation risks', available at: <http://www.climate-mainstreaming.net/litrisktp.htm>.

Results:

	Height of hurdle	Type of hurdle				
		Proof of causality	Extent of liability	Justiciability	Non-illegality	Legal standing
Injunction	none or rather small	20,0	30,0	36,7	36,7	30,0
	rather medium-sized	16,7	30,0	16,7	26,7	43,3
	rather large or very large	63,3	40,0	46,7	36,7	26,7
Damages	none or rather small	13,3	23,3	36,7	36,7	40,0
	rather medium-sized	16,7	23,3	23,3	23,3	16,7
	rather large or very large	70,0	53,3	40,0	40,0	43,3

**I.4. Overcoming the hurdles**

Do you believe that the different hurdles for claims for injunctive relief or damages claims are going to fall? If so, when approximately do you expect this to happen?

Results\*:

	Type of hurdle	Years chosen			
		2009-2012	2013-2015	2016-2020	> 2020
Injunction	Justiciability	52,9	35,3	11,8	0,0
	Legal standing	53,3	26,7	13,3	6,7
	Proof of causality	47,1	35,3	17,6	0,0
	Non-illegality	42,1	36,8	15,8	5,3
	Extent of liability	55,6	27,8	11,1	5,6
Damages	Justiciability	70,6	11,8	17,6	0,0
	Legal standing	62,5	12,5	18,8	6,3
	Proof of causality	46,7	20,0	33,3	0,0
	Non-illegality	43,8	31,3	25,0	0,0
	Extent of liability	37,5	37,5	18,8	6,3

\*100% corresponds to sum of those who consider a fall possible, not to sum of respondents.

Depending on claim and hurdle between 17%-30% of respondents don't expect the fall of the corr. hurdle at all.

**I.5. Legal concepts as a basis for damages claims**

How promising do you think the following legal concepts are as a basis for damages claims?

Results:

Potential success	Legal concepts				
	Public nuisance	Private nuisance	Conspiracy	Unjust enrichment	Negligence
none or little promising	26,1	30,4	65,2	78,3	39,1
moderate promising	13,0	34,8	21,7	8,7	13,0
rather or very promising	60,9	34,8	13,0	13,0	47,8

## ***II Claims in relation to damage indirectly related to climate change***

### ***II.1. Frequency of claims***

Are damages claims based on the breach of duties stated below going to increase until 2020 and if so, how much?

Results:

Type of duty	Increase		
	none or rather slight	Rather moderate	rather strong or very strong
Duty to report and inform	14,8	18,5	66,7
Duty of care	25,9	14,8	59,3
Duty to advise and indicate	18,5	33,3	48,2

### ***II.2. Present hurdles for plaintiffs***

To what degree are proof of causality and evaluating the extent of liability at present a hurdle for successful damages claims?

Results:

Height of hurdle	Type of hurdle	
	Proof of causality	Extent of liability
none or rather small	10,7	14,3
rather medium-sized	21,4	32,1
rather large or very large	67,9	53,6

### ***II.3. Overcoming the hurdles***

Do you believe that the hurdles proof of causality and extent of liability are going to fall? If so, when approximately do you expect this to happen?

Results\*:

Type of hurdle	Years chosen			
	2009-2012	2013-2015	2016-2020	>2020
Proof of causality	50,0	22,2	11,1	16,7
Extent of liability	52,9	17,6	17,6	11,8

\*100% corresponds to sum of those who consider a fall possible, not to sum of respondents. 22% (proof of causality) and resp. 26% (extent of liability) of respondents don't expect the fall of the corr. hurdle at all.



## II.4. Relevance for the insurance business – at present and in 2020

How do you rate the relevance of damages claims based the breach of duties stated below for the insurance business at present and in 2020?

Results:

	Type of duty	Relevance		
		none or low	moderate	rather high or very high
Present	Duty to report and inform	42,3	34,6	23,1
	Duty of care	57,7	23,1	19,2
	Duty to advise and indicate	57,7	23,1	19,2
2020	Duty to report and inform	7,7	34,6	57,7
	Duty of care	15,4	38,5	46,2
	Duty to advise and indicate	11,5	50,0	38,5

## II.5. Relevance for the insurance business – demand for coverage

Do you think that the demand for insurance products related to climate change and for specific climate change policies for damage indirectly caused by climate change will increase?

Result:

Increase of demand	
Yes	No
100	0







Mainstreaming of Climate Risks and Opportunities in the Financial Sector

Germanwatch

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