

Climate Work Heating Up

The legal battles over global warming aren't going away, and firms are starting to cash in.

BY **MARISA MCQUILKEN**

Kenneth Berlin and his team at Skadden, Arps, Slate, Meagher & Flom have been working on climate-related matters for years. He headed the Justice Department's Environmental and Natural Resources Division, chaired

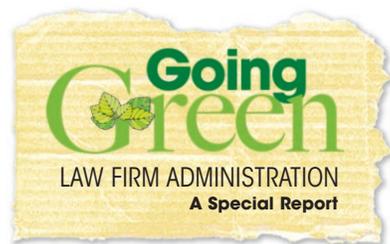
the Environmental Law Institute, and has shepherded a mountain of environmental litigation for major corporations.

Skadden hadn't needed a climate change group before: It simply tapped environmental, energy regulatory,

intellectual property, and tax lawyers to help out when the need arose. Partners, however, at the nation's highest-grossing law firm have changed their minds: This week, they'll launch a 23-lawyer group specifically devoted to climate change issues. "The whole area is changing," says Berlin, who will head the group. "The area is developing so quickly now that it now merits a practice area."

The firm is joining an ever-growing list of major firms that are creating a climate change brand. Akin Gump Strauss Hauer & Feld, for example, debuted its climate change practice in November. Vinson & Elkins announced its climate change practice last spring, and many others have organized groups in recent months. In fact, 26 Am Law 100 firms tout some form of a climate change practice. A handful of others hype clean technology groups. "Climate is hot in a way that nothing else has been before," says Latham & Watkins partner Robert Wyman Jr., the firm's lead counsel for Clean Air Act matters. "We're talking about transforming the energy and transportation economy."

Unlike other fleeting law firm trends—remember those Y2K practices?—there appears to be real work to be done here. Heightened regulation of companies releasing carbon



NATURAL BUSINESS: Claudia O'Brien of Latham & Watkins is seeing more deals involving climate change.

dioxide and other greenhouse gases has led to a host of new legal questions. Although Congress is still working out federal emissions limits, corporate clients are facing state and regional emissions caps as well as standards outside the United States set by the Kyoto Protocol. The work mainly falls into two categories: helping companies navigate emissions caps issues and litigating disputes arising from emissions limits or from problems caused by greenhouse gases.

That said, there's still a marketing ploy at work: "Climate change" groups primarily rely upon lawyers from existing practice areas, such as corporate, energy, tax, and, of course, environmental. Labeling a multidisciplinary group as a "climate change practice" is shorthand for clients who are genuinely fearful about regulation and litigation. "I don't think there's a single Fortune 100 company who has not had

a board-level conversation about their exposure to climate change regulation,” says Todd Glass, chair of Heller Ehrman’s energy practice and a partner in the climate change group.

CASH INCENTIVE

Naturally, there’s money to be made here, too.

Covington & Burling’s Rubén Kraiem, who co-chairs the firm’s carbon markets, climate change, and clean technology practice, says the 17-lawyer area has generated \$1.5 million annually since its inception in 2005.

Kraiem estimates that at least 250 of the hours Covington lawyers spent for clients Kohlberg Kravis Roberts & Co. and Texas Pacific Group on their \$45 billion leveraged buyout of TXU Corp. in 2007 were billed as climate change work. (Partner Stuart Eizenstat is the Covington group’s other co-chairman. During the Clinton administration, Eizenstat led the U.S. delegation that negotiated the Kyoto Protocol.)

During the TXU buyout, investors became concerned about opposition from environmental groups because of the Texas energy company’s coal-powered generation of electricity. The buyers wanted the deal to include a number of policies addressing climate change issues. Covington, Kraiem says, helped structure those commitments, which included increasing TXU’s investments in renewable energy and creating an advisory board with representatives from environmental groups.

Latham’s Wyman says his firm’s global climate change practice, which started in 2004, is generating serious revenue. He says one of his current climate projects alone has brought in more than \$1 million in fees. He declined to disclose the name of that client. Claudia O’Brien, a partner in Latham’s Washington office and a member of the global climate change practice, says she can recall at least 30 recent deals at the firm that have involved climate change.

Wyman, a partner in the firm’s Los Angeles office, organized the California Climate Coalition, and now counts it as one of his major clients. The coalition’s 18 members include Shell, Chevron, General Electric, Northrup Grumman, and a number of startup clean technology companies. The startups can potentially provide the carbon-emitting members with ways to reduce their emissions and, in turn, those members can invest in and help expand the startup companies.

Wyman formed the coalition in anticipation of the 2006 enactment of the California Global Warming Solutions Act, which mandates that greenhouse gas emissions from major industries are reduced to 1990 levels by 2020.

American Honda Motor Co. Inc. belongs to the carbon-emitting side of Wyman’s coalition. David Raney, senior manager of environmental and energy affairs for Honda, says he sought out Latham, and specifically Wyman, for the firm’s expertise on carbon trading. “We’re breaking new ground,” Raney says. “This is fundamentally asking some new legal questions.”

CARBON LAWYERS

One of the key business drivers for firms is the Kyoto Protocol. Though the United States has never adopted it, Kyoto took effect in much of the rest of the world in

2005—and U.S. companies are bound by it when they operate in international markets.

The protocol requires developed countries to reduce greenhouse gas emissions to below 1990 levels and allows companies to invest in clean energy projects in other countries in exchange for credits to offset emissions. The European Union, for example, has set up a cap-and-trade system under which companies are assigned emissions limits. They can then trade for carbon credits if they exceed their caps. Pending legislation in the United States could set up the same type of scheme here. (U.S. companies also engage in voluntary carbon trading, often in response to shareholder concerns.)

And that’s where the “carbon lawyers” come in. Alston & Bird partner Kipp Coddington, for instance, helps his greenhouse gas-emitting clients navigate the carbon market by advising them on emissions trading issues. He says 90 percent of the practice’s clients are new to Alston and were specifically looking for climate change expertise.

Coddington proudly declares himself a “carbon lawyer.” In many ways his practice bears the markings of traditional corporate work. The Washington partner leads the climate change and carbon management group and says Alston has 10 to 15 lawyers working full time for the practice.

Firms are also anticipating eventual federal regulation in the United States. Clifford Chance created its environmental and climatic trading group back in 2003. Washington counsel William Thomas says his energy and manufacturing clients are increasingly aware that the Securities and Exchange Commission may soon require companies to comply with climate-related disclosures. The firm is helping companies “craft appropriate communications in their financial statements and in their voluntary sustainability reports,” Thomas says.

The Senate Committee on Banking, Housing, and Urban Affairs, led by Sen. Christopher Dodd (D-Conn.), has held hearings on getting the SEC to require public companies to disclose the financial impact of climate regulation. In September, a number of states and investors petitioned the SEC to expand and further explain disclosure requirements related to climate change. So far, the SEC hasn’t taken definitive action.

BIG-TICKET LITIGATION

Firms are also seeing a bump in litigation based on climate change issues. Honda, for instance, is one of several automakers involved in a high-stakes fight over greenhouse gas regulation.



Of counsel Charles Haake and partner Raymond Ludwiszewski, both based in Gibson, Dunn & Crutcher's Washington office, represent the Association of International Automobile Manufacturers. Gibson is litigating a string of cases arising out of California's 2002 law restricting greenhouse gas emissions from cars. Carmakers contend the law amounts to a state-level mandate for higher fuel economy—an area they say only the federal government is allowed to regulate.

Though Gibson does not have an explicitly labeled climate change practice, Ludwiszewski was general counsel at the Environmental Protection Agency in the early '90s and has dealt with climate issues for years.

Under the Clean Air Act, California is the only state that can seek permission from the EPA to impose state regulations on air pollution that exceed federal-level restrictions.

After the Supreme Court upheld the EPA's authority in 2007 in *Massachusetts v.*

Environmental Protection Agency to regulate carbon dioxide emissions,

California applied for a waiver to impose a cap on carbon dioxide emitted from cars. The problem, says Ludwiszewski, is that a vehicle's gas mileage is measured by converting carbon dioxide emissions to miles per gallon. By capping carbon dioxide from cars, he says

California would require that automakers increase fuel economy standards—exactly what he says the federal law prohibits at the state level. The California attorney general's office is handling the case for the state. California argues that if it obtains the EPA waiver, then the car emissions cap will become federal law, which cannot be pre-empted. Though the EPA initially denied the waiver, California hopes the denial will be overturned by a court or by a new administration.

Though California lit the initial spark, 13 other states have followed suit and imposed similar caps on car emissions. Automakers have also sued in federal courts in Rhode Island and Vermont.

Like Gibson, litigation giant Kirkland & Ellis does not have a climate change practice, but lawyers there are busy getting up to speed. Washington partners Andrew Clubok and Stuart Drake are representing the Alliance of Automobile Manufacturers, which includes Ford, Chrysler, and General Motors, in the multistate litigation.

The plaintiffs bar is also on board. A number of cases have turned up citing greenhouse gas emissions as the culprit for a host of claims. Crowell & Moring is defending clients in *Comer, et al. v. Murphy Oil USA, et al.*, in which a class of Mississippi property owners blame the environmental impact of energy and chemical companies for Hurricane Katrina damage. The case was dismissed during summary judgment in Mississippi federal court, but has since been appealed to the U.S. Court of Appeals for the 5th Circuit.

Whatever the outcome of the suits, it's clear the legal battle over climate change isn't going away. In Congress, the proposed Lieberman-Warner America's Climate Security Act would set up a federal emissions trading system. Climate lawyers believe a version of the act will pass by the end of 2009. As U.S. companies scramble to meet the subsequent requirements, they will likely end up on the doorsteps of major law firms.

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