Class Action Watch

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Global Warming Nuisance Suits Given a Cool Reception in Court

by Megan L. Brown & Roger H. Miksad

For the better part of a decade, courts have confronted several global warming nuisance suits that seek to persuade judges and juries to play a role in assigning responsibility and remedies for alleged harms flowing from climate change. From New York to California, these creative lawsuits have uniformly been rebuffed by trial courts, but they have spawned protracted litigation up and down the federal judiciary over the proper role of courts in setting environmental standards.

At their core, these nuisance cases seek to change the way energy is produced and regulated in this country by requiring private companies to internalize the impacts of activities that produce greenhouse gases, through imposition of compensatory and punitive damages and mandatory judicial emissions caps. Plaintiffs want courts to spur "practical" options such as "changing fuels" and "increasing generation from . . . wind, solar," and other sources that plaintiffs predict will "reduc[e] carbon dioxide emissions without significantly increasing the cost of electricity."[1] To many of them, "Article III resolution is the only viable choice here as the branches of government authorized by Articles I and II of the U.S. Constitution have refused to act."[2]

Although the Supreme Court in *AEP v. Connecticut*[3] closed the courts to certain global warming nuisance suits, key cases remain pending. A class action, *Comer v. Murphy Oil*, was dismissed in 2007 by a court in Mississippi but was refiled and has been dismissed again after *AEP*. It is currently on appeal to the Fifth Circuit. Another case, *Kivalina v. ExxonMobil*, is pending at the Ninth Circuit. These disputes show that there remains continuing uncertainty over key legal questions and that the Supreme Court has not yet had the last word on global warming nuisance suits.

Water Under the Bridge: A Recap of Three Different Cases

American Electric Power (New York)

In *American Electric Power Co. v. Connecticut* ("*AEP*"),[4] several states and land trusts alleged that named energy companies' greenhouse gas emissions constitute a public nuisance under federal common law. Beyond the novel nuisance theory, the case was unusual

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Touching on the Merits When Deciding Class Certification Motions: Ohio's Experience

by Richard A. Samp

The Supreme Court's *Wal-Mart* decision[1] put to rest persistent arguments that federal courts, when deciding whether to certify a class, should accept (without further proof) some or all of the allegations in the plaintiffs' complaint. The Court made clear that "Rule 23 does not set forth a mere pleading standard" and that a plaintiff seeking class certification "must be prepared to prove" that he has met the Rule 23 prerequisites, regardless whether such proof ends up duplicating questions of fact or law that he will need to demonstrate in order to prevail on the merits.[2]

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EDITOR

The Federalist Society publishes *Class Action Watch* to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

Use of Expert Testimony at the Class Certification Stage After *Wal-Mart v. Dukes*

by Stephen J. Newman

The United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[1] sent a strong message to federal courts to look skeptically at class certification orders sought by plaintiffs' counsel. Many questions remain, however, as to how the opinion should be applied, and what "rigorous analysis"[2] of the class certification elements entails. In particular, the lower courts have not yet fully resolved how expert testimony and statistical proof should be considered. Further clarity from the Court may yet be required to ensure that lower courts follow the message intended to be sent by the *Wal-Mart* decision: that the lower courts enforce all the requirements of Rule 23, and ensure that competent evidence supports whatever conclusions are drawn during class certification proceedings.

Wal-Mart involved the largest employment class action in history—1.5 million female employees of the national retailer who allegedly were denied equal pay or access to promotions as a result of Wal-Mart's practice of giving individual managers substantial discretion in pay and promotion decisions.[3] According to plaintiffs, even though Wal-Mart prohibited discrimination as a matter of company policy, as a practical matter women were still disadvantaged because statistical evidence showed that women were paid less and were less likely to be promoted, and that "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."[4] The Supreme Court ordered reversal of the class certification order on the grounds that it did not comply with Federal Rule of Civil Procedure 23(b) or Rule 23(a)(2). All Justices agreed that claims for monetary relief may not be certified under the lower standard set forth in Rule 23(b)(2) ("the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"), on the grounds that whenever individualized monetary relief is sought, the proponent of the class must prove what is required under Rule 23(b)(3): that common issues predominate over individual ones and that class litigation is superior to other forms of dispute resolution.[5]

The Court split 5-4 on the proper standard for analyzing whether the class satisfied the requirement of Rule 23(a)(2) that "there are questions of law or fact common to the class." Writing for the Court, Justice Scalia found that the liability theory was simply too broad to be asserted on a common basis:

> Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[6]

The plaintiffs had relied heavily on both anecdotal evidence and statistics showing that women did not fare as well as men under Wal-Mart's discretionary system, but the Court determined that the evidence did not sufficiently tie the outcome of Wal-Mart's processes to any common source of unfairness.[7] Quoting Judge Alex Kozinski's dissent in the Ninth Circuit, the Supreme Court's opinion noted that Wal-Mart's female employees

> held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. . . .

> Some thrived while others did poorly. They have little in common but their sex and this lawsuit.[8]

The Supreme Court also criticized the district court's and the Ninth Circuit's uncritical acceptance of plaintiffs' statistical proof without determining whether it met the *Daubert* standard for admissibility of expert or scientific testimony.[9] However, the Supreme Court did not base its decision on the *Daubert* issue and did not explain how competing expert testimony should be evaluated at the class certification stage.[10]

Before *Wal-Mart*, the Third Circuit was a leading proponent of aggressive review of expert testimony presented at the class certification stage.[11] It has continued to follow this approach: "Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."[12] The Seventh Circuit agrees that careful evaluation of the expert testimony is critically important to protect both sides' rights at the class certification stage.[13] The Ninth Circuit also recognizes now, contrary to its pre-*Wal-Mart* rulings,[14] that at the class certification stage, "[u]nder *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable."[15] Moreover, the trial court may not cease its analysis after it finds that the class proponent's evidence of commonality (or another certification element) is admissible under *Daubert*.[16] Rather, a fair reading of the Third, Seventh, and Ninth Circuit case law suggests that when both the proponent and the opponent of the class tender admissible expert testimony that is relevant to one of the class certification elements (such as commonality or typicality), the trial court must determine which testimony is more persuasive, recognizing that the proponent of the class has the burden of proof.

The Eighth Circuit, by contrast, approved use of a "tailored" *Daubert* analysis in *In re Zurn Pex Plumbing Product Liability Litigation*.[17] *Zurn* involved a claim that certain plumbing fittings had design defects dooming them to fail before the end of their warranted life, and plaintiffs presented testimony about tests designed to show the rate of deterioration in the fittings as well as the statistical likelihood of failure. Defendants unsuccessfully objected to this testimony as scientifically unpersuasive, and on appeal the Eighth Circuit upheld an order certifying a class consisting of all homeowners who had installed the plumbing fittings, whether or not they had leaked. In permitting a less stringent application of *Daubert*, the Eighth Circuit explained that because the primary goal of *Daubert* is to prevent a jury from being misled by junk science, *Daubert* is less significant in class certification proceedings, where the decision is made solely by the judge.[18] Critically, the *Zurn* defendant did not offer its own experts who performed their own analysis, but merely challenged the data and techniques relied upon by the plaintiffs, and this litigation decision at the district court level may have affected the outcome.[19] The *Zurn* approach, if followed widely, may create a significant escape route from *Wal-Mart*'s directive that all certification elements be subject to rigorous scrutiny.[20]

One example of a district court apparently straining to avoid the implications of *Wal-Mart* is *Gray v. Golden Gate National Recreation Area*, where the Northern District of California certified a single class consisting of those who "use wheelchairs, scooters, crutches, walkers, canes, or similar devices to assist their navigation" and "those who due to a vision impairment use canes or service animals for navigation," to pursue claims under the Federal Rehabilitation Act.[21] Plaintiffs claimed a large number of barriers to access to public facilities, ranging from steep slopes on hillsides, to lack of Braille or audio exhibit descriptions, to lack of wheelchair access to beaches. The district court declined to apply *Wal-Mart*'s warnings about the need to employ rigorous scrutiny to determine whether the litigation may resolve common questions (such as, what does someone who uses a seeing-eye dog because she cannot see have in common with someone who uses a wheelchair because he cannot walk?), and found that *Wal-Mart* had little application beyond the employment context.[22] On reconsideration, the district court found that *Ellis* did not meaningfully change the law or require more careful analysis of the plaintiffs' expert testimony under *Daubert*.[23]

In *Cholakyan v. Mercedes-Benz, USA, LLC,* by contrast, the Central District of California recognized that *Wal-Mart* and *Ellis* did effect a significant change in how expert testimony must be considered at the class certification stage.[24] In *Cholakyan*, the plaintiff attempted to certify a class of Mercedes vehicle owners who suffered water leakage problems. After considering both sides' expert testimony, the district court concluded that there was no single source of potential water leakage common to the proposed class, as there was no single "water management system" in the vehicles in the proposed class. Rather, there were multiple systems that worked differently in different vehicles, and the plaintiff's expert failed to present any reliable evidence of any common flaw leading to leakage similar to what the plaintiff experienced.[25]

The *Daubert* question remains a critical one for practitioners, and specific guidance from appellate courts may be necessary to ensure that trial courts do not evade *Wal-Mart* by failing to address challenges to class proponents' expert testimony. For a defendant to receive due process at a class certification hearing, its evidence must be considered and the district court must not disregard its duty to determine which of the contradictory, but nevertheless admissible, evidence should be credited. (And the Seventh Circuit recognized in *Messner* that this rule also protects plaintiffs when their expert testimony is based on superior science.) The danger still remains in many jurisdictions, in spite of helpful authority from the Supreme Court, that lower courts will permit improper "delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert," without fully examining which side's expert presentation adheres more closely to reliable scientific techniques.[26]

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Endnotes

1 131 S. Ct. 2541 (2011).

2 *Id.* at 2551 (quoting General Telephone Co. v. Falcon, 457 U.S. 147, 160 (1982), and Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)).

3 *Id.* at 2548.

4 *Id.*

5 *Id.* at 2557-61. The Court did not address when certification of monetary relief claims would be appropriate under Rule 23(b)(1), which often is used when monetary claims may exceed a common fund, other than to reference its previous opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). *Wal-Mart*, 131 S. Ct. at 2558 n.11.

6 *Id.* at 2552.

7 *Id.* at 2555.

8 *Id.* at 2557.

9 *Id.* at 2553-54. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), interprets Federal Rule of Evidence 702 and holds that even though scientific theories need not be "generally accepted" by experts in the field before being presented in court, judges nonetheless must exclude expert testimony that is not reliable, taking into account such factors as whether the theory presented is testable and/or has been tested, whether it has been accepted in peer-reviewed publications, and what error rate is associated with any practical applications of the theory.

10 *Wal-Mart*, 131 S. Ct. at 2554; *see also* Boden v. Walsh Group, No. 06 C 4104, 2012 WL 1079893, at *6 (N.D. Ill. Mar. 30, 2012) (expressing uncertainty as to what sort of statistical or anecdotal proof would satisfy the *Wal-Mart* standard; certification denied as to certain classes but granted as to one); Peterson v. Seagate U.S., LLC, 809 F. Supp. 2d 996, 1008-09 (D. Minn. 2011) (noting that Supreme Court in *Wal-Mart* evaluated relevance of expert testimony, and partially excluding expert testimony in connection with decertification motion).

11 *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2009).

12 Gates v. Rohm & Haas Co., 655 F.3d 255, 269 (3d Cir. 2011) (quoting *Hydrogen Peroxide*, 552 F.3d at 323).

13 *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812-13 (7th Cir. 2012) (vacating denial of class certification order because district court failed to rule on plaintiffs' *Daubert* challenge); American Honda Motor Co. v. Allen, 600 F.3d 813, 816-17 (2010) (reversing class certification order because district court failed to conduct a proper *Daubert* analysis).

14 *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 602-03 (9th Cir. 2010) ("At the class certification stage, it is enough that Dr. Bielby presented scientifically reliable evidence tending to show that a common question of fact . . . exists with respect to all members of the class."), *rev'd*, 131 S. Ct. 2541 (2011); *see also In re* Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 616 (N.D. Cal. 2009) ("At the class certification stage of the proceedings, 'robust gatekeeping' of expert evidence is not required . . . .") (internal quotation omitted).

15 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011).

16 *Id.*; *see also* Sher v. Raytheon Co., 419 Fed. Appx. 887, 888 (11th Cir. 2011) (vacating the district court's order granting class certification, and stating that the "district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony presented by the parties at the class certification stage").

17 644 F.3d 604, 612 (8th Cir. 2011), *pet. for cert. filed*, No. 11-740 (U.S. Dec. 15, 2011).

18 *Id.* at 613-14.

19 *Id.* at 615. The Western District of Washington declined to apply a full *Daubert* analysis in *Fosmire v. Progressive Max Insurance Co.*, 277 F.R.D. 625, 628-29 (W.D. Wash. 2011), noting that the Supreme Court's dicta in *Wal-Mart* left open the possibility of a more lenient approach, such as that described by the Eighth Circuit in *Zurn*. Even so, the *Fosmire* court found that the plaintiff's expert was unreliable under any standard. A similar result was reached in *Bruce v. Harley-Davidson Motor Co.*, No. CV 09-6588 CAS (RZx), 2012 WL 769604, at *4-*5 (C.D. Cal. Jan. 23, 2012), where a class certification motion was denied without prejudice, in part because the plaintiffs' expert report was found not to comply with the *Zurn* standard. The *Bruce* court also noted its belief that *Zurn* is consistent with *Ellis*. *Id.* at *4 n.7 ; *see also* Stone v. Advance Am., 278 F.R.D. 562, 566 n.2 (S.D. Cal. 2011) (conducting a "full" *Daubert* analysis because discovery was complete and expert reports had been exchanged, but noting that *Zurn* might be appropriate in cases at a less "advanced" stage).

20 *See* Lumen v. Anderson, No. 08-0514-CV-W-HFS, 2012 WL 444019, at *9 & n.8 (W.D. Mo. Feb. 10, 2012) (citing *Zurn* in support of decision to deny *Daubert* motion before briefing on it was complete). It is also worth remembering that *Wal-Mart* only binds federal courts, and to the extent removal to federal court under the Class Action Fairness Act is not possible, pre-*Wal-Mart* standards may apply in state-court certification proceedings. *See, e.g.,* Howe v. Microsoft Corp., 656 N.W.2d 285, 295-96 (S.D. 2003) ("As long as the basis of the expert's opinion is not so blatantly flawed that, on its face, it would be inadmissible as a matter of law, the court may consider the expert's evidence in determining whether to certify the class action.").

21 No. C 08–00722 EDL, 2011 WL 7710257 (N.D. Cal. Aug. 30, 2011), *reconsideration denied*, 2011 WL 5573466 (Nov. 15, 2011), *pet. for leave to appeal denied*, No. 11-80287 (9th Cir. Feb. 17, 2012).

22 2011 WL 7710257, at *18-*20.

23 2011 WL 5573466 at *11.

24 No. CV 10–05944 MMM (JCx), 2012 WL 1066755, at *4-*5 (C.D. Cal. Mar. 28, 2012).

25 *Id.* at *13-*15.

26 *See* West v. Prudential Secs., Inc., 282 F.3d 935, 938 (7th Cir. 2002).

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Of course, state courts do not necessarily follow the U.S. Supreme Court's lead on certification issues, and some have been reluctant to permit defendants to seek to defeat class certification by contesting questions of fact or law that relate directly to the merits of the plaintiff's claims. Ohio is one such state; but an interesting case—in which a petition for review has been filed in the Ohio Supreme Court—provides an opportunity for Ohio to decide whether to bring its class certification rules into conformance with federal rules.

The case involves a claim by an auto insurance policy holder, Michael Cullen, that his insurer should have paid to replace his car windshield rather than to repair it. In general, insurers give their policy holders the right to insist upon replacement of a damaged windshield. However, many insurers (including the defendant, State Farm Mutual Automobile Insurance Co.) attempt to persuade their insureds to agree to repair windshields that have experienced very minor damage, such as small cracks caused by a stone. State Farm persuaded Cullen to opt for windshield repair instead of replacement, by assuring him that repair was as effective as replacement for very small cracks and by agreeing to pay for the repair in full (i.e., it waived the $250 deductible on Cullen's policy). Cullen never complained about the quality of the repair and continued to drive the same car with the same windshield for many years thereafter.

Cullen later sued State Farm, claiming breach of contract, bad faith, and breach of fiduciary duty. He contended that his insurance contract gave him the option to demand a cash payment equal to the cost of replacing his windshield (less his deductible) and then decide for himself whether to repair or replace his windshield or simply to retain the payment. He further contended that State Farm inappropriately failed to inform him of this "cash out" option, and that he would have chosen that option if it had been offered to him. Because replacement of a windshield costs more than repair, he contends that he would have derived a financial benefit (even taking into account his $250 policy deductible) if he had exercised the "cash out" option and paid for the repairs himself.

In September 2010, the trial court granted Cullen's motion to certify a plaintiff class under both Ohio Rule of Civil Procedure 23(B)(2) and Rule 23(B)(3). The 100,000-member certified class comprises all Ohio policy holders insured by State Farm who, at any time after January 1, 1991, submitted a "glass-only" damage claim (i.e., no damage to the car other than to the windshield) that was resolved by payment of the cost of repairing the windshield. In determining that the prerequisites for certification had been met, the trial court relied in several respects on the allegations of the complaint without requiring additional proof from the plaintiff. The Ohio Court of Appeals affirmed the certification order in December 2011.[3] State Farm petitioned for Supreme Court review on March 30, 2012.

The wording of Ohio Rule 23 is substantially identical to the Federal Rule 23. Indeed, the Ohio Supreme Court has repeatedly counseled Ohio courts to look to federal authority for guidance in understanding and applying the Ohio rule.[4] Ohio courts nonetheless have often declined to permit defendants to oppose class certification by introducing evidence that goes to the merits of the plaintiffs' claims, even when the evidence is relevant to whether the prerequisites of Ohio Rule 23 have been met.[5] The appeals court expressed similar reluctance in its opinion affirming class certification.[6] State Farm's petition for review asks the Ohio Supreme Court to reconsider that position in light of the *Wal-Mart* decision.

The trial court declined to require the plaintiff to present evidence on several issues relevant to whether common questions of fact and law predominate over individual issues. For example, State Farm presented evidence indicating that it would be impossible to determine in advance of trial who was a member of the plaintiff class. That difficulty arises because the class definition is limited to policy holders who suffered a loss under the plaintiff's theory of the case (i.e., policy holders who could have pocketed cash had they asked to be paid the cash value of a replacement windshield). Policy holders whose deductible exceeded the cash value of a replacement windshield are, accordingly, not included within the class. State Farm presented evidence that the cash value of a replacement windshield varies significantly from class member to class member, based on such factors as car make and model, geographic location, and market conditions at the time of replacement. But the trial and appeals courts simply accepted the plaintiff's allegation (without supporting evidence) that "a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible can be accomplished without trying the issues of the case and can be done in a straight forward, mechanical manner."[7] The courts similarly concluded, based on the plaintiff's allegations, that "computerized algorithms and State Farm's databases" would be sufficient to allow damages of each class member to be calculated accurately."[8] The only evidence submitted to the trial court regarding damage calculations came from State Farm, whose evidence tended to show that its databases did not include sufficient information from which to calculate the damages of individual class members.

State Farm also argues that the appeals court erred in failing to address the legal issue at the heart of the dispute: whether State Farm policies really do offer policy holders a "cash out" option. The plaintiff asserts a contractual right to a cash payment of several hundred dollars (the cost of replacing his windshield less his deductible) to pay the $25 to $50 necessary to have the scratch on his windshield repaired, and then to pocket the difference. State Farm argues that the plain meaning of its policies is that it is only required to pay the amount necessary to return the car to its pre-loss condition (in this case, the cost of windshield repair). The appeals court held that the contractual interpretation issue was a merits-based issue of law that should only be determined at trial or in connection with a motion for summary judgment.[9] State Farm contends that the issue should be determined in connection with class certification because if State Farm policies are not deemed to include a "cash out" option, then the class will not meet the prerequisites of Ohio Rule 23(B)(3); under those circumstances, common questions of fact and law would not predominate over individual questions.

The Ohio appeals court does not stand alone in concluding that merits-based contractual interpretation issues should not be decided in connection with class certification motions even when relevant to Rule 23(B)(3) issues. Indeed, a number of federal appeals courts have reached similar conclusions. Both the Ninth and Seventh Circuits have reasoned—in the context of securities fraud claims seeking class certification based on a fraud-on-the-market theory—that a ruling on a merits-based issue should always be deferred to trial if the issue is capable of being decided on a class-wide basis, regardless whether the issue is relevant to Rule 23(b)(3) "predominance."[10] Those decisions conflict with decisions from several other federal appeals courts, and the Ninth Circuit decision is the subject of a pending certiorari petition.[11]

The Ohio appeals court's decision to defer until trial a ruling on the meaning of State Farm's standard insurance contract is at least arguably in conflict with the principles of *Wal-Mart*. Its decision not to look behind other allegations of the complaint at the class certification stage indisputably conflicts with the principles of *Wal-Mart*. State Farm's petition thus presents an opportunity for the Ohio Supreme Court to determine whether Ohio Rule 23 is more than a mere pleading standard and requires plaintiffs seeking class certification to introduce evidence affirmatively demonstrating that they satisfy each of the Rule 23 requirements. In light of the dangers of inappropriate class certification—including the pressure that defendants face to settle even the most insubstantial of class actions—some observers say that review by the Ohio Supreme Court is fully warranted.

** Richard A. Samp is Chief Counsel of the Washington Legal Foundation (WLF), a nonprofit public interest law firm located in Washington, D.C. WLF submitted an amicus brief with the Ohio Supreme Court in support of the petition for review.*

Endnotes

1 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

2 *Id.* at 2551.

3 Cullen v. State Farm Mut. Auto. Ins. Co., 2011 WL 6780177 (Ohio App. 8 Dist.), 2011-Ohio-6621.

4 Marks v. C.P. Chemical Co., 31 Ohio St.3d 200, 201 (1987).

5 *See, e.g.,* Ojalvo v. Bd. of Trustees, 12 Ohio St. 230, 233 (1984).

6 *Cullen* at ¶ 55 (A finding that "goes to the heart of the merits of the case" is "inappropriate" in connection with a ruling on a class certification motion.).

7 *Id.* at ¶ 34.

8 *Id.* at ¶ 36.

9 *Id.* at ¶ 55.

10 Conn. Ret. Plans & Trust Funds v. Amgen, Inc., 660 F.3d 1170 (9th Cir. 2011); Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010).

11 U.S. Sup. Ct. No. 11-1085.

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because of the remedy sought. In lieu of damages, the plaintiffs asked a federal judge to order a handful of energy companies operating in twenty states to "abate" their alleged "contribution[s]" to global warming "by requiring [them] to cap [their] carbon dioxide emissions and then reduce them by a specific percentage each year for at least a decade."[5] The Southern District of New York concluded that the request presented a non-justiciable political question under *Baker v. Carr*[6] because, among other things, determining what level of emissions is "reasonable" would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests."

On appeal, the Second Circuit reversed on the political question doctrine and found that the case could proceed without running afoul of constitutional or prudential standing doctrines. It also concluded that federal common law provided a cause of action for nuisance and that such a claim had not been displaced by the Clean Air Act or EPA action.

After rehearing was denied, the energy companies petitioned the Supreme Court to reverse the Second Circuit, presenting a variety of bases to dispose of the lawsuit. The Obama Administration participated in the case on behalf of a defendant, the Tennessee Valley Authority, but avoided the justiciability questions by urging the Court to remand to the Second Circuit for reconsideration of the displacement arguments based on EPA action undertaken since the appellate panel's opinion.

The Supreme Court granted certiorari and, in a unanimous opinion written by Justice Ginsburg, held that the plaintiffs' claims could not proceed. The Court reasoned that Congress, in the Clean Air Act, had displaced any federal common law nuisance claim that might exist related to greenhouse gas emissions. The Court explained that "[t]he judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted."[7] As to the other arguments presented by the energy companies and their amici, the court remained split 4-4 (as a result of Justice Sotomayor's recusal) as to whether plaintiffs had Article III standing in the first place. The Court also noted that it had nothing to say about whether the plaintiffs' state law claims were preempted by the Clean Air Act as the issue had not been briefed.

Comer I (Mississippi)

A second major global warming suit has been litigated within the Fifth Circuit. In 2007, a class of Mississippi residents filed a lawsuit in the Southern District of Mississippi against more than thirty energy companies seeking damages from Hurricane Katrina, which plaintiffs alleged was intensified by global warming (*Comer I*).[8] The *Comer I* plaintiffs argued that energy companies' emissions over many decades contributed to global warming and constituted a nuisance that worsened the hurricane's ferocity, causing severe damage for which the energy companies should be held responsible. The district court in Mississippi concluded that the case was nonjusticiable due to a lack of standing, and the class appealed.

A three-judge panel of the Fifth Circuit reversed the district court and issued an opinion that would have permitted the case to proceed. Unusual appellate proceedings followed. Despite a number of recusals, the Fifth Circuit agreed to rehearing en banc and vacated the panel opinion. But in the middle of en banc briefing, the Fifth Circuit dismissed the appeal for lack of quorum after an additional recusal. The court concluded that it lacked jurisdiction to take action on the appeal but that the vacatur was valid because the court had a quorum at the time of the decision to hear the case en banc. The plaintiffs chose not to seek certiorari and instead sought mandamus from the Supreme Court, which denied the petition, leaving the dismissal in place. Thus, the district court's opinion that the case was nonjusticiable remained controlling. As described below, the plaintiffs refiled their

claims under state law on May 27, 2011 in the Southern District of Mississippi,[9] seeking to maintain their suit after the earlier disposition of their case and the outcome of *AEP*.

Kivalina (California)

The Ninth Circuit is home to a third major global warming suit. In 2008, the Alaskan Native Village of Kivalina sued ExxonMobil Corp[10] and dozens of other energy companies in the Northern District of California, seeking hundreds of millions of dollars in damages due to the erosion of the village's land, which was allegedly precipitated by global warming. Similar to *Comer I*, the district court found the case nonjusticiable, and the plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit put the case on hold while *AEP* was considered by the Supreme Court, and after that decision, lifted its stay. Supplemental briefing was filed on the effect of *AEP*, and a panel heard argument in *Kivalina* on November 28, 2011. The panel will consider the Supreme Court's guidance about whether cases seeking to assign responsibility for and limit global warming are properly maintained in federal court.

The Recent Dismissal of *Comer II* Confirms *AEP* Is a Serious Obstacle

Though the unanimous decision in *AEP* was seen by many as a repudiation of global warming nuisance litigation, it has not ended pending lawsuits. To the contrary, litigation continues over *AEP*'s meaning and effect. So far, only one of the lower courts has had occasion to apply the *AEP* decision.

In 2011, the *Comer* plaintiffs returned to court with a very similar state law class action against an even larger pool of more than ninety named defendants (*Comer II*). Filed prior to the *AEP* opinion, the plaintiffs attempted to avoid the difficult question whether federal common law provides a cause of action for nuisance in the global warming context. This time the plaintiffs focused on state law causes of action, barely mentioning their original federal common law claims, and they substantially toned down their language about political inaction on global warming. The complaint also added claims based on strict liability and conspiracy.[11] Finally, the complaint embraced an issue explicitly left unaddressed by the *AEP* Court, by seeking a declaratory judgment that federal law does not preempt the state law claims.

The district court in March 2012 found that the litigation was barred by the court's prior decision in *Comer I* under the doctrines of res judicata and collateral estoppel and that the new issues did not save the case.[12] However, "out of an abundance of caution," the district court once again explored the various claims and provided additional rationales as to why the case fails. In doing so, the district court was mindful to address the discussions in *AEP* regarding standing, political question, and preemption.

On the question of standing, the district court reiterated its original conclusion that Article III's requirements were not satisfied. Though half of the evenly divided *AEP* Court would have found that the states had standing in that case, here the district court relied on the Supreme Court's statement that it "had not yet determined whether private citizens . . . could file lawsuits seeking to abate out-of-state pollution" and held that, as private citizens, the plaintiffs did not have standing.

With respect to the political question doctrine, the district court relied on *AEP*'s logic to hold that the case was barred. Though the Supreme Court did not find the suit in *AEP* barred, it made plain its discomfort with the enterprise the plaintiffs sought to foist upon the courts. The Supreme Court found it "altogether fitting that Congress designated an expert agency, here, EPA," to regulate greenhouse gases. Unlike the agency, "[j]udges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located." The *Comer II* district court further took to heart the Supreme Court's observations, concluding that "if the . . . plaintiffs [are] dissatisfied with the outcome of the EPA's rulemaking, they should seek review from the Court of Appeals"[13] on direct review of agency action, and not judicial intervention in the first instance.

Further, while recognizing that *AEP* did not address federal preemption of state law claims, the district court relied on the logic of *AEP*'s federal displacement holding to support its reasoning that the plaintiffs' "entire lawsuit [was] displaced by the Clean Air Act," in the same manner as the CAA displaces federal nuisance claims.

The district court provided additional reasons why the case fails, thus making it difficult for the plaintiffs to prevail before another panel of the Fifth Circuit. The court applied the Mississippi statute of limitations to conclude that the litigation in *Comer I* did not toll the statute of limitations. The court rejected the plaintiffs' theory that defendants' contributions to global warming constitute a continuing tort that vitiates the statute of limitations bar due to the alleged ongoing effects of their property damage such as increased insurance rates. Finally, the court explained that the plaintiffs cannot establish that

there is proximate cause to support their theory, so they fail to state a claim. Fifth Circuit Judge W. Eugene Davis explored this issue in his special concurrence to the vacated panel opinion, in which he stated that he would affirm the district court's opinion as "plaintiffs failed to allege facts that could establish that the defendant's actions were a proximate cause of the plaintiffs' alleged injuries."[14] The district court's development of this multiplicity of legal issues constitutes strong headwinds against the plaintiffs' appeal, which was docketed April 17, 2012.[15]

Looking Ahead, Several Questions Remain Unanswered

Courts Must Apply AEP *'s Guidance on Displacement*

Kivalina had been fully briefed in the Ninth Circuit and was on hold pending the decision in *AEP*. In supplemental briefs, the parties contest the scope and meaning of the decision. Among other things, the plaintiffs argue that *AEP* does not compel displacement of their damages claims because "the substance of a public nuisance claim for damages fundamentally differs from the substance of a public nuisance claim for injunctive relief."[16] The plaintiffs assert that *AEP* turned on the fact that "'[t]he [CAA] itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law.'"[17] From this vantage point, they argue "[t]hat is not the situation here: the CAA has no parallel remedy of damages for economic injury, nor would pollution victims' ability to sue for damages disrupt EPA's ability to set emissions caps."[18] In plaintiffs' view, *AEP* does not displace their suit.

The defendants take the opposite view, arguing that "[j]ust as in *AEP*, plaintiffs' claims would require a court to 'determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable'—an exercise in 'complex balancing' that would require consideration of the 'particular greenhouse gas-producing sector' at issue (e.g., the oil, coal, electric, or other industries), and an 'informed assessment of competing interests,' including 'our Nation's energy needs and the possibility of economic disruption.'"[19] As such, damages claims are just as much displaced as injunction claims based on the same activities. At oral argument late last year, the panel inquired about the meaning of the *AEP* decision, and pressed counsel about its impact.

AEP will also figure prominently in the appeal docketed in *Comer II*. Just as the plaintiffs in *Kivalina*, the *Comer* plaintiffs will have to convince the Fifth Circuit that *AEP* does not bar their class action suit seeking damages. They also have to navigate the lower court's adverse decisions on a variety of issues. In addition to the justiciability issues addressed below, plaintiffs will have to overcome the district court's application of res judicata, as well its more robust statements about the lack of proximate cause, which in the previous appeal was compelling to at least one member of the panel. Further complicating the plaintiffs' path at the Fifth Circuit is the issue of recusals, which is what made the en banc proceedings so unusual in the first place.

Core Justiciability Questions Remain Unresolved.

Comer II and *Kivalina* will also turn on core questions of standing and the political question doctrine, which the Supreme Court avoided in *AEP*. Given the continued push by the plaintiffs and advocates to have global warming nuisance claims adjudicated notwithstanding *AEP*, these questions remain ripe for resolution. The Supreme Court's standing analysis in *Massachusetts v. EPA* arguably was unique to the statutory scheme of administrative review relied on by the plaintiffs. In *AEP* the Court did not reach the issue, noting that the Justices were split 4-4 on the standing issue and the meaning of *Massachussets v. EPA*. The four Justices who would have found standing also were unpersuaded by other threshold issues like prudential standing.

The district courts in *Kivalina* and *Comer II* readily concluded that the plaintiffs lacked standing and presented political questions, so the courts of appeal will likely grapple with justiciability. An earlier panel of the Fifth Circuit concluded that the plaintiffs' first nuisance claims survived these threshold justiciability hurdles, but that was before the Supreme Court's guidance in *AEP*, in which four Justices quite clearly expressed the view that threshold issues are fatal to such claims. The courts of appeals will have to make sense of that 4-4 split and what it might mean for the pending cases.

Courts Will Grapple with Preemption of State Nuisance Claims.

Also up for judicial consideration is preemption of state nuisance claims for global warming, which were included in the *Comer II* and *Kivalina* complaints. The Supreme Court clearly stated in *AEP* that "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand."[20] The *Kivalina* plaintiffs argue that their "state common law nuisance claims are not before [the Ninth Circuit] because the district court dismissed them without prejudice to re-filing in state court."[21] Only the district

court in *Comer II* directly confronted state nuisance claims and concluded that federal law displaced those claims. This was bolstered by the court's application of the Fifth Circuit's "transactional test" for res judicata, under which the court found that the plaintiffs' attempt to invoke different state causes of action could not avoid the court's prior decision based on federal law.

Conclusion

Creative global warming nuisance suits have been pressed in federal courts for almost a decade, heeding the call for "heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories."[22] These cases have been brought in venues as different as Mississippi and Manhattan, framed as class actions and on behalf of individual States. They have relied on federal and state common law theories, and have alternatively sought damages and injunctive relief. But regardless of the form, theory and venue, one thing has been consistent: every trial court to confront such a suit has found it to be beyond the court's institutional competence and constitutional capacity.

Nonetheless, litigation continues because numerous doctrinal questions—from the demands of Article III standing to the meaning of the Supreme Court's displacement analysis in *AEP*—remain unresolved. These suits offer plaintiffs the possibility of enormous monetary recoveries, punishing discovery, and the opportunity to continue to pressure an industry in political debates over greenhouse gas regulation. As a result, litigation will continue, and the Supreme Court is likely to be called upon again to address the proper role, if any, of federal courts in addressing global warming.

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Endnotes

1 Complaint ¶ 5, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. July 21, 2004), *quoted in* Am. Elec. Power v. Connecticut, 582 F.3d 309, 317 (2d Cir. 2009).

2 Third Amended Complaint at ¶ 18 n.13, Comer v. Murphy Oil Co., No. 1:05-cv-00436 (S.D. Miss. Apr. 19, 2006). These allegations are not in the more recent complaint filed in 2011.

3 131 S. Ct. 2527 (2011).

4 Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

5 Complaint ¶ 186, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. July 21, 2004).

6 369 U.S. 186 (1962).

7 *AEP,* 131 S. Ct. 2527, 2540 (2011).

8 Comer v. Murphy Oil USA, Inc., No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated on grant of reh'g en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

9 Comer v. Murphy Oil USA, Inc., No. 1:11-cv-00220 (S.D. Miss. May 27, 2011).

10 Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. 2010).

11 Complaint at ¶¶ 36, 41, Comer v. Murphy Oil USA Inc., No. 1:11-cv-00220 (S.D. Miss. May 27, 2011).

12 Comer v. Murphy Oil USA, Inc., 2012 WL 933670 (S.D. Miss. Mar. 20, 2012).

13 *Id.* at 26.

14 Comer v. Murphy Oil USA, 585 F.3d 855, 880 (5th Cir. 2009).

15 Comer v. Murphy Oil USA Inc., No. 12-60291 (5th Cir. 2012).

16 Kivalina Supp. Br. at 4 (Dkt. 158, filed Nov. 4, 2011).

17 Kivalina Supp. Br. at 7 (Dkt. 158, filed Nov. 4, 2011) (quoting *AEP*, 131 S. Ct. at 2538).

18 Appellants' Supp. Br. at 7, *Kivalina* (Dkt. 158, filed Nov. 4, 2011).

19 Appellees' Supp. Br. at 4, *Kivalina* (Dkt. 157, filed Nov. 4, 2011).

20 *AEP*, 131 S. Ct. at 2540.

21 Appellant's Supp. Br. at 1 n.2, *Kivalina* (citing *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, 882-83 (N.D. Cal. 2009), and arguing that there can be no res judicata effect against those claims).

22 Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591, 626-27 (2008).

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