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## Second and Fifth Circuit Courts Allow Global Warming Suits to Proceed\*

By Brian Margolies

Two recent federal appellate court decisions, one by a two-judge panel sitting for the Second Circuit in *State of Connecticut, et al., v. American Electric Power Company, Inc., et al.* (September 21, 2009), and the other by three-judge panel sitting for the Fifth Circuit in *Comer v. Murphy Oil U.S.A., et al.* (October 16, 2009), held that public and private entities could proceed with lawsuits based on theories that defendants' greenhouse gas emissions contributed to global

warming. In doing so, both courts reversed lower court decisions holding that such claims presented a non-justiciable political question. While plaintiffs still face significant burdens on issues such as causation, these two decisions may represent a watershed moment for climate change-related litigation.

### History of Global Warming Suits

The *State of Connecticut* and *Comer* lawsuits are two of a

handful of significant global warming suits to have been filed in the United States. Each of these suits alleges that defendants created a public nuisance through their emission of greenhouse gases, primarily carbon dioxide. The *State of Connecticut* lawsuit involves claims by eight states, the City of New York, and three private land trusts, against several coal-burning utility companies. The *Comer*

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## Cinergy Revisited: Indiana Court Addresses Coverage for Clean Air Act Violation

By Brian Margolies

By decision dated October 28, 2009, the Court of Appeals of Indiana reaffirmed that general liability insurers had no duty to defend or indemnify its insured in connection with violations of the Clean Air Act ("CAA"). The decision in *Cinergy Corp v. St. Paul Lines Ins. Co., 2009 Ind. App. LEXIS 2251* (Oct. 28, 2009) is the latest in a series of significant decisions

rendered in this lawsuit, including one by the Indiana Supreme Court in 2007. Given the EPA's recent indications that it will enforce the CAA more aggressively than it was during the previous administration, the latest *Cinergy* decision is of particular interest to insurers, particularly those that issue pollution liability policies.

In 2007, the Indiana Supreme Court held that a federal lawsuit against Cinergy and other power company was not a suit seeking damages for "bodily injury" or "property damage," but rather one seeking injunctive relief in the form of preventing Cinergy and others from further violating the CAA.

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## Global Warming Litigation (cont.)

lawsuit involves a class of homeowners along the Gulf Coast who allege that defendants' emissions of greenhouse gases created the conditions which allowed for the intensity of Hurricane Katrina.

Additionally, in *State of California v. General Motors Corp., et al.*, the State of California sued the automobile industry on the theory that automakers were responsible for products that created significant amounts of greenhouse gases, which in turn, have resulted or will lead to significant environmental impacts and natural resource damages within California. Finally, in *Native Village of Kivalina v. ExxonMobil Corp. et al.*, the Alaskan Village of Kivalina sued the energy industry for having contributed to global warming. The Village alleged that global warming has caused and will continue to cause rising sea levels, which in turn will result in their native village being submerged within the next ten to fifteen years.

In each of the suits, plaintiffs advanced theories of federal common law nuisance or, in the alternative, state common law nuisance. The district courts in each instance held that plaintiffs claims were non-justiciable. Rather, such claims presented political questions involving complex issues of international commerce that could only be resolved through the executive and legislative branches. Additionally, the

district courts in all but the *State of California* lawsuit held that plaintiffs lacked standing to assert their claims.

The State of California appealed the lower court decision to the Ninth Circuit, but later withdrew its appeal, primarily as a result of the financial difficulties of certain automaker defendants. The decision in the *Village of Kivalina* was rendered on September 30, 2009 – just days after the Second Circuit's decision in *State of Connecticut* and two weeks before the Fifth Circuit's decision in *Comer*. Plaintiffs already have announced their intention to appeal in light of the *State of Connecticut* and *Comer* decisions.

### *State of Connecticut and Comer Decisions*

The District Court for the District of Connecticut dismissed the *State of Connecticut* lawsuit on the ground that plaintiffs were asking the court to balance the interest of reducing pollution against the interest of advancing economic concerns, and thus, according to the United States Supreme Court decision in *Baker v. Carr*, presented a non-justiciable political question. The District Court for the Southern District of Mississippi in *Comer* did not issue a written decision, but ruled from the bench that it

could not address the issue of global warming until Congress first enacted legislation setting appropriate standards by which to measure defendants' conduct. Both the Second Circuit and Fifth Circuits reversed, holding that plaintiffs presented justiciable questions and that plaintiffs had standing to bring such claims before an Article III court.

Plaintiffs in *State of Connecticut* do not seek monetary damages, but rather injunctive relief in the form of requiring defendants to regulate their greenhouse gas emissions. The *Comer* plaintiffs are seeking an unspecified amount in compensatory damages for property damage resulting from Hurricane Katrina, as well as punitive damages. The Fifth Circuit acknowledged, however, that it is facially apparent that plaintiffs in *Comer* are seeking an amount in excess of \$5 million. As of the writing of this article, defendants in both suits have not yet announced whether they will seek rehearings *en banc*. Should these matters proceed without reversal, plaintiffs will have the difficult burden of proving causation, and both circuit courts acknowledged as such. Specifically, plaintiffs will need to address how defendants' greenhouse gas emissions can be distinguished from hundreds

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“... these two decisions may represent a watershed moment for climate change-related litigation..”

## Global Warming Litigation (cont.)

of years of greenhouse gas emissions from other sources, including non-industrial, natural sources of carbon dioxide.

### *Impact to the Insurance Industry*

The insurance industry has been aware of the risks associated with global warming for years. While there still may not be a consensus on whether climate change is actually happening, and whether anything can be done to reverse it, the insurance industry already has made no secret that it has incorporated climate change scenarios into its risk-assessment models in order to predict future property and casualty loss. Over the last few years, the insurance industry has taken an active role in addressing climate change issues and has begun to incentivize reduction of greenhouse gas emissions.

Just as alarming to the industry is liability its insureds may face for having contributed to climate change. Nearly every industrial concern is a potential target in such lawsuits, and as such, the exposure, both from defense and indemnity perspective, could be significant. General liability insurers will argue that the pollution exclusion applies to greenhouse gas

claims, as the standard form exclusion applies to “gases” specifically, and “pollutants” more generally, but there is no case law guidance as to whether carbon dioxide released in the ordinary course of business comes within the exclusion. It can be argued that carbon dioxide, which is a natural by-product released from myriad sources, is different than a release of industrial gases more traditionally thought of as falling within the pollution exclusion. Moreover, while the United States Supreme Court held in its 2007 decision in *Massachusetts v. EPA* that carbon dioxide is an “air pollutant” for the purposes of the Clean Air Act, that decision may not have application to the pollution exclusion, as the Clean Air Act ruling was influenced by the definition “air pollutant” which unquestionably included carbon dioxide. In addition to the threshold question of whether carbon dioxide and other greenhouse gases fall within the pollution exclusion, general liability insurers with older “sudden and accidental” pollution exclusions will have to be concerned about coverage in jurisdictions where “sudden and accidental” does not have a temporal element, but rather is defined as “unexpected and unintended.”

Beyond the pollution exclusion, general liability carriers will face issues of whether greenhouse gas emissions are an occurrence, number of occurrences, whether plaintiffs can show property damage as opposed to mere economic loss, and the expected or intended exclusion. Insurers may also rely on the doctrine of loss in progress.

Several of these issues already are being considered in a declaratory judgment action pending in Virginia state court in *Steadfast Insurance Co. v. AES Corp.* Steadfast is seeking an adjudication that it owes no coverage to AES for the *Village of Kivalina* lawsuit. Steadfast has argued that the matter does not allege an occurrence, that carbon dioxide is a “pollutant” and therefore comes within its policies’ pollution exclusions, and that the loss-in-progress doctrine precludes coverage. In its opposition to Steadfast’s motion for summary judgment, AES has argued, among other things, that carbon dioxide is not a pollutant and more significantly, that Steadfast’s underwriters admitted in deposition testimony that they did not understand

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*“Nearly every industrial concern is a potential target ...”*

## Cinergy Revisited (cont.)

Toward this end, the federal government sought relief in the form of requiring the power companies retrofit their facilities with equipment that would reduce future emissions and prevent future environmental harm. The suit also sought recovery of civil fines. The Indiana Supreme Court held that the insureds were not seeking coverage for an occurrence, but rather for installing equipment to prevent a *future* occurrence. As the Court explained, “we discern no ambiguity here that would permit the occurrence requirement reasonably to be understood to allow coverage for damages in the form of installation costs for government-mandated equipment intended to reduce future emissions of pollutants and to prevent future environmental harm.”

Following the Supreme Court’s decision, the matter was remanded to the trial court for further proceedings. The most recent *Cinergy* decision involves the insureds’ arguments that the policies provide coverage for “retrospective remedial measures aimed at remediating environmental harm already caused by

unlawful air emissions,” triggers coverage under their policies. Specifically, the insureds sought coverage for relief awarded in the underlying matter requiring the insureds to shut down several of plants, surrender sulfur dioxide emission allowances, and pay penalties in the amount of \$687,500. While the insureds conceded that installation of equipment to prevent future CAA violations are not covered, they argued that the other relief awarded constituted remedies for past violations and thus qualified for coverage.

The Indiana Appellate Court disagreed. Specifically, the court found that while the trial court in the underlying CAA lawsuit explained that surrendering emissions allowances, and being required to shut down plants, served the purpose of penalizing the power companies for past CAA violations, the real motivation behind such measures was to prevent future CAA violations. Likewise, the court found that because the underlying CAA lawsuit did not involve an occurrence that would

trigger coverage under the general liability policies, coverage was unavailable for the fines awarded in that matter.

The *Cinergy* matter involves general liability policies, since under Indiana law, the total pollution exclusion is considered ambiguous and thus unenforceable. The total pollution exclusion should apply to CAA violations in other states. This defense, obviously, is not available under pollution liability policies. The *Cinergy* decision nevertheless is still relevant to pollution-specific policies, as they arguably provide coverage only for claims or cleanup costs for pollution events that have already happened. From this perspective, the most recent *Cinergy* decision, as well as the prior Indiana Supreme Court decision, provides a strong basis for arguing that any relief awarded under the CAA necessarily relates to preventing future emissions, and therefore does not qualify for coverage.

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*Insurance coverage for costs to prevent CAA violations.*

## Chinese Drywall Update

By Copernicus T. Gaza

In late October 2008, the U.S. Consumer Product Safety Commission, in coordination with the EPA, HUD, CDC, and the ATSDR released a press statement announcing the initial findings of their investigation into the health effects caused by Chinese drywall. While the results are preliminary, the initial findings indicate no significant relationship between Chinese drywall and alleged odors or corrosion.

The CPSC's press release addressed three sets of tests. The first is described as "Elemental and Chemical Testing." This test reportedly confirmed a difference between Chinese drywall and non-Chinese drywall in that the Chinese product contains higher concentrations of strontium and elemental sulfur.

The second set of tests, described as "Chamber Studies," tests emissions from samples of Chinese drywall and non-Chinese drywall. While the studies are not yet complete, preliminary results indicate that Chinese drywall gives off higher rates of volatile sulfur compounds than U.S. made drywall.

The third set of tests, described as "Indoor Air Studies," sampled the indoor air quality of ten homes in Florida and Louisiana for hydrogen sulfide, carbon disulfide and carbonyl sulfide, which are emissions alleged to be responsible for causing odors and corrosion of metallic surfaces. The studies indicate that such gases were either not present in the homes, or only present in limited quantities, thus undermining the

purported link between Chinese drywall and property damage or bodily injury.

The federal studies will continue, with additional findings expected to be announced in late November 2009. Most significantly, the CPSC is expected to announce the result of a comprehensive study of the indoor air quality of fifty (50) homes for whether there is a link between emissions from Chinese drywall and corrosion of metallic surfaces.

While the initial reports indicate no significant link between emissions from Chinese drywall and odors or corrosion, some have questioned the methodology and sample size of the studies, in particular the "Indoor Air Studies." Thus, the impact these studies will have on Chinese drywall suits is uncertain.



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## Global Warming Litigation (cont.)

carbon dioxide to be a pollutant when the policies were first issued. As of the writing of this article, it is not yet clear how the dismissal of the *Village of Kivalina* lawsuit will impact this declaratory judgment action.

General liability policies are not the only types of policies potentially impacted by global warming claims. Pollution policies are obviously at risk, although similar threshold questions must be addressed under such policies; namely, whether long-term carbon dioxide emissions qualify as

a triggering pollution event. Additionally, modern pollution policies typically are written on a claims-made and reported basis and contain retroactive dates requiring that the pollution event commence in its entirety after the retroactive date. Some commentators also have suggested that climate change litigation poses a risk of exposure to directors and officers liability policies.

Should the *State of Connecticut* and *Comer* decisions herald a wave of climate change-related

litigation, the financial consequences to policyholders and insurers could be significant. Accordingly, the pending climate change suits and the declaratory judgment action involving Steadfast and AES warrant close future monitoring. It also bears noting that the courts in *State of Connecticut* and *Comer* both acknowledged that future regulatory action by the executive or legislative branches to regulate greenhouse gas emissions could have the effect of preempting future global warming suits.

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