

RESPONSE

Comment on *Basic Compensation for Victims of Climate Change*

by Raymond B. Ludwiszewski and Charles H. Haake

Providing compensation for individuals or communities who may be impacted by climate change presents four fundamental questions: (1) who, if anyone, should receive compensation; (2) how much each recipient should receive; (3) who should pay; and (4) how much each payer should be required to pay. Prof. Daniel Farber presents a well thought-out foray into this thorny issue, setting forth the pros and cons of various compensation regimes utilized in other contexts and suggesting how they may be adapted to the question of climate change compensation.¹ In the end, however, Professor Farber's discussion demonstrates that the questions of who should receive compensation for climate-related damages and who should be required to pay have no suitable analogs. These questions are not appropriate for resolution by our court system, and climate change is unlikely to be an issue where the elected branches of our government determine that coerced redistribution of wealth represents the best policy choice.

Climate change is markedly different from all other past circumstances where one party has been required to compensate another party for injury. Tort law, which is often the forum of first resort for resolving issues of compensation, is ill-suited to resolving disputes concerning climate-related compensation. Traditionally, in order to show that a defendant is liable to a plaintiff for damages, the plaintiff must show that the defendant owed him a duty, the defendant breached that duty, and the breached duty immediately caused the plaintiff's compensable harm. Each of these questions—duty, breach, and causation—presents seemingly insurmountable hurdles to a party seeking to use the tort system as an avenue for receiving compensation.

It is not surprising, therefore, that no court has held that a party may recover compensation for damages allegedly caused by climate change. Indeed, the three U.S. district courts that have squarely addressed the question have held that they cannot because the question of compensation presents an inherently political question.² To the extent courts have entangled themselves in questions concerning climate change, the decisions have been limited to issues of standing

and regulatory challenges seeking to control future emissions of greenhouse gases (GHGs).³

As noted in one of the articles Professor Farber cites, “[c]ausation remains a big obstacle for potential plaintiffs to overcome in climate change litigation.”⁴ Indeed, it may well be impossible for a litigant to demonstrate that a given climate-related outcome was caused by man's contribution to GHGs in the atmosphere. After all, as Professor Farber points out, some amount of climate change is inevitable,⁵ as the earth's climate has been in a constant state of change since its formation billions of years ago. Teasing out the contribution of anthropogenic GHG emissions to the overall change in the climate, then linking climate change to a particular event, and then establishing that one entity or group of entities should be liable will present immense challenges to litigants. No theory of causation has yet made its way into court to be tested.

Professor Farber attempts to simplify the issue of causation by focusing on harms he believes can be “clearly identified as consequences of climate change.”⁶ However, even the subcategories of climate impacts he identifies may be difficult to link directly to anthropogenic GHG emissions. Take shrinking glaciers, for example. The Kibo ice cap on Mount Kilimanjaro is often pointed to as the “poster child” of global warming. However, a recent study suggests that most of the shrinking of that glacier occurred prior to 1950 and was most likely caused by reduced snowfall and increased solar radiation, as opposed to the increased concentration of GHGs in the atmosphere.⁷ The impact of anthropogenic global warming on sea-level rise is also mired in uncertainty. Professor Farber cites to the plight of Tuvalu, an island nation in the Pacific. However, a 2005 study suggests that Tuvalu's loss of land has been caused by inappropriate land use, such as coastal engineering and aggregate mining, and that empirical measurements have not been able to verify any sea-level rise around Tuvalu islands.⁸

Establishing a particular defendant's duty and a breach of that duty will similarly present tremendous difficulties. In

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1. Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 38 ELR (ENVTL. L. & POL'Y ANN. REV.) 10521 (Aug. 2008) (a longer version of this article was originally published at 155 U. PA. L. REV. 1605 (2007)).
2. See *California v. General Motors Corp.*, No. 06-05755, 37 ELR 20239 (N.D. Cal. Sept. 17, 2007); *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007), available at http://www.bdlaw.com/assets/attachments/Comer_v_Murphy_Oil_opinion.pdf; *Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265, 274, 25 ELR 20186 (S.D.N.Y. 2005).

3. See, e.g., *Massachusetts v. EPA*, 127 S. Ct. 1438, 37 ELR 20075 (2007) (holding that the U.S. Environmental Protection Agency is empowered under the Clean Air Act (CAA) to enact motor vehicle GHG emissions regulations); *Northwest Envtl. Defense Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 971 (D. Or. 2006) (plaintiffs had standing to pursue challenge under the CAA).

4. Vincent S. Oleszkiewicz & Douglas B. Sanders, *The Advent of Climate Change Litigation Against Corporate Defendants*, 27 INT'L ENVTL REP. 936, 940-41 (2004), cited in Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1614 (2007).

5. Farber, *supra* note 1, at 10522.

6. *Id.*

7. See generally Philip W. Mote & Georg Kaser, *The Shrinking Glaciers of Kilimanjaro: Can Global Warming Be Blamed?*, 95 AM. SCIENTIST 318 (2007).

8. Xue Chunting, *Causes of Land Loss in Tuvalu, a Small Island Nation in the Pacific*, 4 J. OCEAN U. CHINA 115, 122 (2005), available at <http://www2.ouc.edu.cn/xywb/web/filedata/05040204.pdf>.

order to show negligence, for example, a plaintiff must show that the defendant acted unreasonably. At what point did it become unreasonable for power companies to produce electricity in a manner that causes emissions of carbon dioxide (CO₂), or for automobile manufacturers to produce cars that burn gasoline and therefore emit CO₂? While the idea that burning of fossil fuels may lead to global warming because of the greenhouse effect is not new, it has only relatively recently been widely accepted. For example, the Supreme Court recognized in *Massachusetts v. EPA*⁹ that “the Congresses that drafted § 202(a)(1) [of the Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming.”¹⁰ Professor Farber suggests that it may be appropriate to establish a cut-off date of 1992, positing that before that date emitters may not have been reasonably on notice of the damaging nature of GHG emissions.¹¹ However, assuming such a cut-off date could be established, how would a court differentiate from a liability standpoint damages caused by post-1992 emissions—which would be actionable—and pre-1992 emissions—which would not be?

Furthermore, liability would require a finding that a putative defendant engaged in conduct that was unreasonable under the circumstances. What constitutes unreasonable conduct when it comes to GHG emissions? Professor Farber suggests that it may have been unreasonable for manufacturers to not use environmentally friendly technologies or to reduce production to account for the impacts of global warming.¹² However, he does not identify what viable alternative sources of energy could have been relied upon, nor does he provide any formula for determining what level of output is reasonable and what level is unreasonable; output, after all, is dictated by the law of supply and demand.

As Professor Farber points out, inherent difficulties in showing duty, breach, and causation have not prevented courts from fashioning rules that would allow for compensation in circumstances where a plaintiff has been injured by some party’s wrongdoing. He points to toxic torts as “a fairly natural analogy to climate change liability,”¹³ and discusses rules developed by tort law to provide for both *ex ante* and *ex post* compensation in such cases. However, even in the toxic tort context, courts still require a plaintiff to show that he has been, or likely will be, injured on account of the tortious conduct of another.

In the case of prospective relief—which most often takes the form of claims for medical monitoring and fear of cancer—the plaintiff must show that as the proximate result of the defendant’s conduct, the plaintiff is at a significantly increased risk of contracting disease so as to justify compensation.¹⁴

With regard to devising a proposal for retrospective relief for climate change, Professor Farber argues that the apportionment rule laid down in *Sindell v. Abbott Laboratories*¹⁵ “seems to be the only workable solution.”¹⁶ Yet *Sindell* and other court-fashioned rules for providing compensation for toxic torts are not applicable in the climate change context. Generally, those cases address the question of who, among a limited number of potential defendants, should be required to pay for a plaintiff’s injuries where it has been established that the injuries were in fact caused by a product manufactured by one of the defendants. In *Sindell*, for example, the plaintiff had a “signature disease,” that could only have been caused by the anti-miscarriage drug diethylstilbestrol (DES).¹⁷ In that circumstance, the court found that a just rule of compensation would allow liability to be assessed based upon a defendant’s market share of DES regardless of who had actually manufactured the DES ingested by the plaintiff’s mother. Climate change is a very poor candidate for such a compensation system because there are no signature climate events that only could be caused by anthropogenic GHG emissions and the relative contributions of potentially responsible parties are impossible to quantify.

In circumstances where the tort system proves to be inappropriate for devising an adequate system of compensation, the legislative branch often steps in. Professor Farber outlines several examples of such legislatively crafted compensation schemes, such as the September 11th Victim Compensation Fund, the United Nations Compensation Commission (UNCC), and various programs to provide reparations. These schemes, however, share several features that are not found in the climate change circumstance. Most importantly, they all involve a discrete set of identifiable victims who were injured by a limited number of morally culpable wrong-doers. The 9/11 fund involved individuals who were unquestionably injured on account of the terrorist attack; the UNCC provided for damages caused by Iraq’s unlawful invasion and occupation of Kuwait; and reparations have been provided for Japanese wrongfully interned during World War II and victims of the infamous Tuskegee experiments.

Climate change, in contrast, does not provide the same rationales as do these other compensation schemes and presents complex policy-laden questions of who should receive compensation and who should pay. Society has benefitted from the products and activities that contribute to the emissions of GHGs and is therefore equally responsible for those emissions. For example, the advent of the automobile and availability of abundant and inexpensive gasoline has allowed commuters to live further and further from their places of work. Who is more responsible for GHG emissions—the commuter who travels 50 miles to and from work each day, or the company that manufactured the vehicle he commutes in? Identifying which subgroups of society

9. 127 S. Ct. 1438, 37 ELR 20075 (2007).

10. *Id.* at 1462; see also *Chrysler Corp. v. EPA*, 631 F.2d 865, 869, 10 ELR 20595 (D.C. Cir. 1980) (catalytic converters lauded as pollution control devices because they produce “two harmless byproducts, carbon dioxide and water”).

11. Compare Farber, *supra* note 1, at 10524, with *General Elec. Co. v. EPA*, 53 F.3d 1324, 25 ELR 20982 (D.C. Cir. 1995) (due process requires that parties receive fair notice of prohibited conduct before being deprived of property).

12. Farber, *supra* note 1, at 10524.

13. *Id.* at 10527.

14. See, e.g., *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) This case held that before recovering in a fear of cancer claim, a plaintiff must prove:

(1) as a result of the defendant’s negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff’s fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure.

Id. at 816.

15. 607 P.2d 924, 937 (Cal. 1980).

16. Farber, *supra* note 1, at 10528.

17. 607 P.2d at 925-26.

should be required to pay for the impact of global warming caused by GHG emissions may prove to be impossible both politically and practically.

In the end, policymakers may decide that the proper way to address the issue of climate change is not to make some

sub-segments of our society compensate other sub-segments for harms for which all are responsible and all are affected. A more productive and rational approach may be to foster investment so that we become less dependant on burning fossil fuels to meet our growing energy needs.