



***Climate Change
and the Threat of Litigation:
The Most Dangerous
Litigation in America:
Free Speech Under Attack
“Kivalina”***

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Prepared for American Justice Partnership by



Southeastern Legal Foundation

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Free Speech Under Attack**

***Native Village of Kivalina and City of Kivalina v. ExxonMobil Corporation, et al.,*
United States District Court for the Northern District of California,
San Francisco Division, Civil Action. No. 08cv1138-SBA**

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I. Executive Summary

Global warming litigation, described by a prominent trial lawyer as “the next tobacco and asbestos,” has taken a critically dangerous turn toward the unconstitutional. At stake are free speech, freedom of association, and the freedom to disagree. The targets are every corporation that offers public information on the environment, and every business organization, advocacy group, and individual who question the assumption that human activity causes global warming.

After several court dismissals in cases filed against energy companies in the wake of Hurricane Katrina and against auto manufacturers, the plaintiffs’ bar is following the U.S. Marine maxim – “improvise, adapt and overcome.” **The lawsuit filed by the Alaskan Eskimo village of Kivalina in late 2007 is the proving ground for the new plaintiffs’ lawyer tactic designed to intimidate, implicate, and ultimately silence public discussion and education on the high-profile issue of global warming.**

Following the litigation strategy used in the tobacco and asbestos lawsuits, Kivalina’s lawyers have sued 24 of the largest energy producers in the U.S., alleging a “coordinated conspiracy” to mislead the public about the effects of greenhouse gas emissions on climate change. By casting the lawsuit as an effort to uncover a conspiracy, the lawyers hope to silence all public education and advocacy activity that disputes the assumption that human activity causes global warming.

The complaint reveals two critical tactics now being used in the developing litigation strategy on global warming – confirming our predictions and underscoring the urgency for action on the part of potential defendants.

- The Kivalina lawsuit breaks new ground by alleging that third-party policy and advocacy organizations are co-conspirators because they dare to speak out on one of the most important issues facing our planet. In effect, the tactic is an attempt to bully companies and organizations into silence through litigation.
- According to the Kivalina lawsuit, any company, organization or individual that publicly addresses environmental issues is subject to the ‘conspiracy.’ This tactic turns the First Amendment on its head by making public education and debate on the environment a quasi-criminal act.
- In a second groundbreaking tactic used by Kivalina’s lawyers, the existence of any ‘green-friendly’ program or education effort offered by the energy producers is ‘evidence’

of global warming liability. By citing information from the defendants' own websites and marketing materials, the lawyers are trying to establish that some 'green' programs are merely remedial measures to cover up global warming liability.

- By so doing, the lawyers have blurred the important line between market-driven, environmentally responsible corporate programs and global warming causation.

II. Conspiracy Theory

The plaintiffs claim that the defendants have conspired to mislead the public, creating a "public nuisance."

- According to the plaintiffs' narrative, the defendants initially denied that global warming/ climate change was occurring and that, even if it was, the detrimental effects could not be backed by scientific evidence. With the controversial conclusions of the United Nations' Intergovernmental Panel on Climate Change (IPCC), the plaintiffs claim that the defendants are now trying to convince the public that global warming is not caused by human activity and may even be good for the planet and its inhabitants.
- The plaintiffs further allege that the defendants are funding "front groups," including phony citizens' organizations and bogus scientific bodies, to regularly publish views expressing doubts about global warming in mainstream publications such as the Wall Street Journal. They also claim that defendants are funding and circulating misleading advertising. The advertising questions the "science" of global warming and human causation. The plaintiffs allege that the coordinated "skeptics campaign" includes funding for energy industry groups and other public policy organizations which voice skepticism regarding global warming, creating the appearance of numerous independent voices speaking out against global warming.

The plaintiffs' lawyers have developed two causes of action that implicate third-party organizations – as well as companies that address environmental concerns – in the "global warming conspiracy."

- Civil Conspiracy - Plaintiffs claim that defendants have committed civil conspiracy by and through agreements to participate in the intentional creation, contribution to and/or maintenance of a public nuisance through global warming.
- Concert of Action - Plaintiffs claim that defendants have engaged in or are continuing to engage in tortious acts in concert with each other – and with outside organizations – by creating and continuing to contribute to global warming.

III. Targets: How to Silence the Public Debate

The Kivalina complaint directly addresses the question of whether communication on the environment generally, and climate change specifically, is suspect. According to the claims, any communication that falls in this category, whether by defendants or third-party organizations, is

part of the “coordinated conspiracy” to enable defendants to continue to emit greenhouse gases and contribute to global warming.

Consider the following claims from the Kivalina complaint:

- “Kivalina further asserts claims for civil conspiracy and concert of action for certain defendants’ participation in conspiratorial and other actions intended to further the defendants’ abilities to contribute to global warming.” Claim No. 2
- “Additionally, some of the defendants, as described below, conspired to create a false scientific debate about global warming in order to deceive the public.” Claim No. 5
- “. . . and damages caused by certain defendants’ actions in furthering a conspiracy to suppress the awareness of the link between these emissions and global warming.” Claim No. 6

As a result of the claims, the plaintiffs’ lawyers are seeking expansive discovery to uncover further links between the defendants themselves and the defendants and third-party organizations based on financial support and communications on the issues. **The effort seeks to stigmatize all public education and advocacy efforts that differ with the plaintiffs’ lawyers’ version of global warming causation – and to create an unprecedented legal liability that would result in damages based on those communications.**

Target #1: Corporations

Corporate communications strategies related to “green programs” are being used by plaintiffs’ attorneys as a basis for alleged corporate liability, as confirmed by the Kivalina lawsuit. The plaintiffs’ bar strategy is to establish that corporate environmental policies are being implemented to remediate corporate responsibility for global warming. Therefore, any environmentally responsible program or education effort is suspect, according to Kivalina’s lawyers.

Implications: According to the plaintiffs’ lawyers, the mere existence of corporate communications in any form that deal with environmental issues generally, and climate change specifically, warrant a finding of global warming liability via the conspiracy claims. If this can be established in the Kivalina case, the litigation door swings open for similar claims against any industry that directly or indirectly creates or emits greenhouse gases, including the automobile, transportation and shipping, and other manufacturing industries.

Target #2: Business Organizations

Trade groups, Chambers of Commerce, and affiliated industry organizations that conduct research, create studies and reports, and generally advocate on behalf of their respective members’ common interests related to climate change are essentially unnamed co-conspirators in the Kivalina lawsuit.

Implications: If the conspiracy claims can be established in the Kivalina lawsuit, business organizations will be targeted as “co-conspirators” due to the fact that they receive support from,

and interact with, potential defendants in global warming litigation. As a result, public advocacy efforts may be seen as a basis for claims and may increase the damage awards sought against the defendants.

Target #3: Public Advocacy Groups, Public Interest Law Firms

Third-party non-profit public advocacy groups, including free market think tanks, public policy research centers, and public interest law firms that conduct research, create studies and reports, participate in any form in ongoing global warming litigation, and generally advocate for any climate change policy or position that differs with the version offered by the plaintiffs' lawyers are also essentially unnamed co-conspirators in the Kivalina lawsuit.

Implications: If the conspiracy claims can be established in the Kivalina lawsuit, third-party non-profit organizations will be targeted as “co-conspirators” if it can be established that they receive support from, or merely interact with, potential defendants in global warming litigation. As a result, public education efforts related to climate change may be seen as a basis for claims and may increase the damage awards sought against the defendants.

IV. Conclusion

In the context of market-driven environmental programs implemented by corporations and increasing communication by third-party organizations about climate change, global warming plaintiffs' lawyers are seeking to silence legitimate public debate by stigmatizing those who differ with the ‘man-made global warming’ dogma. The manner in which they are attempting to accomplish this is not in the courts of public opinion, where open debate should be conducted, but rather in the court of law, where the threat of being named as a defendant or co-conspirator subject to invasive and costly inquiry looms large.

The public debate on global warming and climate change, in which government, private industry, and policy organizations are participating, should enjoy the same constitutional protections given to all so-called “political speech.” The use of any litigation tactic designed to stigmatize and silence one side of the ongoing debate runs counter to the historical position of U.S. courts that such speech is the most protected of all and places at risk a cornerstone of a free society, namely, that free speech enables meaningful participation in public policymaking.

**For more information on global warming litigation developments,
background on climate change, reference materials
and web site links, please contact:**

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