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Comer and Insurance: Who Will End Up Paying?

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Over the past several months, there have been groundbreaking developments in greenhouse gas tort litigation. The U.S. Courts of Appeal for the Second Circuit, Fifth Circuit, and the U.S. District Court for the Northern District of California issued decisions in the three greenhouse gas tort cases: *Connecticut v. American Electric Power Co. (AEP)*,[1] *Comer v. Murphy Oil USA*,[2] and *Native Village of Kivalina*,[3] respectively. In *AEP* and *Comer*, the Second and Fifth Circuits reversed the trial courts' dismissals of the actions and the California district court dismissed the *Kivalina* action. The Fifth Circuit may rehear *Comer* en banc,[4] and the plaintiffs have appealed the *Kivalina* decision to the Ninth Circuit. Different applications of standing and political question doctrine jurisprudence are at the heart of the debate in this context. With a potential circuit split brewing, the U.S. Supreme Court may be poised to review the critical threshold questions of standing and application of the political question doctrine in these greenhouse gas tort cases in the next year.

What does this mean for insurers? Are insurers obligated to provide indemnity and defense for defendants in cases like *Comer*? The answer to these questions will turn in large part on the ultimate success of greenhouse gas litigation as well as whether greenhouse gases are pollutants for purposes of insurance contracts and whether the pollution exclusion, known loss provisions, and occurrence requirement bar coverage. One thing, however, is certain: Coverage disputes related to climate change will be expensive for insurers regardless of the ultimate success of greenhouse gas-related tort litigation. This article provides a brief update on the greenhouse gas tort litigation to date and provides an overview and analysis of some of the critical coverage issues that will arise out of cases like *Comer*.

AEP, Comer, and Kivalina

The blame game related to climate change is on. Plaintiffs' lawyers smell the next asbestos or big tobacco and many in policy arenas are attempting to address attribution for climate change-related damages. *AEP*, *Comer*, and *Kivalina* are three of the first major cases in the tort area, but more are likely to follow. Even non-U.S. cases have arisen. Micronesia just sued a Czech power plant for contributing to climate change that is affecting Micronesia. In a report set to be published this summer, the United Nations (UN) estimates that the world's 3,000 biggest public companies contribute to $2.2 trillion worth of environmental damage annually, half of which they attribute to greenhouse gas emissions.[5] Reports of that kind will certainly spawn more claims. The claims and decisions resulting from three of the first major cases are summarized below.

Connecticut v. AEP

In *Connecticut v. AEP*, several states and nonprofit land trusts commenced a lawsuit in 2004 seeking an order requiring that defendant power utility companies abate the public nuisance of global

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warming. The U.S. District Court for the Southern District of New York dismissed plaintiffs' case on grounds that the lawsuit raised non-justiciable political questions that were better suited to resolution by the legislative or executive branches of government and not by the courts.[6]

On September 21, 2009, the Second Circuit vacated the trial court's dismissal and remanded the case for further proceedings, allowing plaintiffs to go forward with their claims for the following reasons. First, plaintiffs' claims did not present non-justiciable political questions because a decision by a single federal court regarding whether the emissions of six coal-fired power plants constitutes a public nuisance does not set a national or international emissions strategy.[7] Second, plaintiffs had standing to bring their claims; they sufficiently alleged that their current and future injuries (harm to the environment, harm to the states' economies, and harm to public health) were "fairly traceable" to and caused by defendants.[8] Third, plaintiffs could assert claims under the federal common law of nuisance.[9] Fourth, plaintiffs' federal common law nuisance claims were not displaced by federal legislation.[10] Because there was no comprehensive federal greenhouse gas regulatory scheme at this time, the court held that the Clean Air Act and other climate change legislation did not displace plaintiffs' federal common law public nuisance claims.

Thus, the Second Circuit's September 2009 decision revived the lawsuit by vacating the trial court's judgment and by remanding the case for further proceedings. The Second Circuit recently denied petitions for rehearing en banc, and thus the decision stands and the case will go forward unless these issues are eventually brought to the U.S. Supreme Court.

Comer v. Murphy Oil USA

In *Comer v. Murphy Oil USA*, Gulf Coast property owners asserted various tort theories—including nuisance, trespass, and civil conspiracy—against oil companies, coal companies, and chemical manufacturers for their greenhouse gas emissions. The district court dismissed the case on political question doctrine and standing grounds.[11] On October 16, 2009, in a long awaited decision, the Fifth Circuit partially reversed the district court and remanded the case for further proceedings.[12]

First, the court determined that plaintiffs had standing to bring their nuisance, trespass, and negligence claims. The court held that the injuries alleged by plaintiffs (private and public property damage) were "fairly traceable" to defendants' operations.[13] Citing the U.S. Supreme Court's decision in *Massachusetts v. EPA*[14]—that there is a plausible link between man-made greenhouse gases, global warming, and arguably Hurricane Katrina—the court decided that standing turned upon the question of whether plaintiffs' injuries could be linked to defendants' greenhouse gas emissions.[15] The court held that it was enough that plaintiffs alleged that defendants' greenhouse gas emissions caused or contributed to the kinds of injuries alleged by plaintiffs.[16]

Second, the Fifth Circuit held that plaintiffs' nuisance, trespass, and negligence claims did not present non-justiciable political questions.[17] According to the Fifth Circuit, "[c]ommon law tort claims are rarely thought to present nonjusticiable political questions."[18] Because no constitutional or federal law provision specifically delegated the issues in these claims to a political branch, the court held that the issues do not present political questions and no further inquiry was required.[19]

Third, the court held that plaintiffs did not have standing to bring their unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims.[20] These claims did not satisfy prudential standing requirements, as they represented "a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public."[21] The Fifth Circuit may rehear this case en banc.[22]

Kivalina v. ExxonMobil

In *Kivalina v. ExxonMobil*, plaintiffs alleged that twenty oil, coal, and electric utility companies had

emitted large quantities of carbon dioxide through their operations and that these emissions had caused the melting of Arctic sea ice that formerly protected the village of Kivalina, Alaska, from winter storms which subsequently eroded the coastline, putting houses and buildings in imminent danger of falling into the sea.[23] 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."[24]

On September 30, 2009, the district court dismissed plaintiffs' action. The court held that plaintiffs' federal nuisance claim presented non-justiciable political questions, plaintiffs' federal nuisance claim could not meet the "fairly traceable" standard for causation for Article III standing, and that plaintiffs' state law claims were dismissed without prejudice based upon the court's discretion not to decide pendant state law claims.[25]

With regard to the political question doctrine, the court found that neither the U.S. Constitution nor any federal law prescribes the issues in the case to a decision by the political branches, but such a finding is not dispositive.[26] The court held that political questions were implicated because there were no workable standards for a jury to decide whether defendants' emissions caused more harm (erosion to the Kivalina coastline) than good (providing power, utilities, and oil to industry and residences).[27] Furthermore, the court concluded that the issues in the case—the allowable amount of greenhouse gases defendants could emit and who should bear the cost of global warming—required the court to make an initial policy determination that was best left to the political branches.[28]

The court also held that even if political questions were not implicated, plaintiffs did not have standing to bring their federal nuisance claim.[29] The court held that plaintiffs' allegations did not meet the "fairly traceable" standard for causation for Article III standing.[30] Contrary to the Fifth Circuit in *Comer*, the court rejected plaintiffs' claim that they need only establish that defendants "contributed" to their injuries.[31] On November 5, 2009, the *Kivalina* plaintiffs appealed the case to the Ninth Circuit.

Future of Greenhouse Gas Tort Litigation

Survival of motions to dismiss is an important first step in climate change litigation. Whether claims like those in *Comer*, *AEP*, and *Kivalina* can eventually succeed, however, depends on whether cases can first get through causation and class certification hurdles. It will be difficult for the *Kivalina* plaintiffs to prove that the alleged erosion of their coastline was caused by climate change and that defendants substantially contributed to that climate change, or for the *Comer* plaintiffs to prove that oil companies indirectly caused Hurricane Katrina losses. The Fifth Circuit in *Comer* took a relaxed approach to climate change causation in the context of its standing analysis, but courts would likely treat the causation element of plaintiffs' cause of action differently. All it takes, however, is for one district court to apply the "market share" theory of liability that plaintiffs have attempted to use in drug, asbestos, and lead paint cases, to get one case through the significant causation hurdle. In addition, courts may try to rely on regulatory pronouncements about greenhouse gases, Intergovernmental Panel on Climate Change (IPCC) statements, and UN reports to make the causal connection. For example, plaintiffs likely will rely on the upcoming UN report that purportedly will find that the world's 3,000 biggest public companies are responsible for $2.2 trillion worth of environmental damage annually due to greenhouse gas emissions.[32]

Plaintiffs' lawyers will continue to develop new climate change-related litigation theories. For example, in an interview on June 20, 2009, Gerald Maples, the lead plaintiffs' attorney in *Comer*, predicted "massive litigation" in the future from "big farming interests" who suffer droughts, to "communities . . . ravaged by wildfires," to "ski resorts that have no snow."[33] Tort claims may come in many shapes and forms in future years.

Even if greenhouse gas tort claims are not ultimately successful, the *Comer*, *AEP*, and *Kivalina* cases forecast the future of climate change litigation. Litigation costs to defendants for these and future climate change actions will likely be high despite the ultimate merits of the case. Thus, defense costs for insurers could be high even if the cases are not ultimately successful and coverage litigation eventually establishes no coverage. Below is an overview of some major coverage issues.

CGL or Environmental Liability Coverage for Greenhouse Gas Litigation? Key Issues in Upcoming Coverage Battles

Whether or Not Greenhouse Gases Are Pollutants

No issue may be more relevant to future climate change exposure than the interpretation of the term "pollutant" in the pollution exclusion in commercial general liability (CGL) and other policies and in affirmative coverage grants in environmental liability policies. If greenhouse gases are determined to be "pollutants" for purposes of insurance policies, CGL and certain Directors & Officers (D&O) exposures may be reduced and environmental liability exposure would increase. Alternatively, a court construing an exclusion narrowly and a coverage grant broadly could interpret the term "pollutant" in a way that exposes an insurer on both the CGL and environmental liability books of business. The pollution exclusion has been heavily litigated in the past and likely will continue to be the subject of litigation in the future as insurers face more and more greenhouse gas-related claims.

Although definitions can vary by policy, a "pollutant" is typically defined as:

> [A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[34]

In the context of pollution exclusion litigation, courts have interpreted this language differently. One court noted that "[t]o say there is a lack of unanimity as to how the clause should be interpreted is an understatement."[35] Some courts have found the pollution exclusion to be unambiguous and have interpreted the term "pollutant" broadly to encompass many substances.[36] Such courts have held that substances such as carbon monoxide,[37] nitrogen dioxide,[38] hydrogen sulfide,[39] styrene,[40] and anhydrous ammonia[41] qualify as "pollutants" as defined for purposes of the pollution exclusion. Other courts, however, have limited the application of pollution exclusions to situations involving "traditional" environmental pollution because they find the term "pollutant" to be ambiguous and believe that insureds have reasonable expectations of coverage for claims involving "non-traditional" pollution.[42] For example, an appeals court in Wisconsin held that carbon monoxide at high levels in a residence resulting from operation of a fireplace and boiler was not a "pollutant" within the meaning of the landlord's liability policy partially because the landlord could reasonably expect coverage for damages caused by the accumulation of a substance that is commonly present.[43] Not all courts applying the traditional pollution method have been clear in explaining the distinction between traditional and non-traditional pollution, lending to further uncertainty in this area. Some courts, however, have explained that the pollution exclusion was created as a reaction to environmental cleanups required under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), and thus the exclusion should only be applied to cleanup costs arising from such "traditional environmental pollution."[44]

What does this mean for greenhouse gases? Greenhouse gases are gases that are emitted from burning fossil fuels, industrial operations, waste disposal facilities, and mines, just to name a few sources. Certain greenhouse gases have been deemed to be pollutants in U.S. Supreme Court and Environmental Protection Agency (EPA) Clean Air Act decisions.[45] Arguably that makes greenhouse gases gaseous irritants or contaminants. Courts,

particularly those that find the pollution exclusion unambiguous and not limited to traditional pollution, might consider these attributes of greenhouse gases and conclude that greenhouse gases are pollutants for purposes of the pollution exclusion. On the flip side, jurisdictions limiting the pollution exclusion to traditional environmental pollution may find that greenhouse gases are not pollutants. Some greenhouse gases such as carbon dioxide and water vapor are commonly occurring and not always harmful. Carbon dioxide and water vapor are also sometimes naturally occurring. Those seeking coverage would argue that the U.S. Supreme Court only recently has deemed carbon dioxide a pollutant for purposes of the Clean Air Act and that such a determination is not dispositive for the interpretation of an insurance policy. Thus, they would argue that greenhouse gases are not irritants or contaminants under "traditional pollution discourse."

This issue already has been litigated in one case (although the court did not need to reach a decision on the issue) and there likely will be more cases like this in the future.[46] It remains to be seen whether insurers will test the waters in greenhouse gas coverage litigation on the pollution exclusion litigation, or create a substance-specific exclusion as they did with mold, formaldehyde, lead, and silica.

Whether Known Loss Provisions Apply

"Known loss," "known injury or damage," or "loss in progress" language may bar coverage for claims alleging harm caused by decades of greenhouse gas emissions. The "known injury or damage" limitation is common in the insuring agreement portion of more recent CGL policies. It specifies that the insurer will only cover damages learned by the insured after the effective date of the policy; i.e., the insurer will not cover any loss which was known to the insured when it contracted for the policy with the insurer. In addition, some liability policies may contain a "loss in progress" exclusion that excludes from coverage any damage, known or unknown, which "incepts" prior to the effective date of the policy.

The known loss limitations/exclusions were introduced in response to the decision in *Montrose Chemical Corp. v. Admiral Insurance Co.*,[47] an environmental case, in which the California Supreme Court held that unless explicitly agreed otherwise, (1) a loss is not known to an insured unless at the time the insurer entered into the contract, the insured had a legal obligation to pay damages to a third party in connection with the loss, and (2) uninterrupted, repeated events may repeatedly trigger coverage if the events are occurrences.[48]

In the climate change context, application of these limitations and exclusions will be complicated and likely vary by jurisdiction and policy terms. In the first climate change coverage case, insureds already have attempted to argue that the known loss exclusion should not be enforced because it conflicts with the known loss limitation in the insuring agreement.[49] Coverage also may turn on consideration of what the loss is and when the loss occurred. Whether emissions of this kind or climate change can be considered a loss in progress remains to be seen.

It should be noted that these "known loss" defenses are distinct from the "expected or intended" defense. The known loss defenses are applicable when the insured knows that the loss has already happened or is happening at the time the policy becomes effective. Therefore, it is immaterial whether or not the loss was accidental, fortuitous, or expected or intended by the insured at the time of the act or omission that caused the loss. The fortuity issues arising in the context of applying the expected or intended exclusion or determining whether there is an "occurrence" also will be relevant to climate change coverage.

Whether or Not a Claim Constitutes an Occurrence

Whether a climate change claim is an "occurrence" triggering coverage will be hotly contested. "Occurrence" is typically defined to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[50] Under an occurrence-based, as

opposed to claims made policy, coverage is triggered if there was an "occurrence" during the policy period. Thus, insureds can reach back to historic policies to look for coverage and there may be exposure for insurers under multiple policies. The claim need not be made during the policy period.

Whether the emission of greenhouse gases can be considered an "occurrence" will depend on the definition of "accident," whether an objective versus subjective test is used to determine whether an event constitutes an "occurrence," and the interplay between the "occurrence" trigger and the "expected or intended" injury exclusion. In February 2010, a Virginia court held that Steadfast Insurance had no duty to defend AES in connection with the underlying *Kivalina* litigation because there was no "occurrence" under Virginia law.[51] Decisions may differ, however, jurisdiction by jurisdiction.

The application of various trigger doctrines (e.g., continuous, exposure, injury-in-fact, or manifestation) by jurisdiction also will affect coverage. Under the continuous trigger doctrine, for example, all policies during the period of repeated occurrences provide coverage. Thus, there may be long-tail claim exposure for greenhouse gas-related claims where the policy contains the known event/loss trigger limitation, but no known loss exclusion, the policy does not contain any provisions designed to prevent triggering of multiple policies, and the jurisdiction applies the continuous trigger doctrine. In such a situation, if the insured can show that each emission event was an *unknown* occurrence, the continuous trigger doctrine may require the insurer to pay up to the policy limits on multiple policies. Given greenhouse gas emissions have occurred for decades, this is a significant concern.

Path Ahead

The pollution exclusion, occurrence, and known loss issues are just a few examples of the many coverage issues that will arise out of upcoming climate change litigation. Given that climate change litigation could be the next asbestos or big tobacco, insurers would be well advised to review their books of business and evaluate how their existing contracts will operate in the face of coming claims similar to that in *Comer*, and how they might want to change their books of business in the future through creation of new products, alteration of underwriting guidelines, development of new exclusions, or amendments of other provisions in existing products. Otherwise insurers could be surprised about who must pay for defense costs or liabilities associated with claims similar to those in *Comer*.

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[1] *Connecticut v. American Electric Power Co. (AEP)*, 582 F.3d 309 (2d Cir. 2009).

[2] *Comer v. Murphy Oil USA (Comer)*, 585 F.3d 855 (5th Cir. 2009).

[3] *Native Village of Kivalina v. ExxonMobil Corp. (Kivalina)*, 663 F.Supp.2d 863 (N.D. Cal. Sept. 30, 2009).

[4] In February 2010, the Fifth Circuit granted a petition for rehearing en banc in *Comer*. *See* Order Granting Hearing En Banc, No. CV-07-60756 (Feb. 26, 2010). Due to an additional recusal, however, the court may no longer have an en banc quorum pursuant to Fed.R.App.P. 35(a).

[5] *See* Juliette Jowit, *World's Top Firms Cause $2.2tn of Environmental Damage, Report Estimates*, The Guardian (Feb. 18, 2010), *available at* http://www.guardian.co.uk/environment/2010/feb/18/worlds-top-firms-environmental-damage.

[6] *See Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265, 271-74 (S.D.N.Y. 2005).

[7] *AEP* at 325, 332.

[8] *Id.* at 345-47.

[9] *Id.* at 358, 371.

[10] *Id.* at 387-88.

[11] *See* Order Granting Mot. Dismiss, *Comer v. Murphy Oil USA.*, No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007).

[12] *Comer*, 585 F.3d 855 (5th Cir. 2009).

[13] *Id.* at 864-67.

[14] *Massachusetts v. Environmental Protection Agency*, *549 U.S. 497 (2007)*.

[15] *Comer* at 865-67.

[16] *Id.* at 866-67.

[17] *Id.* at 879-80.

[18] *Id.* at 873.

[19] *Id.* at 875.

[20] *Id.* at 867-69.

[21] *Id.* at 868.

[22] *See supra* note 4.

[23] *See Native Village of Kivalina v. ExxonMobil Corp.*, No. CV-08-1138 SBA, Complaint at ¶¶ 3-4 (N.D. Cal. Feb. 26, 2008). At least one coverage dispute arose out of this case. *See Steadfast Ins. Co. v. AES Corp.*, No. 2008-858, 2010 WL 1484811 (Va. Cir. Ct. Feb. 5, 2010).

[24] *Kivalina* Complaint ¶ 6.

[25] *See Kivalina*, 663 F. Supp. 2d 863, 882-83 (N.D. Ca. 2009).

[26] *Id.* at 873.

[27] *Id.* at 873-76.

[28] *Id.* at 876-77.

[29] *Id.* at 877-82.

[30] *Id.*

[31] *Id.* at 878-80.

[32] *See supra* note 5.

[33] *See You are at Risk*, The Sydney Morning Herald (June 20, 2009), *available at* http://www.smh.com.au/business/you-are-at-risk-20090620-crk4.html.

[34] ISO Form, CG 00 01 12 07.

[35] *MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205, 1208 (Cal. 2003).

[36] *See Whittier Properties., Inc. v. Alaska National Ins. Co.*, 185 P.3d 84, 89–92 (Alaska 2008); *Heyman Associates No. 1 v. Ins. Co. of the State of Pa.*, 653 A.2d 122, 129-33 (Conn. 1995); *Deni Associates of Fla., Inc. v. State Farm Fire & Casualty Ins. Co.*, 711 So.2d 1135, 1137-41 (Fla. 1998); *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90, 92 (Ga. 2008); *Bituminous Casualty Corp. v. Sand Livestock Systems, Inc.*, 728 N.W.2d 216, 220-22 (Iowa 2007).

[37] *See Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d 1047, 1051 (Md. Ct. Spec. App. 1994).

[38] *See League of Minn. Cities Ins. Trust v. City of Coon Rapids*, 446 N.W.2d 419, 422 (Minn. Ct. App. 1989).

[39] *See United Nat'l Ins. Co. v. Hydro Tank, Inc.*, 497 F.3d 445, 453 (5th Cir. 2007).

[40] *See Hydro Systems, Inc. v. Continental Ins. Co.*, 717 F.Supp. 700, 702 (C.D. Cal. 1989).

[41] *See Terramatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483, 487-88 (Colo. Ct. App. 1997).

[42] *See Keggi v. Northbrook Property & Casualty Ins. Co.*, 13 P.3d 785, 790-92 (Ariz. Ct. App. 2000); *Minerva Enterprises, Inc. v. Bituminous Casualty Corp.*, 851 S.W.2d 403, 404-06 (Ark. 1993); *MacKinnon*, 73 P.3d at 1208-18; *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 75–82 (Ill. 1997); *American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind. 1996).

[43] *See Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997).

[44] *MacKinnon*, 73 P.3d at 1210–1211, 1216.

[45] *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (defining the aggregate group of six major greenhouse gases as air pollutants).

[46] Complaint for Declaratory Relief, *Steadfast Ins. Co. v. AES Corp.*, No. 2008-858 (Va. Cir. Ct., filed July 9, 2008) (hereinafter *Steadfast*) (addressing Steadfast's obligations to defend AES in the *Kivalina* litigation). The court held that there was no occurrence, and thus did not need to reach the issue of whether greenhouse gases are pollutants. AES has filed a petition for allowance of appeal.

[47] *See Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995).

[48] *See id.* at 901-05.

[49] *See* Steadfast Motion for Summary Judgment, *Steadfast*, No. 2008-858; AES Opposition to Steadfast's Motion for Summary Judgment, *Steadfast*, No. 2008-858, at 36–40 (Va. Cir. Ct. Aug. 7, 2009). The court did not reach the known loss issue in its decision on summary judgment. *See Steadfast*, No. 2008-858 (Va. Cir. Ct. Feb. 5, 2010). Instead, the court decided the case on the "occurrence" issue. *See* note 46 and accompanying text.

[50] ISO Form, CG 00 01 12 07.

[51] *See Steadfast*, No. 2008-858 (Va. Cir. Ct. Feb. 5, 2010).