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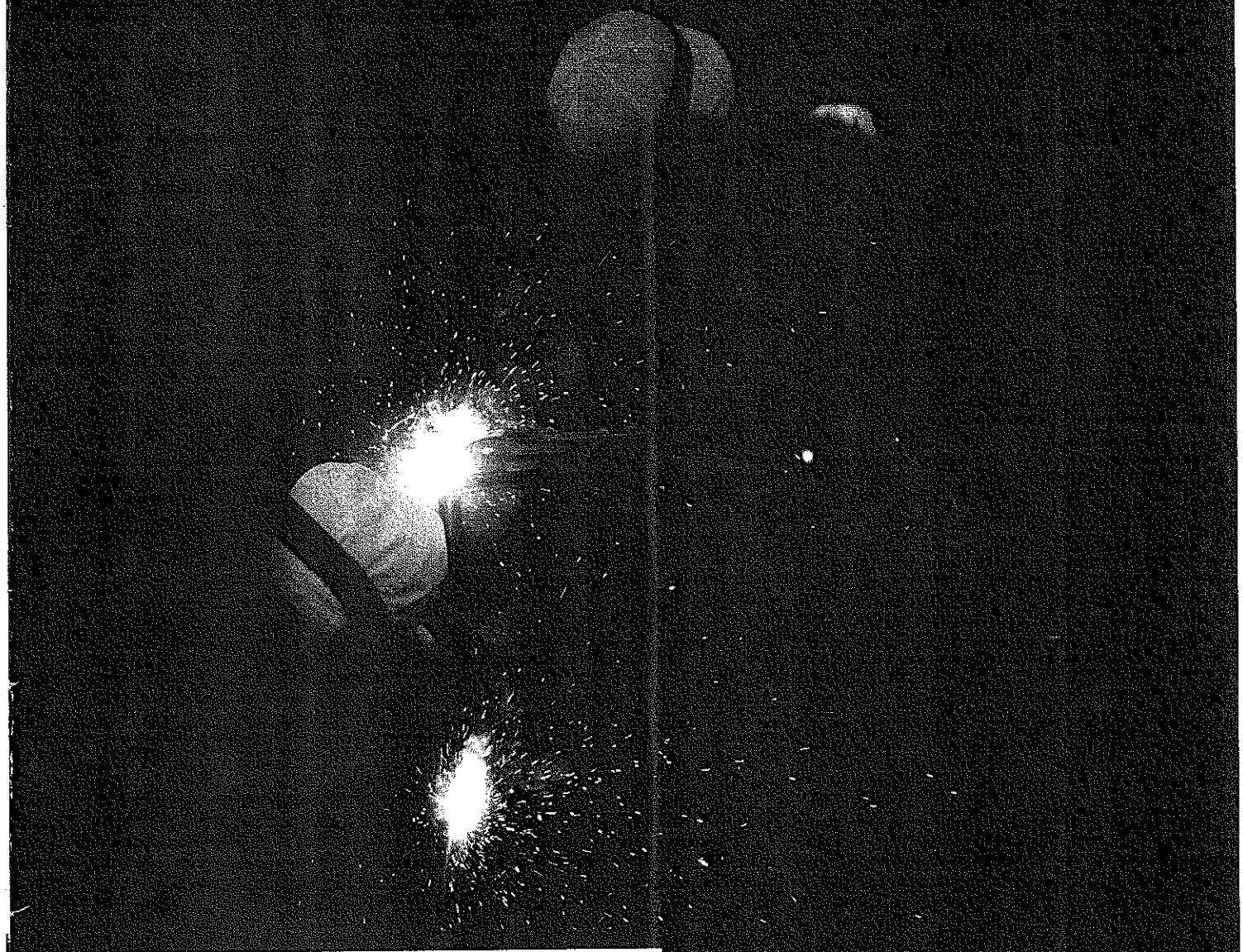

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Climate litigation threat lurks behind twisty case
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Climate litigation threat lurks behind twisty case

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A federal court case on which may depend a serious litigation threat to oil and gas companies and other emitters of greenhouse gases now has nowhere to go except the US Supreme Court.

The case is Comer v. Murphy Oil, in which the US Court of Appeals for the Fifth Circuit found that a class of Mississippi plaintiffs had standing to allege they were damaged by defendants' greenhouse gas emissions, which contributed to climate change that increased the damaging effects of Hurricane Katrina.[1] Its upward climb through the judicial system was temporarily halted when the Fifth Circuit withdrew its original opinion and scheduled an en banc rehearing—involving all rather than a panel of judges—for June. However, on Apr. 30 the court notified the parties by letter that it had lost its quorum, which precluded it from acting on the merits of the case. The court requested briefs from the parties regarding en banc rehearings and the definition of a quorum.

Then, in an unexpected move, the Fifth Circuit handed down an order on May 28 concluding that it lacked authority to consider the case en banc and that it could not reinstate the original opinion, thus dismissing the entire appeal. The order closed by noting, "The parties, of course, now have the right to petition the Supreme Court of the United States."

This order managed to do what defendants hoped to achieve—dismissing the original opinion and remanding back to the district court, which had already dismissed the plaintiffs' case—but it did so without addressing any of the climate-change-related standing issues that formed the basis of the Fifth Circuit's original opinion.

In addition, it has been openly speculated that the Supreme Court also may be unable to hear the matter, even if it could be properly appealed to that court from its current posture, given that at least three justices are also likely to recuse themselves for financial or other reasons.[2]

With the entire appellate process undone in the court's order, what happens to the Comer case next is important to the class members and defendants along the Gulf Coast and is impossible to predict. Will the plaintiffs seek to take the case to the Supreme Court? Will the Supreme Court even be able to hear the matter? If so, will it address the merits of the plaintiffs' nuisance and standing claims or focus instead on the Fifth Circuit's order vacating the en banc rehearing that effectively denied the plaintiffs' right to appeal?

The outcome of these proceedings is being closely watched by the legal community, numerous industries, and insurers alike, given the case's potential significance amid the rising tide of climate change-driven litigation. Adding an even greater sense of urgency to these concerns, the Gulf Coast oil spill following the explosion and fire at the Deepwater Horizon platform has generated a new wave of litigation in the Gulf Coast region, some involving suits filed as putative class actions and including a prominent "nuisance" claim.[3]

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The Comer lawsu

The suit involves a putative class action brought by private citi zens, all of whom are property owners alon the Mississippi Gulf Coast. The plaintiff class sued a variety of defendants, primarily energy, fossil fuel, and chemical companies, all of whom were also

greenhouse-gas emitters.

The plaintiffs alleged that the activities of the defendants in emitting the greenhouse gases contributed to global warming, which in turn caused a rise in sea levels and also increased the damage to plaintiffs' property caused by Hurricane Katrina. The plaintiffs assert claims based on Mississippi common-law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.

The defendants moved to dismiss the class action on the grounds that the plaintiffs lack standing and that their claims were nonjusticiable political questions. The Southern District of Mississippi granted the motion and dismissed the claims. The plaintiffs then appealed to the Fifth Circuit.

In a surprise to many observers, a three-judge panel of the Fifth Circuit found that the plaintiffs have standing to assert their public and private nuisance, trespass, and negligence claims. The Fifth Circuit noted that questions of standing involve the "fairly traceable" standard and that, based on the Supreme Court's decision in the 2007 case styled Massachusetts v. EPA, it is already accepted law that greenhouse gas emissions contribute to global warming, which in turn worsens weather conditions such as hurricanes. Thus, the plaintiffs' injuries were in fact "fairly traceable" to the defendants' emissions of greenhouse gases. The state-law-based claims also did not present nonjusticiable political questions—another surprise to many observers. The court pointed out that common-law-based tort claims rarely present political questions.[4]

The defendants immediately filed a motion for rehearing en banc, spending much of their argument focused on the political-question issue. The motion was granted and the opinion withdrawn, and the Fifth Circuit's subsequent insistence that it could not hear the matter or reinstate the opinion leaves the case either dismissed for all time or on a direct course to the Supreme Court.

Litigation threat

The importance of the rehearing (and likely Supreme Court consideration) of Comer, regardless of outcome, cannot be disregarded. Type the words "climate change litigation" into a search engine like Google and over a million results appear-beginning with stories from the Wall Street Journal and Business Insider with titles like "Is climate change litigation the new asbestos?" or "Climate Change litigation: The New Tobacco?"

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Insurance giant Swiss Re in 2009 predicted "that climate change-related liability will develop more quickly than asbestos-related claims, and...the frequency and sustainability of climate change-related litigation could become a significant issue within the next couple of years."[5]

Although it is unclear at this early stage whether "climate change litigation" can be truly considered the next big wave in mass action litigation, it is at least already clear that there is a true risk to large companies posed by the threat of this litigation. While the procedural issues currently ensnaring the Comer case are dealt with by the court, it is worthwhile to look at the context in which this case is developing.

The Fifth Circuit's original opinion was published at the end of October 2009. On Jan. 1, 2010, the Environmental Protection Agency began to require large emitters of greenhouse gases to collect and report data on their greenhouse gas emissions.[6] Then in February, the Securities and Exchange Commission published a guideline that directed companies to disclose risks associated with climate change, explaining that "This interpretive release is intended to remind companies of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare disclosure documents to be filed with us and provided to investors."[7]

In April, the EPA published a report titled "Climate Change Indicators in the United States," which concluded that US and global temperatures have risen, heat waves and extreme precipitation events have increased in frequency, and the intensity of tropical storms has risen noticeably in the last 20 years.[8] Almost immediately, a law firm responded by publishing a brief review of the report and speculating as to whether the report will be used by litigants in the pending climate change suits.[9] The list still includes the now-vacated Comer.

Then in May, the EPA released its final version of the greenhouse gas emissions permit requirements, which will go into effect in January 2011 absent legal or legislative action.[10] The new permits apply only to new construction and modification but are a large step forward in EPA's effort to reassert control over climate change-although the new rules could also be relied upon by plaintiffs' attorneys in climate change cases like Comer to show that while there is an acknowledged need to limit the emission of greenhouse gases, there is still no system for assigning responsibility for the current effects of climate change.

Other cases

At the same time that the Comer procedural drama is unfolding and climate change activity in all sectors of the government increases, activity con-

tinues in other major climate change cases.

Briefing is under way in the Ninth Circuit in the appeal of Native Village of Kivalina v. Exxon Mobil Corp. (2009). The district court in Kivalina dismissed a putative class action involving a small village seeking damage for the destruction of their village lands due to downstream effects of global warming on arctic ice. The court found that the injuries suffered were not "fairly traceable" to the defendants' greenhouse gas emissions.

In a decision entirely contrary to Kivalina, the Second Circuit allowed a federal common law nuisance global warming claim to proceed in Connecticut v. American Electric Power Co. (AEP, 2009), in which states and other entities sued electric power corporations for their emissions. Like the original (now vacated) Comer opinion, the AEP opinion stated that the plaintiffs had standing to seek relief because their injuries were "fairly traceable," and there was no political question presented. Unlike the Comer court, however, the AEP court rejected the defendants' motion for en banc rehearing, and the defendants are now expected to seek the Supreme Court's discretionary review.

The outcome of these proceedings is being closely watched, given the case's potential significance amid the rising tide of climate change-driven litigation.

In the Fourth Circuit, briefs have been filed and argument has been held in the appeal of North Carolina on the relation of Cooper v. Tennessee Valley Authority (2009). In TVA, the federal district court declared that air emissions from three coal-fired plants operated by the Tennessee Valley Authority are a public nuisance contributing to "significant hurt, inconvenience [and] damage" in the state of North Carolina. As a remedy, the court ordered that the TVA proceed with plans to install enhanced pollution controls in these plants at a cost of $1 billion.

What is shocking about this case is that the court found against the TVA despite its compliance with all applicable federal and state regulations. It has subsequently been predicted that the case, if not overturned, could lead to a flood of new public nuisance suits seeking to redress environmental harms by bypassing the traditional administrative procedures.[1]

Louisiana bucks trend

An unreported but significant footnote in the story of the Comer case is that in neighboring Louisiana, a strikingly similar putative class action was brought in September 2005, alleging damages from oil and gas activities.

In Barasich v. Columbia Gulf Transmission Co., plaintiffs brought claims against a spectrum of various companies that conducted oil and gas exploration, production, and transportation work in the marshes of South Louisiana, claiming that the companies' varying dredging, equipment moving, and oil producing activities caused severe damage to the marshlands that should have otherwise served to protect the inland communities from Hurricane Katrina. The defendants moved to dismiss, arguing that plaintiffs' claims raised nonjusticiable political questions and that plaintiffs failed to state a claim-which primarily argued that causation could not be established.

A judge in the Eastern District granted the defendants' motion on the grounds that plaintiffs had indeed failed to state a claim under Louisiana tort law, and the plaintiffs failed to appeal. Thus, in Louisiana federal court class actions against those directly or indirectly responsible for environmental damage with harmful downstream effects (i.e., damage a marshland, thereby increasing the damage from a hurricane) have not been maintained.

However, Louisiana is also the site where numerous Gulf Coast oil-spill-related class action lawsuits have been filed, making it again a potential stage for another wave of suits seeking both direct and indirect damages from the energy industry.

Courts in control

Policyholders and insurance companies alike must keep abreast of the current trends in climate change litigation, rather than waiting for comprehensive legislation or new regulatory structures to define and limit their potential liability for contribution to global climate change. Even President Obama's senior adviser for energy and climate change, Carol M. Browner, has openly warned that "the courts are starting to take control of this issue."[12]

As demonstrated by the long list of state plaintiffs in AEP and TVA, states may turn with increasing frequency to the courts, utilizing nuisance law and other state tort law-based claims in order to more quickly achieve targeted environmental goals, particularly when the major emitters are located across state lines and thus out of the state's own regulatory reach.

Moreover, these climate-change cases proceed as class actions-a fact whose significance is highlighted by the US Supreme Court's recent decision in Shady Grove Orthopedic Associates v. Allstate Insurance Co.13 The Supreme Court held that the federal class action rule trumped a state law prohibiting class actions that seek to recover statutory penalties or minimal recoveries. This decision has been hailed as "good for those who use class actions as a remedy to corporate wrongdoing"—a statement that could also be used to describe the putative class members in most climate change matters, including Comer.[14]

The insurance industry also faces

great risk from increased use of litigation as a tool to obtain relief from climate change, as noted by Swiss Re. A complaint for climate change liability may trigger the insurer's duty to defend. Alternatively, shareholders may file claims based on a corporation's duty to disclose the effects of climate change and greenhouse gas emission.

Policy holders may also seek coverage for property damage due to climate change, although arguably the standard "pollution exclusion" language common to many policies could be invoked as a defense to such claims.

Despite these risks, a national sustainability organization, CERES, recently published a survey of risk managers from multiple industries which found that 62.1% of survey respondents from various industries indicated that "climate change litigation is not a likely concern for our company." CERES noted that at least five oil and gas firms were among the "unconcerned."[15]

Of the same group surveyed, only 10% of respondents reported that their current insurance coverage was adequate for climate change liability risks. Given the countless blog posts and endless speculation, online and off, by attorneys looking for the next "tobacco" or "asbestos," this may indicate a serious lack of preparedness by the very industries who may find themselves the target of the next big climate change class action. ✦

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