

## Procedural Techniques Available for Climate Litigation

### Executive Summary<sup>1</sup>

Judges encounter numerous procedural questions and devices when overseeing and managing climate cases: justiciability, evidentiary challenges, case management issues, mandamus, stays, interlocutory appeals, and assessing scientific evidence and expert testimony. While many of these differ little from their counterparts in non-climate lawsuits, there are some key distinctions that judges should note when dealing with climate change cases.

**Threshold justiciability questions frequently arise in climate cases in state and federal courts.** The federal Clean Air Act air pollution regulations provide one common way federal courts obtain subject matter jurisdiction over climate change litigation. Though the Clean Air Act gives rise to many federal suits, it also displaces federal common law claims regarding greenhouse gas emissions, including nuisance suits against foreign or multinational corporations. In contrast, the Clean Air Act's citizen suit provision explicitly preserves all state-law claims related to air pollutant emissions, though analogous Clean Water Act precedents suggest that state tort law claims are likely preserved only if they arise under the law of the state in which the source of the pollutant is located. And many climate suits are being framed purely in terms of state common-law claims, such as consumer protection, fraud, or misrepresentation.

**Case management strategies borrowed from mass tort and toxic tort litigation can reduce the time and expense required to reach a settlement or final judicial resolution in climate cases.** Parties and courts can make litigation more efficient by eliminating duplicative proceedings, deciding dispositive issues first, limiting the record to include only helpful amicus briefs, and encouraging settlement. For example, judges may front-load the determination of dispositive issues through tiered discovery or early admissibility hearings, especially when novel science, key scientific evidence, or mass torts are at issue.

**Climate change tort cases present challenging legal questions regarding attributing causation for climate-related events and evaluating available remedies.** Causation in climate tort litigation can often only be assessed in terms of statistical probabilities, and in these instances, toxic tort and product liability litigation provide models for handling such evidentiary uncertainties. The means of apportioning liability where multiple parties share fault for a climate-related injury likewise can be borrowed from existing doctrines, including comparative negligence, contributory negligence, equitable apportionment, joint and several liability, and market share liability.

<sup>1</sup>This is a summary of Procedural Techniques Available for Climate Litigation by Robin Kundis Craig.