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RECENT DEVELOPMENTS IN INSURANCE COVERAGE LITIGATION

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I. RECENT DEVELOPMENTS IN A POST-SANDY WORLD

A. *Introduction*

Superstorm Sandy struck the United States with a liquid fist on October 29, 2012. Sandy devastated the Mid-Atlantic region and affected at least twenty-four states with gale-force winds and heavy rains that reached far inland, causing flooding and blizzard conditions in West Virginia. The storm caused severe and widespread destruction of property in New York, New Jersey, and other states, leaving millions without power or transportation. Even before landfall, the storm caused major disruptions as a result of preparedness actions taken across the East Coast, including mandatory evacuations; suspension of mass transit systems; flight cancellations; and closures of airports, businesses, and entertainment venues—even the New York Stock Exchange. Sandy was the second costliest storm in history, causing $65 billion in economic losses.[1]

When companies turned to their insurance in the wake of Sandy, many were unpleasantly surprised when they did not receive prompt and complete insurance benefits for property damage, business interruption, and other losses. Recent case and legislative developments in the wake of Sandy may assist insureds when the next storm strikes.

B. *Case Law and Proposed Legislation Addressing Causation Issues*

First-party property insurance policies generally cover "physical loss of or damage to" insured property that results from a covered cause of loss. "Windstorm," which encompasses storms such as Sandy, is typically a covered cause of loss. The current standard form Insurance Services Organization (ISO)[2] Standard Property Policy covers "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss."[3] "Covered Causes of Loss" expressly include "Windstorm or Hail."[4] In addition to insuring covered property, many property policies provide so-called time element coverages, including business interruption coverage, which reimburses the insured for its loss of earnings or revenue resulting from covered property damage. The current standard form, ISO

1. *See* AON BENFIELD, ANNUAL GLOBAL CLIMATE AND CATASTROPHE REPORT IMPACT FORECASTING—2012, at 3 (Jan. 24, 2013), *available at* http://thoughtleadership.aonbenfield.com/Pages/Home.aspx?ReportYear=2013 ("Hurricane Sandy was the costliest single event of the year causing an estimated USD28.2 billion [sic] insured loss for Sandy, combining private insurers and government-sponsored programs, and approximately USD65 billion [sic] in economic losses across the United States, the Caribbean, the Bahamas, and Canada. These losses remain subject to change.").

2. ISO is an insurance industry organization whose role is to develop standard insurance policy forms and to have those forms approved by state insurance commissioners.

3. CP 00 99 10 12 (2012), sec. A.

4. *Id.*, sec. A.3.d.

Business Income (and Extra Expense) Coverage Form, which became effective in December 2012, covers the loss of net profit and operating expenses that the insured "sustain[s] due to the necessary 'suspension' of [the insured's] 'operations' during the 'period of restoration.' "[5]

However, as with any type of insurance, commercial property policies contain a wide array of exclusions. Although property policies typically cover loss caused by wind, they often contain flood exclusions. By way of example, the current ISO standard form policy contains a water exclusion that excludes loss or damage caused by "[f]lood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge)."[6]

In the case of Sandy and other natural disasters, there may be multiple causes of loss, including wind, flooding, and actions of civil authority. Courts have taken different approaches in determining the cause or causes of loss or damage. For example, many courts have adopted the efficient proximate cause doctrine, which generally "permits recovery . . . for a loss caused by a combination of a covered risk and an excluded risk . . . if the covered risk was the efficient proximate cause of the loss."[7] Another approach is the concurrent cause doctrine, which generally "takes the approach that coverage should be permitted whenever two or more causes do appreciably contribute to the loss and at least one of the causes is a risk which is covered under the terms of the policy."[8] Causation issues are often nuanced and complex.

In what can result in an unfortunate surprise to an insured facing loss caused by covered and excluded perils, such as the wind and water occasioned by all major storm events, some policies contain anti-concurrent causation (ACC) language, which purports to exclude a loss if *any* part of the causal chain involves the excluded or limited peril, even if there are multiple causes of loss, including covered causes of loss. The current ISO Standard Property Policy contains the following ACC language:

> We will not pay for loss or damage caused directly or indirectly by any of the following [causes or events]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.[9]

5. CP 00 30 10 12 (2012), sec. A.1.
6. CP 00 99 10 12 (2012), sec. B.1.g.(1).
7. 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 101:55 (3d ed. 2013). The efficient proximate cause of the loss "is the one that sets the other causes in motion that, in an unbroken sequence, produced the result for which recovery is sought." *Id.*
8. *Id.*
9. CP 00 99 10 12 (2012), sec. B.1.

Although some courts have upheld ACC clauses, a number of courts have held such clauses to be invalid.[10] In an August 2013 decision, the Louisiana Court of Appeal refused to give effect to an ACC clause in connection with Hurricane Katrina-related losses in *Orleans Parish School Board v. Lexington Insurance Co*.[11] In that case, the Orleans Parish School Board (OPSB) filed a lawsuit seeking coverage under its primary and excess property insurance policies for extensive property damage caused by Katrina. Its insurers moved for summary judgment based on mold exclusions that contained ACC language.[12] In particular, the primary policy excluded loss or damage "caused by, arising out of, contributed to, or resulting from [mold] . . . regardless of any other cause or event that contributes concurrently or in any sequence to such loss."[13] The three excess policies excluded, respectively, loss or damage (1) "directly or indirectly arising out of or relating to [mold] . . . regardless whether there is . . . any insured peril or cause, whether or not contributing concurrently or in any sequence"; (2) "caused by or resulting from the actual or threatened existence, growth, release, transmission, migration, dispersal or exposure to [mold] . . . regardless of any other cause or event that contributed concurrently or in any sequence to the loss"; and (3) "caused directly or indirectly by [mold] . . . regardless of any cause or event that contributes concurrently or in any sequence to the loss" (collectively, the ACC clauses).[14]

Relying upon the ACC clauses, the insurers argued that "OPSB could not recover for loss or damage caused by, arising out of, or resulting from fungus, mold, or mold related damages, regardless of the cause."[15] The trial court agreed, granting summary judgment in favor of the insurers and rejecting OPSB's argument that the mold exclusions did not apply to mold caused by perils otherwise covered under the policies.[16] The trial court provided the following rationale in support of its decision:

> If the excess insurers wanted to provide coverage for mold damages due to a covered peril, they would have indicated that in the plain language of their respective policies; but they did not. Instead, they said things such as "[t]his exclusion applies *regardless* whether there is (b) any insured peril or cause, whether or not contributing concurrently or in any sequence," and "[a]ny such loss described above is excluded, regardless of any other cause or event that contributed concurrently or in any sequence to the loss".[17]

10. *See, e.g.*, Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601, 612, 617 (Miss. 2009); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 13, 15 (W. Va. 1998); Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413, 414, 416 (Wash. 1989).
11. No. 2012-CA-0095, 2013 WL 4564677 (La. Ct. App. Aug. 28, 2013).
12. *See id.* at *1.
13. *Id.* at *4.
14. *Id.* at *4–5.
15. *Id.* at *1.
16. *See id.* at *2.
17. *Id.*

On appeal, the Louisiana Court of Appeal examined "the proper application of the [ACC] provisions within the mold exclusions[,] which state that there is no coverage for mold, regardless of any other cause or event contributing concurrently or [in] any sequence to the loss."[18] After examining persuasive case law from other jurisdictions, the court found that "the ACC clauses do not operate to remove from coverage, damages that would have otherwise been covered as a result of the initially covered loss."[19] The court agreed with the Mississippi Supreme Court's conclusion in *Corban v. United Services Automobile Association*[20] that "ACC language such as 'the loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss' cannot be used to divest an insured of their right to be indemnified for covered losses."[21] The court further acknowledged that "basic principles of insurance law require [the court] to interpret the language broadly in favor of coverage and to construe exclusions and limitations narrowly."[22] The court concluded that "the trial court erred in its plain language analysis, interpretation, and conclusion that under the policy, 'there is no coverage for damages due to mold, regardless of the potential source or initial contributing factor.'"[23]

In addition to common law, some states have statutes that limit application of ACC clauses.[24] In 2013, presumably in response to Sandy, new legislation was introduced that would further limit the application of ACC clauses. For example, a bill introduced in the New York Senate would prohibit an insurer from denying or excluding coverage for loss or damage for a covered peril solely because an excluded peril was a contributing factor or occurred simultaneously with the covered peril.[25] The bill would amend the state's insurance law by adding the following new section 3455:

> S 3455. Anti-concurrent Causation Clauses. An insurer shall not deny or exclude coverage for any claim for loss or damage that would otherwise be covered by a policy solely because an event or peril not covered under the policy or specifically excluded under the policy was a contributing factor in such loss or damage or occurred simultaneously with the event or peril that was covered.[26]

A separate, narrower bill introduced in the New York State Assembly (House) would specify that where there is an excluded flood event and a

18. *Id.*
19. *Id.* at *15.
20. 20 So. 3d 601 (Miss. 2009).
21. *Orleans Parish Sch. Bd.*, 2013 WL 4564677, at *15 (quoting *Corban*, 20 So. 3d at 612).
22. *Id.* (citing Peterson v. Schimek, 729 So. 2d 1024, 1029 (La. 1999)).
23. *Id.* at *17.
24. *See, e.g.*, CAL INS. CODE § 530 (West 2013); N.D. CENT. CODE § 26.1-32-01 (West 2013).
25. S. 5581, 2013–14 Regular Sess. (N.Y. May 22, 2013).
26. *Id.* § 1. The bill states that it "shall take effect immediately and shall apply to claims made on or after such effective date." *Id.* § 2.

covered peril, such as wind, the insurer shall not deny coverage for loss or damage caused by the covered peril:

> S 3455. Anti-concurrent Causation Clauses. (A) When a flood event not covered under a policy or specifically excluded under a policy is a contributing factor in or occurs simultaneously as a covered event or peril, the insurer shall not deny or exclude coverage for the loss or damage caused by the covered event or peril. However, nothing shall obligate the insurer to pay for any loss or damage caused by the flood event that is not covered or is excluded.[27]

The New York State Assembly's insurance committee members who approved this bill noted that the bill will "rectify" circumstances in which, due to ACC clauses, "homeowners found themselves without adequate insurance coverage at a time when they needed it the most."[28] Although the bill may have been prompted by homeowners' claims, the text is not so limited.

Another bill introduced in the New York State Assembly also addresses causation issues and would amend the insurance code to prohibit, among other things, a denial of business interruption coverage caused by a covered peril that results from an excluded peril:

> No insurer writing a policy issued or delivered in this state that provides for business interruption insurance shall deny or exclude coverage for a claim for loss or damage that is caused by a peril insured against by the policy solely because the insured peril:
>
> (1) resulted from a peril not insured against or expressly excluded under the policy; or
> (2) resulted from an action intended to mitigate loss from a peril not insured against or expressly excluded under the policy; or
> (3) occurred within a reasonable amount of time either before or after a peril not insured against or expressly excluded under the policy.[29]

Companies are advised to keep causation issues in mind and, where a policy contains a potentially applicable ACC clause, confirm whether the clause is triggered by the specific facts at issue and enforceable under applicable law.

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27. Assemb. 7455, 2013–14 Regular Sess. § 1(A) (N.Y. May 17, 2013). The bill states that it "shall take effect immediately and shall apply to all policies issued or renewed after such effective date." *Id.* § 2.

28. A07455 Memo, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A7455&term=2013&Memo=Y (last visited Oct. 2, 2013).

29. Assemb. 7452-A, 2013–14 Regular Sess. § 3 (N.Y. May 17, 2013). "Business interruption insurance" would be defined as "coverage against actual loss resulting from necessary interruption of business due to damage or destruction of property by a peril insured against." *See id.* § 2 (incorporating N.Y. INS. LAW § 5401(d)(4)). The bill states that it "shall take effect immediately and shall apply to all policies issued or renewed after such effective date." *Id.* § 4.

C. *Proposed Legislation to Expedite Claims Determinations and Coverage Litigation*

In the post-Sandy claims environment, a bill was introduced in the New York State Assembly that would require an insurer to make a coverage determination within fifteen days, subject to a one-time extension of an additional fifteen days, and pay covered claims within three days after a coverage determination, when the claim relates to property damage or injury in the event of a disaster emergency.[30] The bill would amend the state's insurance law by adding the following new section 2616 to state, in relevant part:

> (B)(1) An insurer shall, within fifteen business days of receipt of all items, statements and forms requested under this section from the claimant . . . advise the claimant in writing whether the insurer has accepted or rejected the claim.
>
> (2) An insurer shall be granted a one-time extension of fifteen business days to determine whether a claim should be accepted or rejected. If the insurer elects to utilize this extension, it shall so notify the claimant . . . in writing. Such notification shall include the reasons additional time is needed for the investigation.
>
> . . . .
>
> (C) An insurer shall pay the claim not later than three business days from the settlement of the claim.[31]

As part of the justification for the bill, the proponents note that "[f]ollowing Superstorm Sandy and Tropical Storms Irene and Lee, it was found that there were often lengthy delays in the time it was taking insurance companies to investigate and process claims and make payments to policyholders" and that the proposed legislation

> would address this issue by requiring insurers to respond to a claim arising from a disaster or emergency in accordance with regulations established by the Superintendent of Financial Services, accept or reject a claim within fifteen business days of closing the investigation, and pay a claim within three business days of the claim being settled.[32]

In the event of a coverage denial and ensuing coverage litigation, a separate bill would establish new civil rules of procedure requiring, among other things: (1) a "mandatory preliminary conference" within thirty days of filing the request for judicial intervention, at which all counsel

30. Assemb. 1092-A, 2013–14 Regular Sess. (N.Y. Jan. 9, 2013).

31. *Id.* § 1. The bill states that it "shall take effect immediately." *Id.* § 2.

32. A01092 Memo, *available at* http://assembly.state.ny.us/leg/?bn=A01092&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last visited Nov. 18, 2013).

"shall be fully authorized to dispose of the case"; (2) completion of discovery within sixty days after the preliminary conference (subject to extension for "good cause shown"); (3) a "mandatory settlement conference" within fourteen days of the filing of a note of issue for the purpose of holding settlement discussions; and (4) pretrial motions within thirty days after the filing of a note of issue.[33]

D. *Proposed Bad Faith Legislation*

All states have statutory provisions governing unfair insurance claim settlement practices. Many have adopted some version of the National Association of Insurance Commissioners' Model Unfair Claims Practices Act, Model Unfair Claims Settlement Practices Act, or both. The model acts contain fourteen prohibited claims practices that are actionable if they are engaged in by insurers with "such frequency as to indicate a general business practice."[34] However, a private cause of action does not exist under the statutes as enacted in many states and as interpreted by the state courts. In those states, the statute is available for use solely by the insurance commissioners. In the wake of Sandy, state legislatures have proposed new bills that, if passed, will amend current laws to create a new private right of action for violation of the statutes. For example, a bill introduced in the New York State Assembly would provide a private right of action under New York's Unfair Claim Settlement Practices Act, N.Y. Insurance Law § 2601, when the claim relates to property damage in an area that has been declared a "disaster emergency":

> Where the governor has declared a disaster emergency pursuant to section twenty-eight of the executive law, in addition to the right of action granted to the department pursuant to this section, any person who has suffered loss or injury by reason of any violation of this section relating to an insurance claim for property damage in an affected area encompassed by the executive order declaring the disaster emergency may bring an action in his or her name as a plaintiff to enjoin such unlawful act or practice and in an action to recover his or her actual damages. The court may, in its discretion, award punitive damages, if the court finds that the defendant insurer willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.[35]

33. Assemb. 5570, 2013–14 Regular Sess. § 1 (N.Y. Feb. 28, 2013). The bill states that it "shall take effect immediately." *Id.* § 3.

34. MODEL UNFAIR CLAIMS SETTLEMENT PRACTICES ACT §§ 3, 4 (1997), *available at* http://www.naic.org/store_model_laws.htm.

35. Assemb. 5780, 2013–14 Regular Sess. § 1 (N.Y. Mar. 6, 2013). The bill states that it "shall take effect immediately." *Id.* § 2.

This is significant because insureds previously lacked standing to bring claims under section 2601.[36] The New York State Assembly's insurance committee members who approved this bill noted that "[a] private right of action is necessary . . . to make certain that insurers are held responsible for unfair claims practice":

> Insurers have every right to attempt to lawfully deny claims, but all too often these attempts create unreasonable situations for homeowners attempting to simply access the benefits to which they are entitled. This is especially acute in situations where the homeowner may have lost most or even all of their possessions due to a storm declared emergency.
>
> . . . .
>
> A private right of action is necessary, in addition to the possibility of administrative action, to make certain that insurers are held responsible for unfair claims practices.[37]

Likewise, two identical bills introduced in the New Jersey Senate and Assembly, both entitled Consumer Protection Act of 2012, would create a new private right of action for violation of New Jersey's Unfair Claim Settlement Practices Act, New Jersey Statutes Annual § 17:29B-1 to -19, and, like the New York proposed legislation, provide for potential punitive damages and attorney fees:

> In addition to the enforcement authority provided to the Commissioner of Banking and Insurance . . . a claimant may, regardless of any action by the commissioner, file a civil action in a court of competent jurisdiction against its insurer for any violation of the provisions of subsection (9) of [N.J.S.A. 17:29B-4], regarding unfair claim settlement practices, notwithstanding that the insurer did not violate any applicable provision with enough frequency as to indicate a general business practice.
>
> Upon establishing that a violation of the provisions of subsection (9) . . . has occurred, pursuant to section 3 of this act, the claimant shall be entitled to:
>
> a. the full amount of damages as set forth in the final judgment, regardless of the coverage limits of the policy;
> b. prejudgment interest, reasonable attorney's fees, and all reasonable litigation expenses from the date of the institution of the action filed pursuant to this act. The prejudgment interest shall be calculated at the rate provided for tort actions, or for non-acceptance of a formal offer for judgment, whichever is higher, as prescribed in the Rules of Court; and

36. *See*, *e.g.*, Rocanova v. Equitable Life Assur. Soc'y of the U.S., 634 N.E.2d 940, 944 (N.Y. 1994) ("the law of this State does not currently recognize a private cause of action under Insurance Law § 2601").

37. A05780 Memo, *available at* http://assembly.state.ny.us/leg/?bn=A05780&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last visited Nov. 18, 2013).

c. punitive damages, when the insurer's acts or omissions demonstrate, by clear and convincing evidence, actual malice or wanton and willful disregard of any person who foreseeably might be harmed by the insurer's acts or omissions.[38]

This is significant because insureds previously lacked standing to bring claims under section 17:29B-4.[39] Additionally, the New Jersey bills provide consumers with a private cause of action under *any* circumstance, not just those involving declared disaster emergencies.

II. BECOMING A DE FACTO INSURER BY FAILING TO PROCURE INSURANCE

Construction defect litigation often gives rise to complex insurance coverage questions, particularly in cases where a subcontractor agrees to defend and indemnify the general contractor and procure an insurance policy naming the general contractor as an additional insured. In the recent case of *D.R. Horton, Inc.–Denver v. Travelers Indemnity Co. of America*,[40] the U.S. District Court for the District of Colorado raised the stakes for subcontractors by holding that a subcontractor that fails to procure insurance is jointly and severally liable for the general contractor's defense costs, as though it were a co-insurer.[41]

In 1999, D.R. Horton, Inc. (DRH) was engaged as the general contractor for the construction of a residential townhouse community known as Summit at Rock Creek.[42] DRH retained a number of subcontractors to perform construction work on the project.[43] The subcontractor agreements required each of the subcontractors to carry a CGL policy naming DRH as an additional insured.[44] Travelers Indemnity Company of America, along with several other insurance companies (collectively, Travelers), provided insurance coverage to the subcontractors.[45] In 2003, the homeowners association for the project brought construction defect litigation against DRH, and DRH thereafter filed a third-party complaint against each of the subcontractors that had worked on the project.[46]

38. S. 2460, 215th Legislature §§ 3 & 4 (N.J. Jan. 8, 2013); Assemb. 3710, 215th Legislature §§ 3 & 4 (N.J. Jan. 28, 2013). The bills state that they "shall take effect immediately." *Id.* § 5.

39. *See, e.g.*, ProCentury Ins. Co. v. Harbor House Club Condo. Ass'n, Inc., 652 F. Supp. 2d 552, 563 (D.N.J. 2009) ("there is no private cause of action under the Unfair Claims Settlement Practices Act, N.J.S.A. 17:29B-4(9)").

40. No. 10-cv-02826, 2012 WL 5363370 (D. Colo. Oct. 31, 2012).

41. *Id.* at *1.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

DRH initiated the subject litigation in Colorado state court against Travelers, bringing claims for relief for declaratory judgment, breach of contract, unreasonable delay or denial of covered benefits under Colorado Revised Statutes §§ 10-3-1115 and -1116, and violation of the Colorado Consumer Protection Act.[47] DRH alleged that although Travelers purported to accept DRH's tender of defense in the underlying action, Travelers improperly delayed payment of DRH's defense fees and costs, and ultimately made inadequately low payments to DRH for those fees and costs.[48]

Travelers removed the action to the federal court for the District of Colorado and asserted counterclaims against DRH for equitable contribution, equitable subrogation, unjust enrichment, and declaratory judgment.[49] In addition, Travelers asserted third-party claims against certain subcontractors that worked on the project; insurers of certain subcontractors; and Admiral Insurance Company, which was DRH's own insurer.[50] The third-party claims alleged that to the extent Travelers was found liable for more than its equitable share of DRH's defense fees and costs, it should be entitled to recoup these amounts from the third-party defendants.[51]

In *D.R. Horton*, the court ruled on the parties' various summary judgment motions, addressing issues that had not yet been resolved by Colorado appellate courts.[52] If Colorado courts follow the district court's lead, there could be far-reaching consequences on a range of insurance disputes in the commercial setting.

One issue addressed by the court was whether a liability insurer's duty to defend is a joint and several obligation with other insurers that also have a duty to defend.[53] Citing five cases, none of which were binding and the majority of which were issued by district courts in other jurisdictions, the court concluded that the majority view in other jurisdictions was that each insurer with a duty to defend can be found liable for the entire amount of defense costs and fees at issue.[54] The court further concluded that in cases where an insurer is found liable for the full amount of defense costs and fees, the insurer can then seek equitable contribution from any

47. *Id.* at *2.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at *14.
53. *Id.* at *8.
54. *Id.* at *9 (citing U.S. Fid. & Guar. Co. v. Cont'l Ins. Co., Nos. CV-04-29-BLG-RFC, CV-08-29-BLG-RFC, 2010 WL 4102250, at *2 (D. Mont. Oct. 18, 2010); Haskel, Inc. v. Super. Ct., 39 Cal. Rptr. 2d 520, 526 n.9 (Ct. App.1995); Mendes & Mount v. Am. Home Assur. Co., 467 N.Y.S.2d 596, 598 (App. Div. 1983); Nutmeg Ins. Co. v. Emp'rs Ins. Co. of Wausau, No. Civ.A. 3:04-CV-1762B, 2006 WL 453235, at *14 (N.D. Tex. Feb. 24, 2006); Newmont USA Ltd. v. Am. Home Assur. Co., 676 F. Supp. 2d 1146, 1158 (E.D. Wash. 2009)).

other insurers that also had a duty to defend in the action.[55] The court therefore concluded that DRH was entitled to recover from Travelers the full amount of uncollected defense fees and costs incurred in the underlying action; the onus was then on Travelers to recoup any amounts owed by co-insurers.[56]

Based on the determination that Travelers' duty to defend DRH was joint and several, the court further concluded that Travelers breached its duty to defend DRH in the underlying litigation, stating:

> There is no doubt that, with open communication between insureds and multiple liability insurers, the insured's defense can be fully paid with prompt and fair *pro rata* contributions from each liability insurer. With insureds and insurers working well together in this way, insurers never have to pay more than their *pro rata* share. However, when insurers delay payment for years, and then make payments based on an allocation method designed to significantly limit their *pro rata* share, they open themselves up to the possibility of being sued jointly and severally for the full amount of defense costs.[57]

The court therefore determined that by failing to timely make payment of defense fees and costs and ultimately paying less than the full amount of the defense expenses, Travelers was liable to DRH for breach of contract.[58] As DRH was the prevailing party on the breach of contract claim, Travelers was liable to DRH for any resulting damages in an amount to be determined at trial.[59]

Another issue addressed by the court was how to allocate the respective obligations of co-insurers when more than one insurer is jointly and severally liable for defense costs and fees.[60] Travelers argued that in this particular case, "the extent of the obligation to contribute to DRH's defense fees and costs should be tied to the underlying liability for construction defects."[61] Thus, it was Travelers' position that, "for example, if Travelers' insureds were responsible for five percent of the total liability for construction defects, Travelers should have to contribute five percent of DRH's defense fees and costs."[62] Travelers was the only party at this juncture to request that a particular allocation method be determined. Because the other parties did not take a firm position on the proper allocation method, the court concluded that it "need not yet determine what the appropriate method of allocation will be in this case, whether it be based

55. *Id.*
56. *Id.*
57. *Id.* at *10.
58. *Id.* at *8.
59. *Id.* at *10.
60. *Id.* at *11.
61. *Id.* at *10.
62. *Id.*

on even shares per subcontractor, or based on policy limits, or some other method."[63]

Although the court declined to rule on the appropriate allocation method for defense costs in this particular case, the court specifically found that allocation based on respective liability in the underlying case was not appropriate, stating:

> The Court understands that in certain cases it might be appropriate to allocate defense fees and costs based on respective underlying liability, for example, in cases in which the judgment clearly indicates the extent to which each party in the underlying litigation was found liable. Here, however, there was a settlement in the Construction Defects Litigation, and as a result in these circumstances there is no workable and reliable method for identifying the respective liability of each subcontractor for the underlying construction defects.[64]

Since the only matter before the court was whether an allocation method tied to relative liability was appropriate, the court ruled on that particular issue alone, ordering solely that the method advocated by Travelers was inappropriate, saving the selection of an appropriate method for another day.

Another issue addressed by the court was whether a subcontractor that failed to procure the liability coverage required by the subcontractor agreement was jointly and severally liable for DRH's defense costs as though it were a co-insurer.[65] The subcontract entered into by DRH and each subcontractor required the subcontractor to carry Broad Form CGL coverage naming DRH as an additional insured.[66] However, Ark Construction Service, Inc., one of the subcontractors involved in the project, apparently failed to do so. In its third-party complaint, Travelers asserted equitable contribution claims against certain subcontractors, including Ark.[67] Travelers alleged that Ark should be required to reimburse Travelers for Ark's share of DRH's defense fees and costs.[68]

Ark moved for summary judgment on Travelers' contribution claim, arguing that as a subcontractor, it was not a co-insurer of DRH with Travelers such that it was liable for contribution for DRH's defense costs and fees.[69] Ark further argued that even if it was a co-insurer, it did not insure

63. *Id.* at *11.
64. *Id.*
65. *Id.* at *17.
66. *Id.* at *1.
67. Although the court had previously dismissed Travelers' equitable and contractual subrogation claims against the subcontractors, Travelers' claims for equitable contribution against these subcontractors, including Ark, remained pending at the time of the October 31, 2012, order. *Id.* at *3.
68. *Id.*
69. *Id.*

the same risk as Travelers with respect to DRH.[70] The court swiftly rejected Ark's argument, finding that by failing to procure the contractually mandated liability insurance, "Ark Construction assumed the risk of having to itself insure DRH for any such claims."[71] The court held that by agreeing in the subcontract to defend DRH against "any and all claims" and by failing to procure the requisite endorsement adding DRH as an additional insured, Ark, in effect, became DRH's insurer and could be held liable to DRH to the same extent as an insurance carrier would have been liable had insurance been obtained.[72]

The court also rejected Ark's argument that as a co-insurer, Travelers was not entitled to contribution from Ark because Ark did not insure the same risk as Travelers.[73] Specifically, Ark took the position that because Travelers' policy covered only those defects caused by its own insureds, it could not be entitled to contribution from Ark, which was only responsible for defects caused by Ark.[74] The court rejected this argument as well, noting that in the subcontractor agreement, Ark specifically agreed to defend DRH against " 'any and all claims . . . (including all costs thereof and attorneys' fees)' arising out of construction defects caused by Ark."[75] The court concluded that "although there are not two insurance policies to compare to verify that Travelers and Ark Construction were insuring the same loss, the fact that the duty to defend is complete (resulting in potential joint and several liability for each insurer) makes this sufficiently clear."[76] Therefore, as a subcontractor, Ark, like the insurers of the other subcontractors, was jointly and severally liable for DRH's defense costs and fees, and Travelers was entitled to contribution from Ark.[77]

As indicated above, the Colorado Supreme Court has yet to address these issues. However, the district court, sitting in diversity, acted as a proxy to address this case of first impression. As to the issues implicating subcontractors, specifically the failure to procure insurance and its corresponding consequences, the court reviewed two Colorado Court of Appeals cases addressing the failure to procure the necessary insurance as required by a contract.

In *Steamboat Development Corp. v. Bacjac Industries, Inc.*, Steamboat hired a contractor, Bacjac, to perform construction-related activities, entering into a contract that included a provision requiring Steamboat to provide all risk insurance, which was intended to cover the interests of

70. *Id.*
71. *Id.* at *17.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

Steamboat and Bacjac.[78] During the course of the construction, a fire destroyed a substantial portion of the project, and Steamboat subsequently filed suit against Bacjac, alleging negligence.[79] Ultimately, the trial court granted summary judgment to Bacjac, explaining that the underlying contract precluded the suit and Steamboat had breached the contract by failing to procure the necessary insurance.[80] Relying heavily upon the clause providing that "the owner shall bear all reasonable costs properly attributable thereto," the appellate court reasoned that Steamboat "in effect became the insurer of [Bacjac] and was liable to it for its losses to the same extent as an insurance carrier would have been liable had insurance been obtained."[81] This result, according to the court, reflected the intent of the parties as mirrored in the underlying contract; therefore, it upheld the trial court's grant of summary judgment.[82]

In *Richmond v. Grabowski*,[83] an individual owner contracted with Grabowski for demolition work and construction at the owner's home. The contract contained a provision stating, in pertinent part:

> [T]he owner shall purchase and maintain property insurance upon the entire work at the site to the full insurable value thereof. This insurance shall include the interests of the Owner, the Contractor, [and] Subcontractors. . . .
> . . .
>
> The Owner and Contractor waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this Article or any other property insurance applicable to the work . . . .[84]

Essentially, the owner conceded that he failed to procure the appropriate insurance and further agreed that his failure would inure to the benefit of the contractor; however, the owner asserted that the contractor waived his right to rely on the contract by beginning work without confirming that the proper insurance had been procured.[85] In light of the owner's waiver

78. 701 P.2d 127, 128 (Colo. Ct. App. 1985). Specifically, the contract provided, in pertinent part:

> [T]he owner shall purchase and maintain property insurance upon the entire work at the site to the full insurable value thereof. This insurance shall include the interest of the owner, the contractor . . . . If the contractor is damaged by failure of the owner to produce or maintain such insurance and to so notify the contractor, *then the owner shall bear all reasonable costs properly attributable thereto*.

Id. (emphasis added).

79. *Id*.

80. *Id*. Steamboat conceded that it failed to procure the necessary insurance, as required by the underlying contract. *Id*.

81. *Id*. (citing Jones v. Adkins, 526 P.2d 153 (Colo. 1974)).

82. *Id*. at 129.

83. 781 P.2d 192 (Colo. Ct. App. 1989).

84. *Id*. at 194.

85. *Id*.

defense, the court concluded that the contractual obligation to procure insurance was not a condition precedent to performance.[86] After ruling against the owner, the court turned to the effect of the owner's breach of the insurance provision.[87] In holding that the owner effectively became the insurer, the court referred to the *Steamboat* opinion, highlighting the *Steamboat* court's reasoning that "[i]n general, the party who agrees to procure the insurance and fails to do so assumes the position of the insurer and, thus, the risk of loss."[88]

In the absence of a Colorado Supreme Court decision, the *D.R. Horton* court relied upon the *Steamboat* and *Richmond* opinions to hypothesize that the prevailing law in Colorado treats breaches of a contractual provision for the procurement of insurance in this fashion.[89] While the court only cited *Steamboat* and *Richmond* in support of its conclusion on this issue, similar reasoning has been espoused in many other jurisdictions, holding that a party that fails to procure insurance effectively steps into the shoes of the insurer.[90] Underlying this principle is an analysis focused on the natural damage flowing from the intention of the parties, as reflected in the contract language, to shift or allocate the risk of loss among certain parties to the contract.[91]

Based upon this result, the next inquiry necessarily turns to the scope of damages arising from this breach, specifically, to what extent is the breaching party required to incur the duties and obligations incumbent upon a general liability insurer. The *D.R. Horton* court held that the breaching party acts as an insurer to the degree required by the underlying contract.[92] Furthermore, where multiple breaching parties are converted to insurers, the court determined, as indicated above, that their duties to the insured are joint and several, another issue of first impression in Colorado.[93]

While the district court has suggested that the Colorado Supreme Court will follow the joint and several method of allocating defense costs among

86. *Id.* at 195.

87. *Id.*

88. *Id.* at 194 (citing 16A J. APPLEMAN, INSURANCE LAW & PRACTICE § 8840 (1981)).

89. D.R. Horton, Inc.–Denver v. Travelers Indem. Co. of Am., No. 10-cv-02826, 2012 WL 5363370, at *17 (D. Colo. Oct. 31, 2012).

90. *See, e.g.*, Hancock Bank v. Travis, 580 So. 2d 727, 731 (Miss. 1991) ("[O]ther courts which have examined the issue have, based on reasoning that we find persuasive, held that a party who agrees to procure insurance and fails to do so, assumes the position of insurer and thus risk of loss."); *see also* Bass v. Home Fed. Sav. & Loan Ass'n, 587 S.W.2d 48 (Ark. Ct. App. 1979); Stone v. Davis, 419 N.E.2d 1094 (Ohio 1981); Bradley v. Oregon Trail Sav. & Loan Ass'n, 617 P.2d 263 (Or. 1980); Heinert v. Home Fed. Sav. & Loan Ass'n of Sioux Falls, 444 N.W.2d 718 (S.D. 1989); Sutton v. First Nat'l Bank of Crossville, 620 S.W.2d 526 (Tenn. Ct. App. 1981).

91. *See* Steamboat Dev. Corp. v. Bacjac Indus., Inc., 701 P.2d 127, 128 (Colo. Ct. App. 1985) ("The purpose of such insurance is to shift the risk of loss away from the contractor and the owner and to place it upon an insurer.").

92. *See D.R. Horton*, 2012 WL 5363370, at *17.

93. *Id.* at *8.

the various insurers, its opinion raises several questions for contractors in the construction industry. First, what omission constitutes a breach of the procurement of insurance provision? The easiest case arises when a party to a contract that is required to procure insurance fails entirely to perform this obligation. The question becomes murky when a party procures an endorsement naming the general contractor an additional insured, yet the endorsement seemingly fails to provide the full spectrum of coverage required in the underlying contract. Still more opaque is the situation where the subcontractor secures the necessary insurance, yet the insurer denies coverage on a subsequent suit or claim.[94]

Secondly, how can parties shield themselves from the potential liability arising out of an additional insured requirement? Recourse might be made to liquidated damages clauses. By tying a potential breach of a procurement of insurance provision to a liquidated damages clause, parties can place a ceiling on potential exposure.[95] The difficulty, of course, is reaching an agreement between the parties to insert such language.

The *D.R. Horton* decision could give rise to far-reaching ramifications if its prognosis of Colorado law is correct. By holding that a subcontractor's failure to procure the necessary insurance converts the subcontractor into an insurer with a joint and several duty to defend, the court's opinion effectively creates a new insurance market. In light of the *D.R. Horton* holding, subcontractors are no longer merely purchasers of insurance; they may be the providers.

III. NEW YORK'S COURT OF APPEALS ISSUES MAJOR DUTY TO DEFEND DECISION

New York's Court of Appeals, the state's highest court, appears to have dramatically altered New York law concerning the consequences for breaching a duty to defend in its June 11, 2013, ruling in *K2 Investment Group, LLC v. American Guarantee & Liability Insurance Co*.[96]

94. This latter scenario could prove to be a confusing sequence of events. The subcontractor may secure an additional insured endorsement with the requisite coverage, but the insurer may still deny coverage of a subsequent claim or lawsuit. Does this scenario provide for recourse against the subcontractor for breach of the subcontract because of its insurer's failure to secure applicable coverage, thereby effectively transforming the subcontractor into the general contractor's insurer? Or does the general contractor have a breach of contract claim against the original insurer for failure to provide coverage? Assuming the former occurs and the subcontractor defends and indemnifies the general contractor, can the subcontractor incur a subrogation interest against its insurer?

95. *See* Marvin v. Pueblo Dairymen's Coop., Inc., 284 P.2d 238, 241 (Colo. 1955); *see also* Memorial Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc., 690 P.2d 207, 212 (Colo. 1984).

96. 993 N.E.2d 1249, *reargument granted*, 995 N.E.2d 1155 (N.Y. 2013).

Prior to the decision in *K2*, New York courts at both the state and federal levels consistently rejected the notion that by having breached a duty to defend, an insurer is estopped from relying on coverage defenses for the purpose of contesting an indemnity obligation.[97] In fact, this rule was reaffirmed the same day as the *K2* decision by the Second Circuit in *CGS Industries, Inc. v. Charter Oak Fire Insurance Co.*[98]

The *K2* decision, however, departs from this long-established jurisprudence. *K2* involved loans made by two limited liability companies to a third company, Goldan.[99] The loans were to be secured by mortgages, but the mortgages were not properly recorded.[100] The two LLCs subsequently brought suit against Goldan and its two principals, one of whom, Jeffrey Daniels, was an attorney.[101] The suit asserted a claim of legal malpractice against Daniels for failing to record the mortgages.[102] Daniels sought coverage from his errors and omissions carrier, American Guarantee, but American Guarantee disclaimed coverage on several grounds.[103] He subsequently defaulted in the underlying action, and the plaintiffs took a judgment in excess of the policy limits of the American Guarantee policy.[104] The LLCs then asserted a direct action against American Guarantee for breach of contract and failure to settle within policy limits.[105]

American Guarantee moved for summary judgment on the basis of its policy's business enterprise exclusions.[106] It argued that the claim against Daniels arose out of his capacity or status as a member or owner of Goldan and that, as such, the exclusions applied.[107] The trial court granted summary judgment in favor of the claimants and, on appeal, the Appellate Division held that the exclusions were "patently inapplicable," at least for duty to defend purposes, because the essence of the underlying claim was that Mr. Daniels committed legal malpractice.[108] The appellate court, however, was divided as to whether the exclusions applied for the purposes of American Guarantee's duty to indemnify.[109]

97. Servidone Constr. Corp. v. Sec. Ins. Co., 477 N.E.2d 441, 444 (N.Y. 1985) (holding it is impermissible for a court to enlarge a policy's coverage on the basis of an insurer's breach of a duty to defend); Hotel des Artistes, Inc. v. Gen. Accident Ins. Co. of Am., 775 N.Y.S.2d 262, 271–72 (App. Div. 2004); Robbins v. Mich. Millers Mut. Ins. Co., 653 N.Y.S.2d 975, 977 (App. Div. 1997).

98. 720 F.3d 71, 83 (2d Cir. 2013).

99. *K2 Invest. Grp.*, 993 N.E.2d at 1251.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

On appeal to the New York Court of Appeals, American Guarantee essentially conceded that it had breached its duty to defend Daniels but argued that it could still rely on the exclusions to avoid a duty to indemnify.[110] The court disagreed, holding that by having breached its duty to defend Daniels, American Guarantee "lost its right" to rely on the exclusions for indemnity purposes.[111] Relying on its decision in *Lang v. Hanover Insurance Co.*,[112] a case involving the insurer's right to contest the insured's liability for underlying loss after breaching a duty to defend, the court articulated its new rule:

> [W]e now make clear that *Lang*, at least as it applies to such situations, means what it says: an insurance company that has disclaimed its duty to defend "may litigate only the validity of its disclaimer." *If the disclaimer is found bad, the insurance company must indemnify its insured for the resulting judgment, even if policy exclusions would otherwise have negated the duty to indemnify*. This rule will give insurers an incentive to defend the cases they are bound by law to defend, and thus to give insureds the full benefit of their bargain. It would be unfair to insureds, and would promote unnecessary and wasteful litigation, if an insurer, having wrongfully abandoned its insured's defense, could then require the insured to litigate the effect of policy exclusions on the duty to indemnify.[113]

The *K2* court conceded that there may be exceptions to this new rule, such as where public policy precludes indemnification for an underlying loss.[114] Such issues, however, were not before the court.

At face value, the decision in *K2* appears to bring New York in line with jurisdictions such as Illinois and Connecticut, where a breach of the duty to defend can foreclose an insurer's ability to contest indemnity.[115] The court stated quite clearly that if an insurer breaches its duty to defend, it has a corresponding duty to indemnify irrespective of whether policy exclusions would have otherwise negated this duty. Some commentators, however, have opined that the *K2* court's failure to have cited its prior holdings regarding the consequences for breaching a duty to defend, such as *Servidone*, means that the decision should not be read as a wholesale shift in New York duty to defend law. Rather, they posit that the Court of Appeals may have used imprecise language to reach the otherwise unremarkable conclusion that by having allowed its insured to default in a legal malprac-

110. *Id.*
111. *Id.*
112. 820 N.E.2d 855 (N.Y. 2004).
113. *K2 Invest. Grp.*, 993 N.E.2d at 1253–54 (emphasis added).
114. *Id.* at 1254.
115. *See* Emp'rs Ins. of Wausau v. Ehlco Liquidating Trust, 708 N.E.2d 1122, 1136 (Ill. 1999); Missionaries of the Co. of Mary, Inc. v. Aetna Cas. & Sur. Co., 230 A.2d 21, 26 (Conn. 1967).

tice claim, American Guarantee was precluded from relitigating the threshold issue of whether its insured was providing legal services.[116]

Lending support to the view that *K2* augers a more widespread change, however, is the subsequent decision by the U.S. District Court for the Eastern District of New York in *Lawrence v. Continental Casualty Co.*[117] There, the court, citing to *K2*, held that an insurer's wrongful disclaimer of a defense based on a policy exclusion (applicable to willful violations of law) precluded that insurer from relying on that exclusion for indemnity purposes, and that the insurer, therefore, was responsible for paying the entirety of the underlying default judgment.[118] While the case may be an anomaly, the *Lawrence* court appeared to have applied a more aggressive standard in considering the application of the exclusion for defense purposes than prior New York case law suggests was appropriate. It is not clear whether the *Lawrence* court misconstrued New York case law on the exclusion or instead was applying a more aggressive standard in light of the *K2* decision.

Perhaps as a result of the confusion and sharp response generated by its decision in *K2*, on September 3, 2013, the Court of Appeals took the rather extraordinary step of granting a motion for reargument.[119] As of the date this article was written, the date for reargument has not been set, but presumably it will be held sometime during the 2014 calendar year. Should the court confirm that, indeed, it intended to establish a harsh penalty for a breach of the duty to defend, *K2* will have dramatic and far-reaching implications on the manner in which insurers make coverage determinations and under what circumstances insurers will pursue declaratory judgment actions to preserve potentially applicable indemnity defenses.

IV. 2013 DEVELOPMENTS IN COVERAGE DISPUTES RELATED TO CLIMATE CHANGE TORT CLAIMS

In 2013, two federal courts issued pivotal decisions addressing the viability of climate change-related tort actions. First, the U.S. Supreme Court denied a petition for certiorari filed by plaintiffs in a tort action alleging that multiple utility companies and other energy producers have emitted massive quantities of greenhouse gases, which in turn have contributed to global warming and to rising sea levels that are endangering a Native

116. *See* Charles A. Booth, Michael L. Anania & Douglas J. Steinke, *Another View on* K2 Investment v. American Insurance, LAW360 (Sept. 10, 2013), http://www.law360.com/articles/470392/another-view-on-k2-investment-v-american-insurance.

117. No. 12-cv-0412, 2013 WL 4458755 (E.D.N.Y. Aug. 16, 2013).

118. *Id.* at *6–7.

119. K2 Invest. Grp., LLC v. Am. Guar. & Liab. Ins. Co., 995 N.E.2d 1155, 1155 (N.Y. 2013).

Alaskan village.[120] In the second decision, the Fifth Circuit affirmed a dismissal of a tort action seeking to hold various chemical and energy companies liable for damages caused by Hurricane Katrina on the theory that defendants' greenhouse gas emissions contributed to global warming that, in turn, made Hurricane Katrina more intense than it might otherwise have been.[121]

These developments have provided some additional clarity concerning the future path of climate change-related tort litigation, at least for the moment. Yet, discounting the possibility of future claims emerging seems premature at best. The tenacity with which affected plaintiffs have pursued and are continuing to pursue climate change-related liability claims, together with certain other circumstances, such as the increase in the number and intensity of natural disasters, suggests that additional developments concerning such claims are likely.

A. Native Village of Kivalina v. Exxon Mobil Corporation

In May 2013, the U.S. Supreme Court ended what many consider the seminal climate change-related tort litigation thus far, *Native Village of Kivalina v. Exxon Mobil Corp*. In 2008, an Inupiat Native Alaskan village brought suit in a federal district court in California alleging that the greenhouse gas emissions from several utility companies contributed to global warming, the melting of Arctic Sea ice, and the resulting erosion of the Kivalina coastline.[122] The plaintiffs sought "monetary damages for defendants' past and ongoing contributions to global warming, a public nuisance, and damages caused by certain defendants' acts in furthering a conspiracy to suppress the awareness of the link between these emissions and global warming."[123] As discussed in a previous annual update on insurance coverage litigation,[124] the *Kivalina* defendants, twenty oil, coal, and electric utility companies, successfully moved to dismiss, based on arguments that the plaintiffs lacked standing and presented a nonjusticiable political question.[125]

On September 21, 2012, the Ninth Circuit affirmed the trial court's decision, focusing its analysis on the displacement of the federal common law action by the Clean Air Act and EPA actions authorized by the Act.[126] The

120. Native Vill. of Kivalina v. Exxon Mobil Corp., 133 S. Ct. 2390 (2013).

121. Comer v. Murphy Oil USA, Inc., 718 F.3d 460, 469 (5th Cir. 2013).

122. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

123. Complaint for Damages ¶ 6, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. CV-08-1138 SBA), ECF No. 1.

124. Todd A. Rossi et al., *Recent Developments in Insurance Coverage Litigation*, 47 TORT TRIAL & INS. PRAC. L.J. 279, 302–03 (2012).

125. *Kivalina*, 663 F. Supp. 2d at 883.

126. Native Vill. of Kivalina, v. ExxonMobil Corp., 696 F.3d 849, 856–58 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

Ninth Circuit relied heavily on the Supreme Court precedent set in *American Electric Power Co. v. Connecticut*.[127] In *AEP*, eight states, the City of New York, and three private land trusts attempted to bring a federal common law public nuisance claim against five large carbon dioxide emitters (four private power companies and the Tennessee Valley Authority).[128] In a unanimous decision, the Supreme Court held "that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement" of carbon dioxide emissions.[129]

In *Kivalina*, the Ninth Circuit acknowledged that the dispute arose in a "slightly different context" than the *AEP* case because the plaintiffs were not seeking abatement of emissions, but rather "damages for harm caused by past emissions."[130] After interpreting current Supreme Court jurisprudence, however, the Ninth Circuit determined that "displacement of a federal common law right of action [also] means displacement of remedies."[131] In conclusion, the Ninth Circuit offered condolences to the plaintiffs, though it could offer no judicial remedy: "the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."[132] The majority opinion did not address the plaintiffs' state law claims or whether they had standing to raise their claims in federal court.

The *Kivalina* plaintiffs sought rehearing en banc on October 4, 2012, arguing that the court erred in applying an *AEP* analysis, which focused on injunctive relief, to the plaintiffs' claims for monetary relief.[133] In late November 2012, the Ninth Circuit denied the *Kivalina* plaintiffs' request.[134] No judge voted to rehear the case.[135] Having come this far, the *Kivalina* plaintiffs took the additional step of filing a petition for certiorari with the U.S. Supreme Court on February 25, 2013.[136] On May 20, 2013, the Supreme Court denied the plaintiffs' writ, ending over five years of litigation.[137] The September 2012 Ninth Circuit opinion dismissing the action therefore stands.

127. *Id.*
128. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2533–34 (2011).
129. *Id.* at 2537.
130. *Kivalina*, 696 F.3d at 857.
131. *Id.* (citing Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)).
132. *Id.* at 858.
133. Petition for Reh'g en Banc, Native Vill. of Kivalina v. ExxonMobil Corp., No. 09-17490 (9th Cir. Oct. 4, 2012), ECF No. 169.
134. Order, Native Vill. of Kivalina v. ExxonMobil Corp, No. 09-17490 (9th Cir. Nov. 27, 2012), ECF No. 170.
135. *Id.*
136. Petition for a Writ of Cert., Native Vill. of Kivalina v. ExxonMobil Corp., 133 S. Ct. 2390 (2013) (No. 12-1072).
137. Native Vill. of Kivalina v. Exxon Mobil Corp., 133 S. Ct. 2390 (2013).

Although it appears settled that the federal courts will not grant injunctive or monetary relief to the *Kivalina* plaintiffs for the harm they have suffered, the fight may not yet be over. In a lengthy concurrence with the September 2012 Ninth Circuit decision, District Judge Pro noted that the plaintiffs could refile their state law nuisance claims in state court and "may pursue whatever remedies [plaintiffs] may have under state law to the extent their claims are not preempted" by federal law.[138] No state law claims have yet been filed.

B. Comer v. Murphy Oil USA

Less than a week before the Supreme Court denied the writ of certiorari in *Kivalina*, the Fifth Circuit affirmed for the second time the dismissal of *Comer v. Murphy Oil USA, Inc.* (*Comer II*).[139]

To recap briefly, the plaintiffs in *Comer II* are Mississippi coastal residents and landowners who previously instituted a class action lawsuit against numerous oil and coal companies and chemical manufacturers, alleging that their emissions contributed to global warming and added to the ferocity of Hurricane Katrina.[140] The defendants successfully dismissed the action on grounds that the plaintiffs lacked standing and the claims were barred by the political question doctrine.[141] A panel of the Fifth Circuit initially disagreed with the district court's dismissal and remanded the case for arguments on the merits.[142] But then the Fifth Circuit (at that time left with a bare quorum due to the recusal of seven judges) voted to hear the *Comer* appeal en banc, automatically vacating the panel's earlier decision. The subsequent recusal of an eighth judge resulted in the loss of the quorum necessary to hear the appeal, leading the Fifth Circuit to dismiss the *Comer* appeal entirely on grounds it lacks authority to reinstate a panel decision that has been vacated.[143] The plaintiffs thereafter filed a petition for a writ of mandamus to the Supreme Court seeking reinstatement of their appeal, which was denied.[144]

The *Comer I* plaintiffs refiled their climate change tort action in 2011 (*Comer II*) in the U.S. District Court for the Southern District of Mississippi, alleging many of the same claims as in *Comer I*, i.e., public and pri-

138. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 866 (9th Cir. 2012).

139. 718 F.3d 460 (5th Cir. 2013).

140. Comer v. Nationwide Mut. Ins. Co., No. 1:05 CV 436 LTD RHW, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006), *rev'd sub nom*. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *rev'd en banc*, 607 F.3d 1049 (5th Cir. 2010) (*Comer I*).

141. Comer v. Nationwide Mut. Ins. Co., No. 1:05 CV 436 LTD RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd sub nom*. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009).

142. *See* Comer v. Murphy Oil USA, 585 F.3d 855, 879–80 (5th Cir. 2009), *rev'd en banc*, 607 F.3d 1049 (5th Cir. 2010).

143. *See* Comer v. Murphy Oil USA, 607 F.3d 1049, 1055 (5th Cir. 2010).

144. *In re* Comer, 131 S. Ct. 902 (2011) (denying petition for writ of mandamus).

vate nuisance, trespass, and negligence causes of action under Mississippi law.[145] In March 2012, the trial court granted the defendants' motions to dismiss, holding that (1) all of the plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel; (2) the plaintiffs do not have standing to assert their claims because their alleged injuries are not fairly traceable to the defendants' conduct; (3) the lawsuit presented a nonjusticiable political question; and (4) all of the plaintiffs' claims, including their state claims, were preempted by the Clean Air Act.[146] The court also found that the *Comer II* plaintiffs' claims were barred by the applicable statute of limitations and that they "cannot possibly demonstrate that their injuries were proximately caused by the defendants' conduct."[147]

Unbowed, the *Comer II* plaintiffs appealed the case for the second time to the Fifth Circuit. Unfortunately for those plaintiffs, the Fifth Circuit affirmed the district court's dismissal on procedural grounds.[148] Indeed, the Fifth Circuit concluded that it need not go beyond the doctrine of res judicata. Because the district court's 2006 dismissal of *Comer I* was on the merits, res judicata applied and plaintiffs could not have another bite of the apple.[149]

C. *Looking Ahead*

As the foregoing summary suggests, 2013 was a good year for greenhouse gas emitters facing potential climate change-related tort liability. The recent decisions in *Kivalina* and *Comer II* suggest that the federal courts believe climate change should be addressed through the regulatory and legislative process, not in the courts. The Ninth Circuit decision in *Kivalina*, like the *AEP* decision before it, leaves open the possibility that a private party may pursue climate change-related nuisance claims under state law theories, pursue other state law remedies to the extent such claims are not preempted by federal law, or both. It remains to be seen whether any plaintiffs will do so. But the history of the *Kivalina* and *Comer* cases shows that plaintiffs remain motivated to press their climate change-related liability claims even in the face of significant judicial adversity.

Moreover, notwithstanding the string of defeats for climate change plaintiffs, history suggests that such claims could just be getting started. After all, the first rule of American litigation is that where there are significant damages, claims and litigation are almost certain to follow. From tobacco litigation to asbestos claims to pollution recoveries, attorneys have

145. Class Action Complaint, Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012) (No. 1:11-cv-00220-LG-RHW), ECF No. 1.
146. Comer v. Murphy Oil USA, Inc., 938 F. Supp. 2d 849, 868 (S.D. Miss. 2012).
147. *Id.*
148. Comer v. Murphy Oil USA, Inc., 718 F.3d 460, 469 (5th Cir. 2013).
149. *Id.*

proven eager to pursue mega exposures, even if it takes decades. Sometimes, as was the case with tobacco and asbestos, those efforts pay off with mega settlements or judgments. Other times, they are a bust. The bottom line, however, remains the same: lawsuits are an inevitable part of the American system for determining whether and how to compensate injuries. The larger the alleged injuries, the greater the effort to recover will be. There is no doubt the injuries caused by natural disasters (allegedly caused by or intensified by climate change) are on the rise. According to recent reports from the insurance industry, natural disasters in 2012 caused economic losses of $186 billion with approximately 14,000 lives lost.[150] Experts predict that these astounding totals will only increase in the coming years.[151]

150. *Swiss Re's Sigma on Natural Catastrophes and Man-Made Disasters in 2012 Reports USD 77 Billion in Insured Losses and Economic Losses of USD 186 Billion*, SwissRe.com (Mar. 27, 2013), http://www.swissre.com/media/news_releases/nr_20130327_sigma_natcat_2012.html.

151. *See*, *e.g.*, Falk Niehörster, *Warming of the Oceans and Implications for the (Re)Insurance Industry*, Geneva Ass'n (June 2013), https://www.genevaassociation.org/research/topics/climate-risk.