



By  
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A disquieting question for many liability insurers is whether two recent federal appellate decisions, each permitting a broad variety of plaintiffs to pursue global warming nuisance claims, portend big problems.

The industry constantly scans the horizon for the “next asbestos,” and climate change liability is a plausible candidate for that title. But there are reasons for guarded optimism that global warming claims won’t grow into a sustained wave of climate liability exposure.

Recently, four “nuisance” lawsuits

Nine days later, in *Kivalina*, the Federal Court for the Northern District of California reached a contrary result, dismissing claims against 24 large U.S. power companies for allegedly contributing to global warming. Kivalina’s Inuit residents live on an Alaska barrier reef that they claim is disappearing under rising seas resulting from warmer oceans caused by defendants’ greenhouse gases. The *Kivalina* court dismissed these claims, based upon the attenuated nature of the link between the claimed injuries and any particular defendants’ conduct.

On Oct. 16, the scales tipped again. The U.S. Court of Appeals for the Fifth

# Blame Global Warming

Court rulings in recent climate-nuisance suits have yet to clear the air for insurers.

were filed against major greenhouse gas emitters in federal district courts: *Comer v. Murphy Oil* (Southern District of Mississippi); *California v. General Motors* (Northern District of California); *Connecticut v. American Electric Power* (Southern District of New York); and *Native Village of Kivalina v. ExxonMobil* (Northern District of California).

All four lawsuits claim that industrial emitters of greenhouse gases allegedly are disproportionately responsible for climate change. Few observers felt these cases could survive a variety of causation and “political question” defenses. In fact, *Comer*, *GM* and *AEP* were dismissed by the district courts, and California withdrew its appeal in *GM* after the Environmental Protection Agency took steps to regulate greenhouse gas emissions.

Then, last Sept. 21, the legal landscape was abruptly upended. In *AEP*, the U.S. Court of Appeals for the Second Circuit held that public nuisance claims against GHG emitters weren’t barred on political question grounds; and private groups, upon a showing of injury different (in scope or kind) from the public at large, had standing to pursue litigation.

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Circuit held in *Comer* that residents and property owners in Mississippi had standing to assert nuisance claims against oil, coal and chemical companies for contributing to climate change, which they alleged strengthened Hurricane Katrina.

The Second and Fifth Circuit Courts of Appeal rulings certainly could open Pandora’s box. Lawsuits with either financial or political motives could target utilities, automakers, heavy industry, dairy farms, timber companies or any party that either emits GHGs or whose land-use changes eliminate “carbon sinks.”

Still, these decisions may not lead to an explosion of global warming litigation. First, a majority of all judges on the Second and/or Fifth Circuits, in “en banc” review, may overturn the three-judge panels that issued these opinions. Second, the Supreme Court is likely to permit an appeal—and probably make the ultimate decisions on these issues. Or Congress may pass a climate change law that pre-empts nuisance suits, or at least strengthens the “political question” defense. The courts may even reject nuisance claims on the basis of defenses not yet argued—particularly the inability of plaintiffs to meet the legal burden of proof for causation.

Despite so much uncertainty, climate nuisance claims must run an imposing gauntlet of legal and coverage defenses before they emerge as covered liability.

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**Questions of liability, almost certain to be decided by the U.S. Supreme Court.**