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# Acting Like Lawyers

By Stephen F. English  
Bullivant Houser Bailey PC

Over the past several years I have had the enjoyable opportunity to work with a gentleman named Tom Capps. Although Tom lives in the Portland area, he has extensive experience, both in New York and L.A., as an actor and acting coach (he has been a coach for Academy Award and



Stephen English

Tony Award winners). Tom and I have had many discussions about the tools that acting uses that are transferable to good lawyering, whether in front of a jury, a judge, dealing with opposing counsel,

or even in meetings with clients. I have tried to distill some of Tom's observations in the following points:

**1** Juries today are influenced about how a lawyer should act and what should occur in a courtroom because they believe they know it from TV and movies showing actors as their favorite or most-hated lawyers. Whether we like this or not, this is a reality that we have to live with and try to benefit from.

**2** The jury is your audience and you, your client and your witnesses are characters in your case. Although training in public speaking is useful (certainly in helping one's delivery), that alone does not necessarily locate and develop the "drama" of your case. In acting



parlance, you are both storykeeper and storyteller, and you are responsible for getting your audience (whether judge or jury) to feel as passionately as you and your client do about your case.

**3** Most attorneys miss the mark right at the beginning of trial. We have lived with a case every day and know it inside and out, and it is sometimes difficult to focus energy on a set of facts that we have had engrained in us for the past year (or even years).

**4** To this end, every great story has a beginning, middle and end. When you have worked with a story for two years before you tell it to the jury, you tend to water down the begin-

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**FROM THE  
MANAGING  
EDITOR**

**BACK  
TO THE  
FUTURE**

**By  
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What's the secret to professionalism? Senior U.S. District Court Judge Owen M. Panner once noted it's simply a matter of "looking back to the future." At the time, I did not know what he meant. Now I do.

Judge Panner meant, to simply practice over the course of one's career in the manner in which one would like to be remembered at the end of one's career. In short..."look back to the future."



*Dennis Rawlinson*

In the fall of 2009, I had the privilege of serving on the Advisory Committee for the Section of Litigation of the American Bar Association. The Advisory Committee is a committee of five which selects the future leadership for some 75,000 members of the Section of Litigation nationally. In performing the due diligence for one of the candidates for chair of the section, judges, opposing counsel, and clients listed the following as qualities of the candidate:

**1. Trial skills**

- (a) "Gifted" first-chair trial lawyer;
- (b) "Superb" trial lawyer;
- (c) "Nice touch" with both witnesses and the court;
- (d) Can conduct an "aggressive" cross-examination and yet be "likeable;"

- (e) A "strategic" thinker;
- (f) "Savvy" in the courtroom;
- (g) An "extraordinary litigator."

**2. Personal qualities**

- (a) Approaches everything he does with a "contagious enthusiasm;"
- (b) A "joy" with whom to work;
- (c) "Responsive, creative and delightful;"
- (d) "Patient demeanor and a willingness to listen to all . . .;"
- (e) "Bright, articulate and quick witted;"
- (f) "Capable of 'disagreeing' without 'being disagreeable;'"
- (g) "Razor-sharp intellect;"
- (h) "Passionate."

**3. Professionalism**

- (a) "Bigger than life;"

- (b) "Quick witted, practical and professional;"
- (c) A "lawyer's lawyer;"
- (d) A "solid guy;"
- (e) "A credit to his profession;"
- (f) "His word is his bond;"
- (g) "An example for our profession."

**4. Leadership**

- (a) "Ability to listen to others and build consensus;"
- (b) A "good sense of self;"
- (c) "Comfortable with himself;"
- (d) Charismatic, enthusiastic and practices with a high degree of energy;
- (e) A "peace maker;"
- (f) Has a "strong work ethic, a passion for the law, and a love of lawyering."

I couldn't help, at the end of conducting these interviews, to conclude that this candidate knew and understood "Professionalism." He had been looking "back to the future" his entire career and had conducted each year, month, week, and hour in the manner in which he had hoped to be remembered at the end of his career.

Professionalism is simply "writing your eulogy day by day." It is simply as Senior Judge Owen M. Panner noted "looking back to the future." □

# Are Mandatory Mediation Clauses Enforceable?

By Caroline Harris Crown  
Tonkon Torp LLP

The question whether mandatory mediation clauses in contracts are enforceable may seem academic. What's the point in trying to enforce an agreement to mediate, when mediation is essentially a voluntary process?



Caroline Harris Crown

From the opposite perspective, what's the point in resisting mediation when our courts require us to engage in a settlement conference or other dispute resolution process before trial? In recent years, however, courts across the nation have become increasingly willing to enforce agreements to mediate, and the effect is sometimes outcome-determinative. Plaintiffs in particular must tread carefully around mandatory mediation clauses at the peril of missing a statute of limitations, losing an opportunity for injunctive relief, or having meritorious claims dismissed after lengthy and expensive litigation. Mediation clauses can engender their own satellite litigation, which is unfortunate when the purpose of including them in contracts usually is to promote early and efficient resolution of disputes. This article will explain the legal basis for enforcing mandatory mediation clauses in contracts, point out some procedural problems, and make recommendations for contract drafting and legislative reform to avoid protracted litigation over the enforcement of mediation clauses.



## The Legal Basis for Enforcing Mediation Clauses – in General

Unlike the enforcement of arbitration clauses, the enforcement of mediation clauses is generally a matter of state law. The Federal Arbitration Act (FAA), 9 USC §§ 1-16, which requires courts to enforce agreements to arbitrate disputes, does not apply to mediation. *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F3d 1235, 1238-41 (11th Cir 2008); *but cf Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F3d 1205, 1207-09 (9th Cir 1998) (holding that FAA does apply to *non-binding arbitration* because the process still involves submission of a dispute for a decision by a third party). The states are therefore free to decide whether and how they will enforce agreements to mediate.

Enforcement of an agreement to mediate is a matter of contract law. The issue may arise as a claim for specific performance of the contract, *Martin v. Howard*, 784 A2d 291 (RI 2001), or as a defense of failure of condition precedent, *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F3d 201, 207-08 (6th Cir 1995). Damages generally are not available because there is no certainty that mediation will result in a settlement. *Martin*, 784 A2d at 302. With regard to the defense of failure of condition precedent, courts consider whether the contract at issue requires a party to initiate mediation *before* filing an action in court for relief. *Santana v. Olguin*, 208 P3d 328 (Kan App 2009) (holding that trial court properly dismissed claim for failure of condition precedent, rather than directing parties

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## Mediation Clauses

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to participate in mediation). Sometimes courts avoid dismissal by interpreting the contract to require a party to participate in mediation *only if* the other party demands it. *Millsboro Fire Co. v. Const. Mgmt. Svc., Inc.*, C.A. No. 05C-06-137, 2009 WL 846614, at \*5 (Del Super March 31, 2009). Courts frequently also consider whether the party seeking to enforce a mediation clause has waived its right to do so by participating in litigation. *Harting v. Barton*, 6 P3d 91, 94-96 (Wash App 2000); *1930-34 Associates, L.P. v. BVF Const. Co., Inc.*, 2005 No. 0908, 2006 WL 1462932 (Pa Com Pl May 22, 2006).

### The Law of Mediation in Oregon

There are no published cases in Oregon addressing the enforceability of agreements to mediate. Oregon has a Uniform Arbitration Act (OUAA), ORS 36.600 et seq., which like the FAA, should not apply to mediation. See ORS 36.600(2) (defining "arbitrator" as a person "appointed to render an award"); *but cf. Solomon v. Progressive Cas. Ins. Co.*, 685 A2d 1073 (RI 1996) (stating that agreement to mediate could be enforced pursuant to Rhode Island's arbitration statute, RI Gen Laws § 10-3-4).

Oregon does have a handful of statutes specific to mediation. ORS 36.100 states a policy in favor of *encouraging* and *assisting* parties to resolve their disputes through mediation. Judges have the power to refer any civil dispute to mediation on their own initiative under ORS 36.185, or upon the stipulation of all the parties under ORS 36.190, but any party has the right to take the case out of mediation simply by filing an objection under ORS 36.185. *Cf. Kirschenman v. Superior Court*, 36 Cal Rptr 2d 166, 168 (Cal App 1994) (holding that courts in California have no authority to enforce oral agreement to mediate, based on in-court stipulation of the parties' attorneys, because California statutes allow parties to revoke their consent to participate in mediation).

A contractual agreement to mediate could be considered a stipulation to mediate under ORS 36.190, since that statute allows the stipulation to occur "at any time prior to trial." ORS 36.190(1). If so, then mediation clauses are not enforceable in Oregon because courts cannot require participation in mediation once a party has objected. However, courts may decide that the mediation statutes were not intended to apply to contractual agreements to mediate, in which case they would simply enforce mediation agreements pursuant to general principles of contract law.

A more nuanced middle position is possible. One could take the view that Oregon courts have authority to refer cases to mediation – whether on the basis of a pre-dispute mediation agreement or a stipulation reached during litigation – but cannot compel continued participation in mediation. In other words, Oregon courts will not probe whether a party has participated in mediation in good faith. This interpretation is appealing because it harmonizes the policies reflected in the Oregon mediation statutes with the contract law approach to mediation agreements.

### Procedural Perils

Enforcement of a mediation agreement under traditional contract law principles can have serious consequences. If a party is found to have failed to participate in mediation, as a condition precedent to seeking relief in court, that party may be barred from seeking emergency injunctive relief.

The parties may engage in months of litigation only to have the claims dismissed for failure to mediate, after summary judgment or trial, or even after an appeal. *See, e.g., Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F3d 201, 207-08 (6th Cir 1995) (upholding grant of summary judgment to defendant on warranty claim because participation in dispute resolution process provided in contract

was condition precedent to filing suit); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F2d 326 (7th Cir 1987) (same).

While it may seem that parties can avoid these perils by complying with their mediation agreements, which should be a simple matter, it is not always so easy. For one thing, a party may not even be aware that a mediation agreement applies to the dispute. In business relationships, it is common for parties to have multiple contracts over time with different dispute resolution provisions. Also, the process of initiating mediation and selecting a mediator can take time and effort, especially when the other side is dragging its feet. Such delays can put a party in jeopardy of missing the statute of limitations. Delays in getting mediation started also can cause damages to escalate in situations when injunctive relief is needed.

The FAA and the OUAA have gone a long way toward eliminating such procedural perils in the enforcement of arbitration agreements. Both provide that the court may stay litigation while the parties comply with a duty to arbitrate. 9 USC § 3; ORS 36.625(6). Both provide a procedure for enforcement of an arbitration agreement by motion to compel, which allows the issue to be resolved early in the case. 9 USC §§ 4, 6; ORS 36.625(8). Both provide for interlocutory appeal if the trial court denies a motion to compel arbitration, which ensures a conclusive determination of this procedural issue before the merits of the case are presented. 9 USC § 16; ORS 36.730(1)(a). The Oregon Supreme Court recently held that interlocutory appeal is not only available but is the exclusive means of challenging a trial court's denial of a petition to compel arbitration, pointing out the solid practical reasons for requiring an immediate appeal. *Snider v. Production Chemical Mfg., Inc.*, 348 Or 257 (2010). Finally, the OUAA expressly addresses the issue of

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## Mediation Clauses

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emergency injunctive relief, allowing parties to an arbitration agreement to seek provisional remedies in court in certain circumstances, and the federal courts have generally followed the same approach despite the lack of a comparable express provision in the FAA. ORS 36.630; Uniform Arbitration Act, § 8, *cmt.* 1, 7 ULA 1, 34-35 (revised 2000) (noting that five of six circuit courts to address this issue have allowed provisional relief).

Without similar procedures for enforcement of agreements to mediate, there is nothing to prevent a defendant from alleging the failure to mediate as an affirmative defense in its answer and then taking a wait-and-see approach, relying on the defense later only if the plaintiff seems likely to prevail on its claims. It is counterintuitive, but a defense based on the failure to mediate can be more dangerous than a defense based on the failure to arbitrate.

### Suggestions for Reform

Mediation clauses are put in contracts with the best of intentions. Early resolution of disputes through negotiation and mediation is often the best outcome for everyone involved. But the clauses themselves can engender disputes, adding to the overall cost of litigation and distorting the outcome. We can promote mediation, while avoiding spin-off litigation about mediation, by improving our contracts and our legislation.

For those drafting contracts, avoid making mediation a *condition precedent* for a party to obtain relief for a breach of the contract. In other words, do not state that the parties must participate in mediation before seeking relief in court. Instead, provide for an optional mediation process. The fact that it is included in the contract will serve to encourage the parties to consider mediation in the event of dispute, particularly if the process for initiating mediation and selecting an arbitrator is spelled out. If mandatory mediation is desired, the contract can

be drafted to require participation in mediation *only if* one party initiates the process. Mediation may be initiated before or after a claim is filed in court, and the parties may seek relief in court while mediation is in process.

For those who do want to make mediation a condition precedent to obtaining relief in court, it is important to consider issues such as the possible need for emergency provisional relief and tolling of the statute of limitations during mediation. Drafters should be as clear as possible in describing the scope of the clause, including expressly addressing what types of disputes will be subject to the mediation requirement. They also should specify the manner of initiating mediation, how the mediator will be selected, and whether mediation must be completed within a certain time. Vague mediation clauses make it difficult for parties to determine what exactly they must do before they are free to seek relief in court. Dispute resolution clauses that incorporate both mediation and arbitration require even more care in drafting.

As for statutory reform, the simplest way to avoid litigation over mediation would be to amend ORS 36.185 to .200 to make clear that those sections apply to *pre-dispute* mediation agreements as well as stipulations made after a case is filed and, further, that they provide the *only* mechanism for enforcing mediation agreements in a pending case. In other words, a party would not be able to obtain dismissal of a claim based on the opposing party's failure to mediate. Such an amendment would in effect limit what parties can agree to in their mediation clauses. This approach is consistent with the OUAA, which provides a number of procedures that parties may not vary in their arbitration agreements, including that an application for relief under the arbitration act "must be made by petition to the court." ORS 36.615(2) (a). Since the mediation statutes cur-

rently apply only to pending cases, they could also be amended to expand the mediation referral process to make it available to disputants who do not yet have a case pending in the court.

Another way to promote mediation, without resorting to the heavy penalty of dismissal of claims, is to give greater weight to dispute resolution efforts in the award of attorney fees. ORS 20.075 already lists "the diligence of the parties in pursuing settlement of the dispute" among the factors the court should consider in awarding attorney fees pursuant to a statute. Drafters of contracts could provide that the prevailing party may recover its attorney fees only if it made reasonable efforts to use the mediation process provided in the contract to resolve the dispute.

### Conclusion

Mandatory mediation provisions in contracts can cause more trouble than they are worth. At best, they bring parties to the negotiating table, where the outcome depends on how interested the parties really are in achieving a settlement. At worst, they serve as fodder for procedural jockeying, which complicates the litigation. Before including a mediation clause in a contract, think about what may happen if the parties fail to initiate mediation before going to court. With careful drafting, you may be able to steer clear of the worst unintended consequences. □

### Endnote

- 1 The author was recently involved in a case in which her client obtained an important award on a contempt motion, with substantial attorney fees, and then had to defend that award on appeal against an argument that she had not complied with a mediation clause. While the defense was ultimately rejected by the Court of Appeals, it put a substantial award at risk for over a year and added to the cost of the litigation.

# Climate Change Litigation: Understanding, Avoidance, and Adaptation

By Tom Lindley & Emily Merolli  
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In 2007, the U.S. Supreme Court issued an opinion in *Massachusetts v. Environmental Protection Agency*<sup>1</sup> that recognizes climate change as scientific fact and acknowledges the authority of the Environmental Protection Agency ("EPA") to determine whether to regulate



Tom Lindley

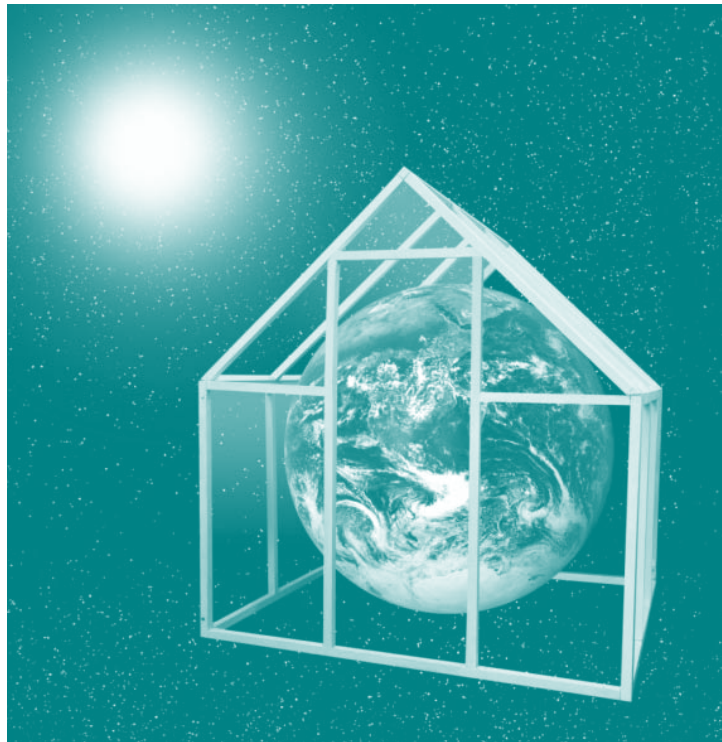


Emily Merolli

greenhouse gases ("GHGs") under the Clean Air Act ("CAA"). This decision has ushered in a new era of environmental litigation, as community and environmental groups, industry, and government agencies turn to

the courts to determine how and to what extent GHG emissions should be regulated and how such regulations might be employed to impact proposed projects.

The purpose of this article is to provide a brief overview of where climate change litigation has gone thus far, identify some emerging areas of potential litigation, and provide advice on how to avoid or settle such litigation.



## Climate Change Litigation

Litigants have brought lawsuits to address GHG impacts under both statutory law and common law. The statutory claims focus on the CAA, National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), corporate law and regional initiatives, and most recently the Clean Water Act ("CWA"). Common law claims have focused on public and private nuisance, fraud, and other claims. With the change in admin-

istration, the focus of climate change litigation is likely to shift from issues primarily driven by environmental groups to challenges brought by regulated parties.

### A. Clean Air Act

During the Bush Administration, in an effort to force the federal government to enact comprehensive GHG regulations, plaintiffs brought lawsuits under numerous provisions of the CAA. The suits demanded that EPA issue an "endangerment finding" (i.e., that GHG emissions pose a risk to human health and the environment),<sup>2</sup> grant a waiver allowing California to impose their own emissions standards on motor vehicles,<sup>3</sup> and require

new permits to consider and mitigate those emissions.<sup>4</sup> Plaintiffs, largely environmental groups, have litigated under two strategies: cases aimed at forcing nationwide regulations and cases taking a "state-by-state" approach, hoping that rulings requiring individual state regulation will ultimately force a national consensus.

With the Obama Administration acting quickly on both the GHG registry and endangerment finding, environmental

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## Climate Change Litigation

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plaintiffs have largely stepped back to give EPA time to respond outside of litigation. Environmental plaintiffs, however, continue to challenge permits issued to new facilities and demand that those permits include analysis of GHG emissions. For example, in *In re Deseret Power Electric Cooperative*,<sup>5</sup> environmental plaintiffs petitioned to the Environmental Appeals Board ("EAB") to review a CAA prevention of significant deterioration ("PSD") permit issued by EPA Region VIII to Deseret Power to construct a new waste-coal-fired utility generating unit at an existing power plant in Utah. Plaintiffs claimed the permit failed to include a best available control technology ("BACT") analysis to determine achievable GHG emission limitations. In November 2008, the EAB rejected EPA's reasons for excluding carbon dioxide ("CO<sub>2</sub>") limits from the PSD permit and required EPA to determine whether "technologically feasible and cost effective" controls are available to limit GHG emissions. To reduce uncertainty, the EAB urged EPA to establish a national rule rather than make determinations on a permit-by-permit basis.<sup>6</sup> This and other CAA rulings continue to influence state-by-state and regional policies, as EPA considers setting limits for GHG emissions under the CAA. Individual rulings such as *Deseret* can force agency action to some degree, but the indisputable road to CAA permit requirements remains for EPA to establish substantive GHG emissions regulations under some generic provision, such as a motor vehicle GHG standard. At that point, GHG emissions would become "pollutant[s] regulated under the CAA" and subject to the PSD permit requirements under CAA section 165 *et seq.*

Additionally, while the courts have not yet reached a consensus on the

**In *California v. County of San Bernardino*, the State of California claimed that San Bernardino County failed to fully evaluate, disclose, and mitigate the reasonably foreseeable GHG emission effects of its new "general growth plan."**

issue, industry is beginning to respond to these lawsuits with their pocket-books, walking away from potential fossil fuel-intensive projects that are too burdened with ongoing climate change litigation and concerns about regulatory uncertainty to be viable investments. In *Longleaf Energy Ass'n, LLC, v. Friends of the Chattahoochee, Inc.*,<sup>7</sup> a Georgia State superior court judge ruled that the state environmental department must conduct a BACT review to determine whether a CAA PSD permit issued to Dynegy, Inc.'s planned 1,200 MW Longleaf power plant would adequately control for CO<sub>2</sub>. Longleaf Energy appealed. On January 2, 2009, however, Dynegy pulled out of its agreement with New Jersey-based LS Power to build four coal-fired power plants, including the Longleaf Energy Station. Environmental groups opposed to the plant are citing Dynegy's decision as a victory and as proof that coal plants are no longer a wise investment for power companies.

## B. National Environmental Policy Act

The first round of climate change litigation under NEPA and equivalent state statutes ("little NEPAs") emerged in response to two issues: first, whether NEPA requires any consideration of climate change in the assessment of impacts of proposed federal undertakings; and second, how climate change impacts should be addressed in the NEPA process. Recently, with the rising acceptance of the position that NEPA requires consideration of climate change impacts, plaintiffs have increasingly initiated climate change lawsuits alleging violations of NEPA and little NEPAs in three primary contexts: challenges to city and county land use planning decisions, challenges to agency rulemaking actions that may have climate change implications, and challenges to individual project development.

State plaintiffs have successfully challenged city and county general growth plans based on a failure to analyze impacts of climate change. In *California v. County of San Bernardino*,<sup>8</sup> the State of California claimed that San Bernardino County failed to fully evaluate, disclose, and mitigate the reasonably foreseeable GHG emission effects of its new "general growth plan." The parties settled in August 2007, and the County agreed to amend its plan to create a baseline GHG emissions inventory, project its further inventory for the year 2020, and set an emissions reduction target. Threatening similar litigation to numerous other counties, California Attorney General Jerry Brown warned them to revise their growth plans. In a January 13, 2009, letter to the City of Pleasanton, Attorney General Brown objected to the City's draft California Environmental Quality Act ("CEQA") review of their proposed general plan update, arguing that it failed to adequately address GHG emissions from increased transportation.<sup>9</sup>

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## Climate Change Litigation

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In *Center for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*,<sup>10</sup> environmental plaintiffs brought a lawsuit against the National Highway Traffic Safety Administration for failing to consider climate change in the context of administrative rulemaking. Plaintiffs challenged the agency's final Environmental Assessment ("EA") and corporate average fuel economy requirements for light trucks manufactured in model years 2008-2011. Ruling in favor of the plaintiffs, the Ninth Circuit held that the agency's EA failed to assess adequately CO<sub>2</sub> emission reduction benefits and required a revision of its rule.<sup>11</sup>

Most NEPA and little NEPA climate change cases have been challenges to individual projects. For example, in *No Wetlands Landfill Expansion, et al. v. County of Marin, et al.*,<sup>12</sup> environmentalists filed a lawsuit in January 2009, claiming that local government officials failed to properly analyze and mitigate GHG emissions and potential climate change impacts under CEQA when approving a permit for a landfill and recycling center expansion project. Specifically, plaintiffs argued that county officials failed to assess adequately or require mitigation of methane and CO<sub>2</sub> emissions as part of the permit for the Redwood Landfill project. This lawsuit is significant because it adds to a growing list of such actions on the West Coast that will be influential in shaping future agency actions as well as setting important precedent,<sup>13</sup> and underscores an emerging policy conflict among environmentalists favoring new green development, such as the recycling facility at issue here, and those favoring the reduction of GHG emissions.

Climate change lawsuits under NEPA and little NEPAs have been limited, however, by a recent opinion from the U.S. Court of Appeals in the DC Circuit. In *Center for Biological Diversity v. Dep't of the Interior*,<sup>14</sup> three environmental

**The court held that petitioners had procedural standing to bring their climate change claims, having shown they possess a threatened particularized interest, "namely their enjoyment of the indigenous animals of the Alaskan areas listed in the Leasing Program."**

plaintiffs and the Native Village of Point Hope, Alaska challenged DOI's five year leasing program for offshore oil and gas development between 2007 and 2012 under the Outer Continental Shelf Lands Act ("OCSLA"). The challenge focused on the expansion of previous lease offerings in the Beaufort, Bering, and Chukchi Seas off the coast of Alaska. The Court of Appeals ruled in favor of the plaintiffs and ordered DOI to analyze the proposed leasing areas to determine the risk of environmental damage before moving ahead with the lease sales. However, the court rejected the plaintiffs' substantive and procedural climate change claims. Plaintiffs claimed that DOI violated both OCSLA and NEPA by failing to consider the economic and environmental costs of the GHG emissions associated with the program and the effects of climate change on areas of the Outer Continental Shelf. The court, noting the limiting language of *Massachusetts v. EPA*,<sup>15</sup> held that the petitioners lacked stand-

ing on their substantive climate change theory. Specifically, the court found that *Massachusetts v. EPA* did not govern here because there was no immediate harm or threat, the harm was not particularized, and there was no causal link. The plaintiffs failed to prove they would suffer more harm from climate change than other citizens, and failed to prove the government's action in approving the leasing program was a direct cause of that harm.

The court held that petitioners had procedural standing to bring their climate change claims, having shown they possess a threatened particularized interest, "namely their enjoyment of the indigenous animals of the Alaskan areas listed in the Leasing Program."<sup>16</sup> However, the court found that the claims were not ripe because of the multiple-stage nature of the Leasing Program. The court held that "an agency's NEPA obligations mature only once it reaches a critical stage of a decision which will result in irreversible and irretrievable commitments of resources that an action will affect the environment,"<sup>17</sup> and that in "the context of multiple-stage leasing programs, we ultimately held that the point of irreversible and irretrievable commitment of resources and the concomitant obligation to fully comply with NEPA does not mature until the leases are issued."<sup>18</sup> The court found that because DOI had simply issued the Leasing Program, which is the first of four steps in the process, and had not completed any lease sales, the climate change claims were not ripe. Furthermore, the court stated that if it were to allow plaintiffs to bring such NEPA challenges to leasing programs before rights had been implicated or actions taken, it would create an additional procedural requirement on all agencies and would be too onerous at too early a stage in the decision-making process.

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## Climate Change Litigation

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### C. Endangered Species Act

Since 2005, the U.S. Fish and Wildlife Service ("FWS") has battled with various plaintiffs over whether ESA consultations and listing actions should consider the impacts of climate change. The issues surrounding the polar bear are the most controversial: in May 2008, FWS listed the polar bear as "threatened," acknowledging that population losses were caused by climate change-induced habitat reduction.<sup>19</sup> Since then, numerous cases have been filed challenging the listing decision from both the environmental and industry-and-commerce perspectives.<sup>20</sup> New consultation regulations issued by FWS in December 2008 maintained that the ESA is not intended to regulate climate change, and that ESA consultation would not require parties to consider the effects of climate change on ESA-listed species during the section 7 consultation process under the ESA for new projects and project reauthorizations.<sup>21</sup> However, the new regulations have been suspended pending further review,<sup>22</sup> and other species may soon be listed for climate change-related reasons. For example, in California, plaintiffs recently filed suit under the ESA and the equivalent state statute, claiming that the decline in the American pika rabbit population was caused by climate change-induced habitat loss. In February 2009, plaintiffs reached a settlement that will require FWS to assess whether the pika warrants protection under the ESA due to climate change.<sup>23</sup>

Plaintiffs have also brought general challenges to federal rulemaking authority under the ESA. Environmental groups sued to block the December 2008 revised rules that would eliminate the requirement to consider GHG emission impacts on species and ecosystems during formal consultation.<sup>24</sup> Various states, including Oregon, have since filed a similar lawsuit opposing the new rules.<sup>25</sup> In January

**In January 2009, environmental groups filed suit against numerous federal agencies for failing to develop regulations to speed the recovery of endangered species and to integrate climate change considerations into all major federal decision-making processes.**

2009, environmental groups filed suit against numerous federal agencies for failing to develop regulations to speed the recovery of endangered species and to integrate climate change considerations into all major federal decision-making processes.<sup>26</sup> These suits will likely be settled by administrative action in the coming months.

### D. Corporate Law

State Attorneys General are beginning to demand that corporations disclose climate change-related risks to the public. New York State recently reached settlements in lawsuits against publicly held energy companies. The settlements mandate future climate change-related corporate disclosure.<sup>27</sup> The settlements require Xcel Energy and Dynegy, Inc. to disclose to the federal Securities Exchange Commission, via Form 10-K, any financial risks that climate change may pose to investors. Disclosure requirements include financial risk analyses based on increased regulation and

physical impacts of climate change, any climate change-related litigation that is likely to have a material effect on the company, and a strategic analysis of climate change risks and emissions management. There is, therefore, already discussion of whether such disclosures will lead to more shareholder derivative or other securities litigation.

### E. Regional Initiatives

In the absence of a national cap-and-trade program, state and regional initiatives have taken shape and attracted controversy. In January 2009, Indeck Energy, owner of the Indeck-Corinth Generating Station in Corinth, New York, filed a lawsuit against various state agencies over New York's participation in the Regional Greenhouse Gas Initiative ("RGGI"), a coalition of ten Northeastern states crafting a framework to reduce GHG emissions through a regional cap-and-trade system.<sup>28</sup> Under RGGI, power plants must buy allowances equal to the amount of carbon they produce. Indeck claims the agencies lack the legislative authority to implement what amounts to an authorized tax, and furthermore, they claim the multi-state compact is unconstitutional without federal Congressional authorization. The lawsuit is the first of its kind to challenge regional GHG emissions programs, although similar suits have been threatened against the Western Climate Initiative and California's AB 32, a landmark climate change law involving the auction of GHG emission allowances and a cap-and-trade program.<sup>29</sup> Although defendants claim the lawsuit is without merit, it raises issues of state sovereignty and federal preemption that may ultimately accelerate nationwide GHG regulation.

### F. Clean Water Act

*Conservation Law Foundation v. EPA*<sup>30</sup> presents a challenge that is the first

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of its kind. In October 2008, environmental plaintiffs filed a complaint in the U.S. District Court for the District of Vermont against EPA, alleging violations of sections 1311 and 1313 of the CWA. Among the alleged violations is the agency's failure to analyze climate change when it approved the establishment of wasteload allocations, load allocations, the overall loading capacity, critical conditions, seasonal variation, and the margin of safety for discharge authorizations under the statute. This case, which has not yet been decided, is being closely watched as the first climate change-based challenge under CWA authority.

Ocean acidification<sup>31</sup> is another issue gaining attention in the climate change context. In February 2007, the Center for Biological Diversity petitioned eight coastal states to declare portions of the Atlantic and Pacific Oceans under their jurisdiction "impaired" based on their low pH levels, list the segments on their CWA § 303(d) lists, and establish a total maximum daily load for CO<sub>2</sub>. The group also filed a December 2007 petition to EPA for revised pH water quality criteria under CWA § 304 to address ocean acidification. The petition cited concerns about water quality and the significant impacts of ocean acidification on coral reefs, including the ESA-listed elkhorn and staghorn corals. Following a November 2008 60-day notice of intent to sue, EPA announced they would solicit further information and develop biological assessment methods and other technical guidance relating to water quality and the health of coral reefs.<sup>32</sup>

### G. Common Law

Successful lawsuits brought under statutory authority force agency action and can result in policy change. In an effort to obtain financial relief for climate change-related harms, plaintiffs are suing individual companies under common law theories as well. While the award may be

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substantial, the burden of proof remains quite high.

In *Native Village of Kivalina v. ExxonMobile Corp.*,<sup>33</sup> village residents claim that various energy companies' emissions caused severe erosion that destroyed their coastal Alaskan town. In an effort to prove causation and damages, plaintiffs submitted studies by the U.S. Army Corps of Engineers and Government Accountability Office recommending that the town be relocated due to climate change-related damage. The plaintiffs argue that the studies' estimate that the move will cost anywhere from \$95 to \$400 million proves damages and goes toward showing that there is a real and particularized harm that can be traced back to the defendant companies.

In *Comer v. Murphy Oil USA*,<sup>34</sup> Gulf Coast property owners and citizens brought class action tort claims against numerous oil, chemical, coal, and energy companies. Plaintiffs allege the defendants' collective actions contributed to climate change and caused a chain reaction that ultimately led to Hurricane

Katrina in August 2005. Damage claims include loss of income and property. After the district court dismissed the claims in August 2007, plaintiffs appealed to the Fifth Circuit.<sup>35</sup> In November 2008, the court heard oral arguments to consider whether plaintiffs have legal standing to bring the lawsuit. The outcome of this case will likely set significant legal precedent regarding the rights of individual property owners to file similar claims in the future.

Finally, there are common law cases that do not raise climate change issues, but are nonetheless relevant. In *State of North Carolina v. Tennessee Valley Authority*,<sup>36</sup> for example, the state filed a public nuisance action against the utility. North Carolina cited urgent environmental concerns in the state, allegedly caused by air pollution emitted by the utility's coal-fired power plants in other states. The state claimed that airborne particles from the plants entered the state in "unreasonable amounts," threatening public health, the region's economy, and the "beauty and purity of a vast natural ecosystem." The district court held that there was a public nuisance and the state was entitled to damages. While the case does not address GHG emissions, two points are of interest in the context of climate change litigation. First, the state initially sought relief by using the normal CAA administrative channels. However, when those channels failed to result in the desired reduction of out-of-state emissions, the state turned to the federal court with a common law claim. This seems to be part of a growing trend of parties seeking common law relief outside of the politicized statutory frameworks that are the more traditional path to judicial relief in the environmental context. Second, this case continues to develop the discussion of causation in terms of common law emissions cases. While the emissions models here are different from those used to determine causation as related

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to climate change, the case does contain discussions of admissibility of evidence and causation that may be applicable in the climate change context.

### H. Upcoming Litigation Trends

When the Obama Administration took office in January 2009, parties on both sides of existing and emerging climate change litigation reflected on how a significantly changed political and legislative climate would influence the face of future litigation. Some industry groups have announced plans to step up litigation to block or delay the expected upswing in environmental regulations. The industry position and pledge to initiate litigation is largely a role reversal with environmental groups who, during the Bush Administration, mounted a number of legal challenges against administrative policies. While a number of environmental plaintiff-driven lawsuits continue to move forward, some groups have indicated a willingness to hold off on filing new litigation in order to give the Obama Administration time and room to demonstrate their views on climate policy.<sup>37</sup> However, the campaign by environmental plaintiffs against coal-fired power plants and other fossil fuel-intensive industries will continue unabated. No new plant or significant source of GHG emissions will go unchallenged.

EPA Administrator Jackson is expected to grant California's emission waiver, release federal GHG inventory regulations, and publish a final endangerment finding for GHG emissions by the end of this summer. Secretary of the Interior Ken Salazar is expected to reverse the new ESA consultation regulations. Most significantly, the Waxman-Markey "American Clean Energy and Securities Act of 2009" bill, a comprehensive climate change legislation addressing emissions limitations and cap-and-trade, is currently in Committee. The legislation did not pass by early 2010 as its drafters

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had hoped, in large part due to Congressional focus on economic issues and health care legislation. However, many hope that comprehensive climate change legislation can still be passed in the near future. All of these actions will spark new controversy, and are sure to cause an even greater increase in climate change-related litigation in the coming years. It is also likely that litigants will seek out niche areas that GHG legislation and EPA regulation may not cover – for example, the duties of companies to report GHG impacts under securities laws.

### II. How to Avoid Climate Change Litigation

Involvement in climate change litigation can be costly and can result in project delays of several years. Susceptibility to litigation can detract potential investors or cause existing investors to pull out of proposed projects. While the current instability in the statutory and regulatory climate at both the state and federal level makes it difficult to predict what the future framework of emission limita-

tions will be, it is clear that no industry is immune to climate change litigation. The original targets of environmental plaintiff-driven climate change litigation were certainly large coal-fired power plants, and this industry continues to see new litigation, as well as the financially devastating impacts that it brings with it.<sup>38</sup> Recently, however, even industries long thought immune, including agriculture<sup>39</sup> and the emerging green industry,<sup>40</sup> have been the subject of litigation.

Industry needs clear and consistent guidance from legislators and regulators on the level of emissions abatement to be required, the timeline for those reductions, and the extent to which cap-and-trade programs at the state, regional, and federal level can be used to offset and mitigate emissions. As that guidance continues to develop and emerge, however, there are several steps that businesses can take to avoid litigation and secure their path through the development process.

#### A. Develop a Strategic Plan

Entering the permitting process for an individual new project should not be done in a vacuum. Rather, businesses should approach the permitting process for individual projects as part of a long-term corporate strategy to minimize risks to the company and capitalize on opportunities presented by the political climate surrounding global warming. While reducing a business's climate change impact is difficult, especially if a company's core business is heavily reliant on fossil fuels, the clear trend in business, policy and the law is to move toward "green" technology and renewable energy sources. Valuable corporate strategic planning processes exist to assist businesses in evaluating and minimizing risks, and capitalizing on emerging opportunities.

The steps toward developing a strategic plan are straightforward. They include conducting an analysis of the

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risks of climate change regulation for a business's products and services, establishing internal reduction goals for company operations, and designing various substantive and tracking mechanisms to help achieve those goals.

Business plans should anticipate legal and market shifts that will reward low carbon energy and technologies. Climate change-related risks should be incorporated into financial decisions and corporate disclosures. Investor confidence should be created by scrutinizing business deals for physical and regulatory climate change impacts, and providing information about how your business foresees handling these challenges.

All strategic decisionmaking should be done with the clear understanding that climate change reduction initiatives and emerging regulatory controls on GHG emissions are going to remain a central and fundamental challenge for many years to come. Any proposed project with significant GHG emissions will likely face increasingly severe controls as well as push-back from environmental litigants. Industries heavily reliant on fossil fuels should take the next few years, especially in light of current tax advantages and political benefits, to capitalize on long-term planning opportunities and invest in technologies and business models to reduce and mitigate GHG emissions.

### B. Prepare for Permitting

Once a company has a strategic climate change plan in place, it is in a better position to move forward into the permitting process. At the outset it is prudent for businesses, especially in fossil fuel-intensive industries, to adopt an expansive approach. The best way to move forward with permitting in a way that will help avoid litigation is to first create a plan with the help of a team of professionals. A successful team will be able to provide both insights and support on many ar-

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eas of potential challenges and pitfalls throughout the permitting process, and anticipate and defuse or overcome legal challenges to the project.

### C. Preemptively Reach Out to the Community

Once a project permitting team has been formed, the most critical step to avoid climate change-related litigation is to identify and reach out to members of the community who support the project as well as those who oppose it.

Community members who support the project, or people who can be influenced to support it, are invaluable resources. These individuals and organizations can be mobilized to communicate key positive attributes to others in the community, as well as bring back information and recommendations to the permitting team about potential changes and improvements to the project that may reduce opposition.

Working with the project permitting team and community supporters, identify

those parties who will likely oppose the project and work toward finding ways to eliminate or reduce that opposition. One controversial, but highly successful method of defusing opposition and eliciting support is to negotiate directly with opposition parties before filing permit applications. This method of preemptive negotiation has been effective in avoiding certain litigation in the context of coal-fired power plants. For example, in 2007, TXU Corporation was engaged in an \$11 billion program to construct eleven new coal-fired power plants totaling 8,600 MW. The proposed plants were actively opposed by the Environmental Defense Fund ("EDF") and the Natural Resources Defense Council ("NRDC"). Kohlberg Kravis Roberts & Co. ("KKR") and TPG Capital ("TPG") made an offer to take over the program. In order for KKR and TPG to effect their takeover, they needed approvals from public regulatory agencies. To assist in the process, the companies decided to negotiate with the project's principal opponents to secure their support for the buyout. EDF and NRDC requested more than fifty separate commitments from the companies, and the parties gained agreement on several of the core requests. TXU's new owners agreed to scrap eight of the proposed plants and support a mandatory cap-and-trade program targeting carbon emissions. While the agreement did cost TXU some of the proposed power plants, it allowed KKR and TPG to purchase the company and move forward with three of the most profitable plants without core opposition from principal opponents and the cost and uncertainty of litigation.

Environmental plaintiffs are often receptive to this type of approach. It is seen as an effective way to resolve cases involving a clear legal challenge, and leaves more resources available for mitigation measures rather than attorney fees.

Early negotiations will not neces-

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sarily preclude all litigation with other entities, nor will such negotiations always be successful. However, the simple act of engaging in the process can help companies to understand the level of opposition to the project, and allow an opportunity to defuse or eliminate resistance early in the permitting process.

### D. Stay Informed

There are three main drivers that will hasten the transformation to a carbon-constrained world: new regulation, rising energy prices, and increased scrutiny by the investment community. Businesses must be prepared to face them. When permitting an individual project, it is necessary to anticipate the long-term local, regional, and national regulatory climate that will govern the treatment of emissions from the project. Project sponsors and permitting teams should track these emerging initiatives and, where possible, help design them through the public comment process to avoid burdensome and unwarranted regulatory complexity.

If, despite efforts to avoid it, a lawsuit is brought challenging a permit, creative settlements should be considered as well as full-throttle litigation. Climate change litigation can be an immensely costly process that can take years to make its way through the courts, resulting in financial hardship to the company, significant delays in project development, and negative publicity.

### III. Conclusion

Climate change law is fluid, uncertain, and constantly changing, growing and developing. The next few years will yield noteworthy developments in climate change statutes and regulations at both the federal and state level, as well as the continued growth of various regional initiatives aimed at reducing emissions through a variety of mechanisms, from

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cap-and-trade programs, the development of new technologies, transportation and land use planning, building codes and energy performance standards, and emission mitigation. These advancements will continue to be further shaped and interpreted by the courts. While this is a time of uncertainty for fossil-fuel intensive industry and businesses, it also presents an opportunity to get ahead of the curve by creating and implementing a business strategy, initiating conversation and outreach with concerned community groups, and becoming involved in policy development at the local, state, regional, and national level.

### Endnotes

- 1 *Massachusetts v. EPA*, 549 U.S. 497 (2007).
- 2 When the Supreme Court decided *Massachusetts v. EPA*, the Court found that CO<sub>2</sub> is a pollutant under the CAA and issued a mandate that EPA make a determination as

to whether emissions of CO<sub>2</sub> from mobile sources endanger human health or the environment. The Bush Administration declined to make an "endangerment finding."

On July 11, 2008, EPA released the Advanced Notice of Proposed Rulemaking ("ANPR") to solicit public input on the potential implications of issuing an endangerment finding and adopting GHG regulations under CAA authority. 73 Fed. Reg. 44,353-44,520 (July 30, 2008). The ANPR stated that the CAA is "ill-suited for the task of regulating global greenhouse gases" and that, instead, Congress should enact comprehensive climate change legislation. Administrator Jackson has since fast-tracked the endangerment finding, and a proposed finding was issued on April 17, 2009. Available at <http://epa.gov/climatechange/endangerment.html>. The proposed finding, which will be subject to a sixty-day notice and comment period once it is published in the Federal Register, will not, in its final version, regulate GHG emissions. Rather, once such an endangerment finding is made, EPA will be required to begin CAA rulemaking to reduce GHG emissions.

Additionally, some plaintiffs have brought creative CAA lawsuits targeting some of the less prevalent but equally detrimental GHGs. For example, in *Environmental Integrity Project, et al. v. EPA*, No. 1:09-cv-00218 (D.C. Dist. Ct., filed Feb 4, 2009), environmental groups filed a February 2009 lawsuit against EPA seeking nitric acid plant standards for N<sub>2</sub>O emissions. The complaint alleges EPA failed to update its new source performance standards for nitric acid plants since 1984. The

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lawsuit targets an area of regulation where EPA could quickly make an endangerment finding that would apply to all GHGs, and move forward with controls.

- 3 In 2005, the State of California asked EPA for a waiver of the preemption of state mobile source emission standards that the CAA contains, in order to impose its own, more stringent automobile efficiency standards to reduce GHG emissions. Section 209 of the CAA allows California, and only California, to get this waiver. More than a dozen states, together accounting for nearly half of all new automobile sales in the U.S., said they would have followed California's lead. In December 2007, EPA denied the state's request. 73 Fed. Reg. 12,156 (March 6, 2008). On May 5, 2008, four petitions for review were filed in the U.S. Courts of Appeals for the DC and Ninth Circuits, with numerous amici for both sides. The cases have since been consolidated in the DC Circuit. *State of California v. EPA*, No. 08-1178 (D.C. Cir., filed May 5, 2008). As litigation progressed, California Governor Arnold Schwarzenegger and others lobbied the incoming Obama Administration to override the Bush Administration's decision to deny the waiver, effectively making the lawsuit moot. On January 26, 2009, President Obama signed a memorandum, available at [http://www.whitehouse.gov/the\\_press\\_office/California\\_Request\\_for\\_Waiver\\_Under\\_the\\_Clean\\_Air\\_Act/](http://www.whitehouse.gov/the_press_office/California_Request_for_Waiver_Under_the_Clean_Air_Act/), instructing EPA to review the decision to deny the waiver. While the process could take time, EPA is expected to decide in California's favor. President Obama also signed a memorandum instructing the Transportation Department to finalize rules this

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spring to overhaul the nation's fuel economy requirements. Available at [http://www.whitehouse.gov/the\\_press\\_office/Presidential\\_Memorandum\\_Fuel\\_Economy/](http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_Fuel_Economy/). These actions, among the first that the new president has taken on the environment, represent a sharp break from the Bush Administration, and a shift in climate change policy and the resulting focus of future litigation.

- 4 See e.g., *In the Matter of Northern Michigan University*, Appeal No. PSD 08-02 (DC EAB, Feb. 18, 2009) (Environmental plaintiffs, before the EAB, challenged a PSD permit granted to the University by the state Department of Environmental Quality for the construction of a 10 MW coal-fired boiler. Plaintiffs challenged the state's claim that the federal government is not required to set GHG limits in an air permit for a small coal-fired power plant. Rather, plaintiffs argue that because EPA regulates CO<sub>2</sub> emissions from
- landfills, the agency should also regulate CO<sub>2</sub> emissions from power plants. In February 2009, the EAB remanded in part the permit for a determination of whether, among other things, CO<sub>2</sub> and N<sub>2</sub>O emission from the boiler should be limited pursuant to BACT); *Sierra Club v. Utah Air Quality Board*, No. 20080113 (Ut. S. Ct., filed Feb. 6, 2008) (Environmental plaintiffs challenged the state Air Quality Board's approval order granting a permit to Sevier Power Company to construct and operate a coal-fired power plant. The Board affirmed their decision, holding that since no rules have been adopted governing CO<sub>2</sub> emissions, it cannot, as a matter of law, require limitations or consideration of CO<sub>2</sub> as part of the approval order or permit process. Plaintiffs appealed to the state Supreme Court, where the case is still pending); *U.S. v. Merit Energy Co., LLC*, No. 1:08-cv-00917 (W.D. Mich., filed Sept. 30, 2008) (On October 6, EPA Region V published a proposed Consent Decree with Merit Energy and Shell Exploration & Production Co. for violations of the CAA relating to an onshore natural gas processing facility. The consent decree is the first CAA enforcement settlement requiring a natural gas facility to capture and permanently store CO<sub>2</sub> and hydrogen sulfide underground. The settlement requires that the companies install and operate an acid gas injection system that is piped to a depleted natural gas well, dramatically reducing emissions from the plant.).
- 5 *In re Deseret Power Cooperative*, Appeal No. PSD 07-03 (DC EAB, Nov. 13, 2008).
- 6 In December 2008, former EPA Administrator Stephen Johnson reversed the EAB's conclusions, affirming EPA's decision not to include CO<sub>2</sub> limits in the permit. See, *Memorandum from*

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Stephen Johnson, Administrator of EPA, to EPA Regional Administrators, "EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program" (Dec. 18, 2008), available at [http://www.epa.gov/air/nsr/documents/psd\\_interpretive\\_memo\\_12.18.08.pdf](http://www.epa.gov/air/nsr/documents/psd_interpretive_memo_12.18.08.pdf). While Administrator Lisa Jackson has announced that the agency will reconsider Johnson's reversal, the reversal remains in effect pending further action. See, *Letter from Lisa Jackson, Administrator of EPA, to David Bookbinder, Chief Climate Council for the Sierra Club* (Feb. 17, 2009), available at [http://www.epa.gov/air/nsr/documents/20090217LPJ\\_lettersierraclub.pdf](http://www.epa.gov/air/nsr/documents/20090217LPJ_lettersierraclub.pdf).

- 7 *Longleaf Energy Ass'n., LLC, v. Friends of the Chattahoochee, Inc.*, No. A09A0387 (Ct. App. GA, filed Oct. 15, 2008).
- 8 *California v. County of San Bernardino*, No. 07-00329 (Cal. Super. Ct. of San Bernardino County, April 13, 2007).
- 9 *Letter from Edmund Brown, Attorney General of the State of California, to Janice Stern, Principal Planner for the City of Pleasanton* (Jan. 13, 2009), available at [http://ag.ca.gov/globalwarming/pdf/comments\\_Pleasanton\\_GP.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/7dc7a6e2-f729-4140-b05b-1a39c957a106/1/hilite/](http://ag.ca.gov/globalwarming/pdf/comments_Pleasanton_GP.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/7dc7a6e2-f729-4140-b05b-1a39c957a106/1/hilite/).
- 10 *Center for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007).
- 11 *But see, Center for Biological Diversity v. Dep't of the Interior*, No. 07-1247 (D.C. Cir. April 17, 2009) (Courts will not consider climate change claims brought in the early stages of phased NEPA analysis; claims are not ripe until the process "reaches a

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critical stage of a decision which will result in irreversible and irretrievable commitments of resources," and standing is limited under *Massachusetts v. EPA* to state actors with concrete and particularized harm).

- 12 *No Wetlands Landfill Expansion, et al. v. County of Marin, et al.*, No. 09-0198 (Marin Co. Sup. Ct., filed Jan. 16, 2009).
- 13 *See e.g., Center for Biological Diversity v. San Joaquin Valley Air Pollution Control Dist.*, No. 08-03614 (Fresno Co. Sup. Ct, filed Oct. 16, 2008) (Plaintiffs challenged a September 2008 decision by the District to approve the environmental review for a large planned dairy with over 3,000 cows. Specifically, plaintiffs argue that regulators failed to properly analyze GHG impacts of the proposed project under CEQA); *WildEarth Guardians v. U.S. Forest Service*, No. 08-02167 (D.Ct. Colorado, filed October 7, 2008) (Plaintiffs filed a lawsuit against the

U.S. Forest Service and DOI, arguing the agencies violated NEPA by failing to consider the climate change impacts of methane emissions and failing to explore alternatives to reduce those emissions before approving the EIS for the expansion of the West Elk Coal Mine in Colorado).

- 14 *Center for Biological Diversity v. Dep't of the Interior*, No. 07-1247 slip.op. (D.C. Cir. Apr. 17, 2009).
- 15 The court in *Center for Biological Diversity v. Dep't of the Interior*, No. 07-1247, found that the holding of *Massachusetts v. EPA* stands for the limited proposition that where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests have been harmed, wholly apart from the alleged general harm. The court here found that plaintiff's harm was too generalized to provide standing.
- 16 *Id.*, slip op. at 25.
- 17 *Id.*, slip op. at 19.
- 18 *Id.*
- 19 *Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range*, 73 Fed. Reg. 28,212-28,303 (May 15, 2008).
- 20 On December 3, 2008, the U.S. Judicial Panel on Multidistrict Litigation ordered the transfer and consolidation of all eight of the related polar bear cases to the U.S. District Court for the District of Columbia.
- 21 *Interagency Cooperation Under the Endangered Species Act*, 73 Fed. Reg. 76,272-76,287 (Dec. 16, 2008).
- 22 *See Memorandum from President Barack Obama to Heads of Executive Departments and Agencies, "The Endangered Species Act"* (Mar. 3, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/).

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- 23 *Center for Biological Diversity, et al. v. Kempthorne, et al.*, No. 2:08-cv-01936 (E.D. Cal., Feb. 12, 2009). The February 12, 2009 settlement agreement requires FWS to assess whether the pika may warrant protection under the ESA by May 2009. If so, FWS must determine whether the mammal will be designated as an endangered species nine months later.
- 24 *Center for Biological Diversity v. Kempthorne*, No. 3:2008-cv-05546 (N. Dist. Cal., filed Dec. 11, 2008) (Environmental plaintiffs filed a lawsuit in the U.S. District Court for the Northern District of California, challenging new ESA consultation rule, which the groups claim will shelter thousands of federal activities, including those that generate GHGs, from review under the ESA.)
- 25 *People of the State of California, ex rel, et al. v. Kempthorne, et al.*, No. 3:08-cv-05775 (N. Dist. Cal., filed Dec 29, 2008) (California Attorney General Jerry Brown sued DOI and the Dep't of Commerce in an attempt to block the revised ESA consultation rules. The complaint alleges that the rule revisions eliminate requirements to consider the effects of GHG emissions on species and ecosystems. Using largely the same arguments as environmental plaintiffs above, the State alleged that the revised consultation rules were an attempt by the Bush Administration to minimize the impact of recent court victories by environmental groups who argued that GHG emissions should be mitigated to protect species. On January 16, 2009, the complaint was amended to add the following states as plaintiffs: Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Oregon, and Rhode Island).

**(Environmental plaintiffs filed a lawsuit in the U.S. District Court for the Northern District of California, challenging new ESA consultation rule, which the groups claim will shelter thousands of federal activities, including those that generate GHGs, from review under the ESA.)**

- 26 *Center for Biological Diversity v. Kempthorne, et al.*, No. 1:09-cv-00090 (D.C. Dist., filed Jan. 15, 2009) (Environmental plaintiff filed suit against DOI, Dep't of Commerce, Dep't of Agriculture, Dep't of Defense, Dep't of Transportation, and EPA, alleging the agencies' failure to develop nationwide regulations to speed the recovery of endangered species and integrate global warming considerations into all major federal decision-making processes, as requested by plaintiff's 2007 ESA petition to federal officials. In the petition, plaintiff requested the federal agencies develop regulations to: review all threatened, endangered, and candidate species to determine which are threatened by climate change; revise all federal recovery plans to ensure endangered species are able to adapt to a warming environment; require all federal agencies to implement endangered species recovery plans; review the global

warming contribution of all federal projects and require mitigation of impacts on imperiled species; and require a final ESA listing decision on all candidate species within five years).

- 27 *See, In the Matter of Dynegy, Inc.*, AOD #08-132, "Assurance of Discontinuance Pursuant to Executive Law §63(15)" (Oct. 23, 2008); *In the Matter of Xcel Energy, Inc.*, AOD #08-012, "Assurance of Discontinuance Pursuant to Executive Law §63(15)" (Aug. 26, 2008).
- 28 *Indeck Corinth, LP v. Paterson, et al.* (NY Sup. Ct., filed Jan. 29, 2009).
- 29 At the end of 2008, industry attorneys announced that they are preparing challenges to AB 32, California's "Global Warming Solution Act of 2006." Potential legal arguments will challenge the state's ability to hold such auctions and participate in cap-and-trade, based on the assertion that by charging businesses and industries for "carbon permits," the state is attempting to levy a new tax without approval from the state legislature. Challenges rooted in this "taxation" argument, similar to Indeck's lawsuit, argue that the cap-and-trade program should have been approved by a 2/3 majority of the state legislature as required for a new tax, because the state would be redistributing money from the program to other state programs. Concern over the legality of California's cap-and-trade program also calls into question the state's leadership position in the Western Climate Initiative, an evolving regional cap-and-trade program to which the State of Oregon is also a party. State officials dismiss industry claims, however, saying that an internal legal analysis of the issue reached the conclusion that they

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do have the authority to hold or participate in GHG emission allowance auctions under a state or regional cap-and-trade program.

30 *Conservation Law Foundation v. EPA*, No. 2:08-cv-0238 (D.Ct. VT, filed Oct. 28, 2008).

31 Ocean acidification is a process related to climate change that alters the pH of ocean waters and

threatens the continued existence of numerous species and ecosystems. It is the result of the absorption of large loads of CO<sub>2</sub> by ocean waters, which occurs because of the higher levels of GHGs in the atmosphere.

32 More information is available at [http://www.biologicaldiversity.org/campaigns/ocean\\_acidification/index.html](http://www.biologicaldiversity.org/campaigns/ocean_acidification/index.html).

33 *Native Village of Kivalina v. Exxon-Mobil Corp.*, No. 08-cv-1138 (N.D. Cal., filed Feb. 26, 2008).

34 *Comer v. Murphy Oil, USA*, No. 1:05-cv-00436 (S.D. Miss., order dismissing suit filed Aug. 30, 2007).

35 *Comer v. Murphy Oil, USA*, No. 07-60756 (5th Cir., filed Sep. 28, 2007).

36 *State of North Carolina v. Tennessee Valley Authority*, 2009 WL 77998 (W.D. NC Jan 13, 2009).

37 In early January, sources involved with a potential CAA lawsuit against EPA stated that Earthjustice would not immediately move forward with a threatened lawsuit aimed at

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forcing the agency to regulate GHG emissions from aviation and maritime sources in order to give the new administration time to act. Earthjustice first petitioned EPA on behalf of Oceana, Friends of the Earth, and Center for Biological Diversity in 2007, requesting action on air-and-maritime emissions regulations. The group issued a six-month notice of intent to sue under the CAA in July 2008, after EPA issued an ANPR on

GHG emission that failed to address the petitions for regulations of air and sea sources.

38 See e.g., *Longleaf Energy Ass'n., LLC, v. Friends of the Chattahoochee, Inc.*, No. A09A0387 (Ct. App. GA, filed Oct. 15, 2008) (financial investor pulled its support of the Longleaf power plant and other related coal-fired power plants due to the burdens of ongoing litigation).

39 Green industry includes businesses such as clean technology plants, recycling facilities, the renewable energy market, and other enterprises that, as a part of their business model, seek to reduce environmental impacts. See e.g., *Center for Biological Diversity v. San Joaquin Valley Air Pollution Control Dist.*, No. 08-03614 (Fresno Co. Sup. Ct, filed Oct. 16, 2008).

40 See e.g., *No Wetlands Landfill Expansion, et al. v. County of Marin, et al.*, No. 09-0198 (Marin Co. Sup. Ct., filed Jan. 16, 2009).

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# Standing On a Carbon Footprint

By Brian Campf  
Brian S. Campf PC



Brian Campf

Ground-breaking global warming lawsuits that are now percolating through the federal system have raised interesting and controversial standing issues.

Standing—who may bring an action—is an essential part of subject matter jurisdiction. Injury, causation, and redressability are its basic requirements. Without standing under Article III of the U.S. Constitution, a federal court may not reach the merits of a dispute. *Fulfillment Services Inc. v. United Parcel Service, Inc.*, 528 F.3d 614, 618 (9th Cir. 2008).

For example, if you are injured at your house in Portland as a result of inhaling toxic fumes emitted by a chemical plant in Vancouver, Washington, and money damages will redress the harm, you probably have standing to sue in federal court because you can arguably satisfy the underpinnings of Article III standing.

But what if that same chemical plant emits greenhouse gasses which cause weather changes that harm your property? As a private citizen, do you have standing to sue the polluter for damages? Yes, according to the Fifth Circuit in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). Does a city have standing to bring that claim? No, according to the *Northern District of California in Native Village of*



*Kivalina v. ExxonMobil Corporation*, 663 F.Supp.2d 863 (N.D.Cal. 2009).

States, a city, and land trusts have been held to have standing in global warming litigation. See, e.g., *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) (states, local governments, and environmental organizations challenged an Environ-

mental Protection Agency decision not to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act); *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309 (2nd Cir. 2009) (states, a city, and land trusts filed separate suits against the same electric

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power corporations that owned and operated fossil-fuel-fired power plants seeking abatement of their ongoing contributions to global warming, a public nuisance).

However, *Comer* is significant because it involves private parties seeking compensation for damage to private property or impaired access to public property, as opposed to states, municipalities, or private entities preserving property open to the public that are seeking injunctive relief.

*Kivalina*—though not an appellate decision and a case in which public and not private plaintiffs filed suit—is noteworthy because its legal analysis departs from *Comer* in important ways, and sets the table for a possible split between the Fifth and Ninth Circuits on those issues.

In *Comer*, the plaintiffs were residents and owners of lands and property along the Mississippi Gulf coast. They filed a putative class action lawsuit founded on diversity jurisdiction in the district court against the U.S. operators of certain energy, fossil fuel, and chemical plants alleging that their U.S. operations emitted greenhouse gasses that contributed to global warming, which ultimately made Hurricane Katrina more destructive, resulting in the destruction of their private property and public property useful to them.

They asserted claims for compensatory and punitive damages based on Mississippi common-law theories of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.

The district court granted defendants' motion to dismiss on the grounds that plaintiffs lacked standing and that their claims presented nonjusticiable political questions. On appeal, the Fifth Circuit held that plaintiffs have standing to assert public and private nuisance,

**For prudential standing reasons the court dismissed the unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims.**

trespass, and negligence claims, and that those claims are justiciable. For prudential standing reasons the court dismissed the unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims.

The path to addressing standing in the *Comer* case looked like this:

- Starting with global warming, here explained by the U.S. Supreme Court...

*A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species-the most important species-of a "greenhouse gas." Massachusetts, 549 U.S. at 504-05.*

- ...and adding a devastating hurricane to the mix...

*Hurricane Katrina, one of the most powerful storms ever to threaten the United States, bore down on the Gulf Coast on Sunday, sending hundreds of thousands of people fleeing the approach of its 160-mile-an-hour winds and prompting a mandatory evacuation of New Orleans, a city perilously below sea level. New York Times, Aug. 28, 2005.*

- ...and stirring in a federal lawsuit laying blame for Hurricane Katrina's origins...

*The plaintiffs allege that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gasses that contributed to global warming, viz., the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs' private property, as well as public property useful to them. Comer, 585 F.3d at 859.*

- ...raises the issue of standing:

*"...a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." Massachusetts, 549 U.S. at 517, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).*

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### 1. State constitutional standing requirements.

State and federal standing requirements must be satisfied in a diversity case involving state common law claims. *Comer*, 585 F.3d at 861-62.

Mississippi's Constitution is permissive in granting standing to parties by not limiting judicial power to cases or controversies: "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay[.]" *Id.* at 862, quoting Miss. Const. art. III § 24.

Having alleged that their interests in their lands and property were damaged by the adverse effects of defendants' greenhouse gas emissions, plaintiffs had standing to assert all of their claims under Mississippi law. *Id.*

### 2. Federal standing requirements.

Federal jurisdiction is limited by the case-or-controversy requirement of Article III (Article III standing), and by limits courts impose on their exercise of federal jurisdiction (prudential standing). *Id.* at 862, 867-68 (citations omitted).

#### a. Article III standing and traceability.

A federal standing inquiry invokes the "cases" and "controversies" limits of Article III of the U.S. Constitution. *Id.* at 862, citing *Massachusetts*, *supra*, 549 U.S. at 516. The standing inquiry poses a three part test which requires plaintiffs to demonstrate that they have suffered an injury-in-fact; the injury is fairly traceable to the defendant's actions; and the injury will likely be redressed by a favorable decision. *Id.*

Defendants in *Comer* did not contest the injury-in-fact and likely-to-be-redressed standing requirements for the nuisance, trespass, and negligence claims.

**The court rejected defendants' contention that traceability is lacking because their emissions contributed only minimally to plaintiffs' injuries.**

In the wake of Katrina, plaintiffs had suffered actual, concrete injury that a damage award would likely redress.

Instead, defendants asserted that traceability is lacking because: (1) the causal link between emissions, sea level rise, and Hurricane Katrina is too attenuated, and (2) the defendants' alleged actions are only one of many contributions to greenhouse gas emissions, thereby foreclosing traceability. *Id.* at 863-66.

The court rejected both arguments. An indirect causal relationship will satisfy the Article III traceability requirement so long as there is a fairly traceable connection between the alleged injury-in-fact and the alleged conduct of the defendant. Showing traceability does not require proximate causation needed to succeed on the merits of a tort claim. A court's statutory or constitutional power to adjudicate a case does not turn on the absence of a valid (as opposed to arguable) cause of action. *Id.* at 864.

Aiding the court was the Supreme Court's decision in *Massachusetts v. EPA*, *supra*. In that case, the Supreme Court "accepted a causal chain virtually identical in part to that alleged by plaintiffs, viz., that defendants' greenhouse gas emissions contributed to warming of the environment, including the ocean's temperature, which damaged plain-

tiffs' coastal Mississippi property via sea level rise and the increased intensity of Hurricane Katrina," and extended the causal chain even further: because the EPA did not regulate greenhouse gas emissions, motor vehicles emitted more greenhouse gasses than they otherwise would have, thus contributing to global warming, which injured Massachusetts lands through sea level rise and increased storm ferocity. *Id.* at 865.

The court rejected defendants' contention that traceability is lacking because their emissions contributed only minimally to plaintiffs' injuries. To support standing, traceability can be found in "actions that contribute to, rather than solely or materially cause, greenhouse gas emissions and global warming." *Id.* at 866.

#### b. Prudential standing.

Prudential standing involves judicial self-governance through which courts recognize that generalized grievances are more properly dealt with by the representative branches. *Id.* at 867-68 (citations omitted).

In *Comer*, the court held that plaintiffs lack standing to bring claims rooted in the alleged failure of the government to properly regulate and enforce environmental laws—an omission claimed to be caused by the defendants engaging in an allegedly false public relations campaign and wrongfully convincing the government to not impose certain regulations—which allegedly enabled the defendants to increase their prices and profits. Missing was a particularized injury that affected plaintiffs in a personal and individual way. Such generalized grievances, common to all consumers of petrochemicals and the American public, are the province of the representative branches. *Id.*

In sum, the court's standing analysis distinguished between plaintiffs' claims that rely on a causal link between green-

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house gas emissions, global warming, and the destruction of the plaintiffs' property by rising sea levels and the added ferocity of Hurricane Katrina (public and private nuisance, trespass, and negligence) and claims based on alleged injuries caused by defendants' public relations campaigns and pricing of petrochemicals (unjust enrichment, civil conspiracy, and fraudulent misrepresentation).

### 3. A different view of traceability.

The Northern District of California took a different view of traceability from *Comer* in *Kivalina*, *supra*. The decision is now on appeal to the Ninth Circuit.

Kivalina, Alaska, an Inupiat Eskimo village of about 400 people, is located north of the Arctic Circle on the tip of a six-mile long barrier reef. The governing body of the Native Village of Kivalina and the City of Kivalina sued 24 oil, energy, and utility companies seeking damages under claims of federal common law public nuisance, state law private and public nuisance, civil conspiracy, and concert of action. The defendants allegedly contributed to the excessive emission of carbon dioxide and other greenhouse gasses that cause global warming. *Native Village of Kivalina*, 663 F.Supp.2d at 868.

Plaintiffs assert that global warming diminished the Arctic sea ice that protects the Kivalina coast from winter storms, causing erosion and destruction that will require Kivalina's residents to be relocated at a cost estimated to range from \$95-to-\$400 million. *Id.* at 869. The court granted defendants' motion to dismiss for lack of jurisdiction on the grounds that plaintiffs lack standing and that their claims are nonjusticiable.

Central to the court's ruling on standing was its conclusion that plaintiffs could not show that defendants contributed to their alleged injuries. Plaintiffs relied on contribution principles from Clean Water Act cases. The court drew a key distinction

**However, no federal standards limit greenhouse gas emissions, so no presumption arises of a substantial likelihood that a defendant's conduct harmed plaintiff.**

between a statutory water pollution claim and a common law nuisance claim.

The court explained that where a plaintiff shows that a defendant's discharge regulated by the Clean Water Act exceeds federal limits, a substantial likelihood that defendant's conduct caused plaintiff's harm, even if other parties made similar discharges, is presumed for standing purposes. *Id.* at 879.

However, no federal standards limit greenhouse gas emissions, so no presumption arises of a substantial likelihood that a defendant's conduct harmed plaintiff. Without that presumption, and given what the court called the "extremely attenuated causation scenario" plaintiffs alleged, the court concluded that contribution is irrelevant because a discharge alone is insufficient to establish injury. *Id.* at 880.

Even if the contribution theory applied outside of statutory water pollution cases, the court held that it would not apply to this case because plaintiffs did not allege that the "seed" of their injury can be traced to any of the defendants. Rather, many sources other than defendants have contributed to global warming over centuries. Which emissions and which emitters caused plaintiff's alleged injuries could not be identified. *Id.* at 880-81.

The court also found that plaintiffs are not within the zone of discharge of the greenhouse gasses. That is, proximity to the discharges did not affect their property. As a result, the "fairly traceable" causation requirement could not be satisfied. *Id.* at 881-82.

### 4. Cloudy landscape.

The reader should check the status of the key cases because, as of this writing, they are in a state of flux. *Comer* was to be re-heard en banc, but a recusal left the en banc court without a quorum. *Kivalina* is on appeal to the Ninth Circuit. The Second Circuit denied a petition for rehearing en banc in Connecticut. Clarification by the U.S. Supreme Court of the significant issues these cases present seems inevitable. □

### Endnotes:

- 1 A petition for rehearing en banc was granted, *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010). However, on April 30, 2010, the clerk for the Fifth Circuit notified the parties that due to a judge's recusal the en banc court had lost its quorum, precluding the court from acting on the merits.
- 2 The Second Circuit denied a petition for rehearing en banc on March 5, 2010.
- 3 Beyond the purview of this article is the issue of justiciability, which concerns whether a question, issue, case or controversy is constitutionally capable of being decided by a federal court. *Comer, supra* at 869 et seq. The Fifth Circuit in *Comer* held that plaintiffs presented claims that are justiciable; the district court in *Kivalina* held otherwise.

# Attorney Liens in Oregon: Tool or Trap?

By Mark J. Fucile  
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Although attorney liens have existed in statutory form in Oregon since 1862, the recent economic climate has renewed focus on them as a collection tool.<sup>1</sup> Attorney liens come in two varieties in Oregon. The first, called



Mark Fucile

a "charging lien" and created by ORS 87.445, places a lien for fees over the action or resulting judgment in a litigated matter the lawyer handled successfully for a client. The second, called a "retaining lien" and created by ORS 87.430, places a lien for fees over the client's file and other property in the lawyer's possession.<sup>2</sup> While the former is a potentially powerful collection tool for litigators, the latter can be a deceptively dangerous trap for lawyers. This article will survey both.

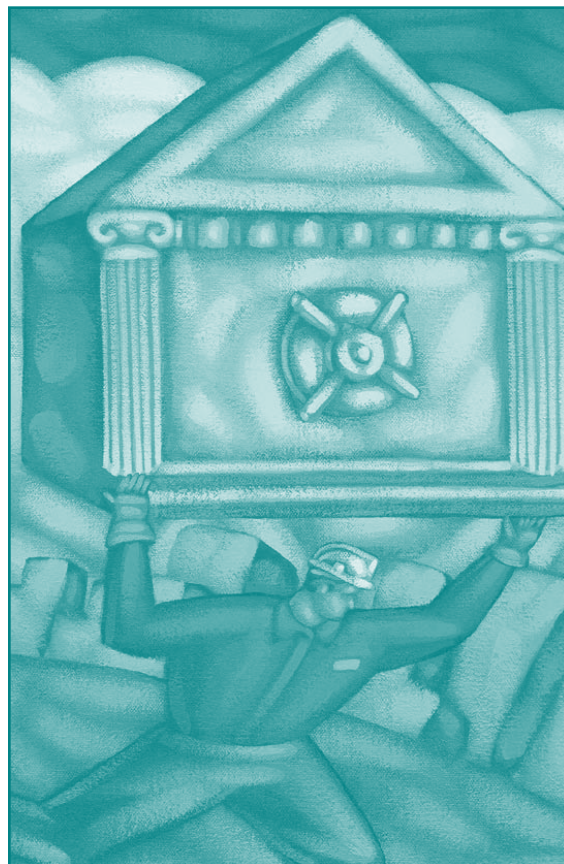
With each, it is important to note two caveats at the outset. First, the liens only apply when there is a direct attorney-client relationship between the lawyer and the client. Second, the lawyer will still need to demonstrate entitlement to and the amount of the fee claimed by either agreement with the client or *quantum meruit*.<sup>3</sup>

## The Tool: Charging Liens

ORS 87.445 defines charging liens:

"An attorney has a lien upon actions, suits and proceedings after the commencement thereof, and judgments, orders and awards entered therein in the client's favor and the proceeds thereof to the extent of fees and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney."

ORS 87.445 draws a distinction between liens on judgments and liens on actions settled short of a final judgment. Each has a different mechanism to perfect the lien. With both, however, the significant practical element that makes them a powerful collection tool for the prevailing party's lawyer is that the *nonprevailing* party's obligation is *not* extinguished until the lien is addressed. Liens on judgments are not satisfied unless, under ORS 87.475(2)-(3), the lien is paid directly or the full amount of the judgment is paid into the court by the nonprevailing party (which releases the nonprevailing party but *not* the prevailing party from the lien). See *O'Meara v. Cullick*, 200 Or App 562, 567-



68, 116 P3d 236 (2005). Liens on settlements, in turn, may be enforced against *either* the prevailing lawyer's client *or* the settling party under ORS 87.475(1)-(2) and *Potter v. Schlessor Company, Inc.*, 335 Or 209, 63 P3d 1172 (2003).

The requirements for perfecting liens on judgments and their duration vary somewhat under ORS 87.450, 87.455, and 87.460, depending on whether the judgment is for, respectively, money, personal

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property or real estate. See *Rockwood Water Dist. v. Steve Smith Contracting, Inc.*, 80 Or App 136, 139-140, 720 P2d 1332 (1986) (discussing the common elements and distinctions among the three). A lien notice for the former must be filed with the clerk of the court involved (within three years of entry) and lasts until the judgment itself expires under ORS Chapter 18. Lien notices under the latter two must be filed with the county recorder (within one year for personal property and six months for real estate) and must generally be foreclosed within one year after the lien notice is filed. Failure to timely file or foreclose the lien within these periods voids the lien by operation of law under ORS 87.465. ORS 87.470 governs the content of lien notices and requires information concerning the judgment involved and the amount of fees due. Foreclosure of liens on judgments over personal and real property are governed generally by ORS Chapter 88. By contrast, foreclosure of a lien on a money judgment is neither defined nor delimited by specific statutory procedures, but rather, "are various and are apparently, in the absence of statutory direction, controlled by peculiar circumstances attending the character of the lien asserted, that is, for example, whether the amount claimed is fixed or determined, unliquidated or contingent, or whether the claim rests upon asserted reasonable value in the absence of an express agreement for compensation." *Crawford v. Crane*, 204 Or at 67; accord *Lee v. Lee*, 5 Or App 74, 79 n.1, 482 P2d 745 (1971).

Liens on settlement proceeds are considered "charges on the action" itself. They arise with the filing of the action involved and no formal notice is required. *Potter v. Schlessor Company, Inc.*, 335 Or at 213.<sup>4,5</sup> "The lien is a charge on the action, and the parties to the action cannot extinguish or affect the attorney's lien by any means (such as settlement) other than by satisfying the underlying claim of the attorney for the fees incurred in

**"The lien is a charge on the action, and the parties to the action cannot extinguish or affect the attorney's lien by any means (such as settlement) other than by satisfying the underlying claim of the attorney for the fees incurred in connection with the action."**

connection with the action." *Id.* at 214. No particular foreclosure mechanism is prescribed or proscribed and, as noted earlier, the lien can be enforced against a settling party who resolves a case without ensuring that the prevailing party's attorney fees have been paid. *Id.* at 215-16.

Under ORS 87.490, charging liens generally have priority over all other liens except tax liens (and prior liens of record on real or personal property at issue). See *Valley Credit Service, Inc. v. Kelley*, 165 Or App 169, 173, 994 P2d 1229 (2000).<sup>6</sup> In bankruptcy, the validity of an attorney's lien is governed by state law. *In re Century Cleaning Services, Inc.*, 202 BR 149, 152 (D Or Bankr 1996), *rev'd on other grounds*, 195 F3d 1053 (9th Cir 1999).<sup>7</sup> If a lawsuit is necessary to foreclose a charging lien, ORS 87.485 allows the prevailing party to recover reasonable attorneys fees. See *Robinowitz v. Pozzi*, 127 Or App 464, 469-70, 872 P2d 993 (1994); *but see Rockwood Water Dist. v. Steve Smith Contracting, Inc.*, 80 Or App at 140-41 (finding that an interpleader

action brought by a losing party to determine competing claims to a judgment that included the prevailing party's law firm lien was not a "foreclosure" for purposes of ORS 87.485).

### The Trap: Retaining Liens

ORS 87.430 defines retaining liens:

"An attorney has a lien for compensation whether specially agreed or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim."

On its face, ORS 87.430 appears both broad and simple. It seems broad because, unlike its charging lien cousin, it applies to both litigation and non-litigation matters. It appears simple because, again unlike its charging lien cousin, it does not require any steps to foreclose.<sup>8</sup>

Beyond its face, however, ORS 87.430 creates a deceptive trap in three ways.

*First*, as to "papers," Rule of Professional Conduct 1.16(d) and Oregon State Bar Formal Ethics Opinion 2005-90 (2005) require a lawyer to surrender a client's file regardless of the lawyer's lien rights if the client needs the materials and is not otherwise able to satisfy the lien.<sup>9</sup> In other words, a financially ailing client's need for the file "trumps" the lawyer's retaining lien.

*Second*, as to "money," RPC 1.15-1(e) and OSB Formal Ethics Opinion 2005-149 (2005) require a lawyer to keep disputed funds in the lawyer's trust account pending resolution of the dispute.

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## Attorney Liens

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In other words, if (as is often the case) the client disputes the lawyer's right to money held in trust for the payment of fees, the lawyer needs to keep the disputed funds in trust notwithstanding the lawyer's retaining lien.

Third, as to "property," RPC 1.15-1(e) and *In re Boothe*, 303 Or 643, 652-53, 740 P2d 785 (1987), require a lawyer to keep disputed property unliquidated pending resolution of the dispute. Again, therefore, if (as is often the case) the client disputes the lawyer's right to property held in trust, the lawyer needs to hold the disputed property unliquidated notwithstanding the lawyer's retaining lien.

The lawyers' duties noted are not solely regulatory (although they also have important regulatory consequences). See *In re Starr*, 326 Or 328, 341, 952 P2d 1017 (1998) ("The existence of a lien does not excuse a lawyer from complying with ethical requirements."). In *Kidney Ass'n of Oregon v. Ferguson*, 315 Or 135, 144, 843 P2d 442 (1992), the Supreme Court recognized that the Rules of Professional Conduct reflect a lawyer's underlying fiduciary duties to the lawyer's client. Therefore, a client who claims damage from a lawyer wrongfully withholding a file (or funds or other property) would also have a basis to pursue a civil claim for breach of fiduciary duty against the lawyer (in addition to or in lieu of a bar complaint).

### Summing Up

Charging liens provide litigators with a powerful collection tool because they create a remedy for the prevailing lawyer that cannot effectively be ignored by either the lawyer's client or the nonprevailing party. Retaining liens, by contrast, can create a deceptively dangerous trap for a lawyer who attempts to invoke them against a client who needs the file but cannot then satisfy the lien. □

**Charging liens provide litigators with a powerful collection tool because they create a remedy for the prevailing lawyer that cannot effectively be ignored by either the lawyer's client or the nonprevailing party.**

### Endnotes

- 1 For a history of attorney liens in Oregon, see William J. Ohle, "Oregon Attorneys' Liens: Their Function and Ethics," 27 Willamette L Rev 891, 892-93 (1991).
- 2 For more on the origins of this nomenclature, see *Crawford v. Crane*, 204 Or 60, 61-63, 282 P2d 348 (1955).
- 3 For a discussion of both caveats, see *Hahn v. Oregon Physicians' Service*, 786 F2d 1353, 1355-56 (9th Cir 1985).
- 4 This fact does not give the lawyer a direct interest in the case involved. See *In re Grimes' Estate*, 170 Or 204, 220-21, 131 P2d 448 (1943) (interpreting the predecessor to ORS 87.480).
- 5 If a lawyer has withdrawn for nonpayment, it is prudent from a practical

perspective to file and serve a lien notice in any event so that the lawyer's lien rights cannot be ignored if the case later settles short of a judgment.

- 6 For the treatment of liens by off-setting judgments, see generally *Clackamas Town Center Associates v. Jandel Foods*, 98 Or App 12, 777 P2d 420 (1989), *Ketcham v. Selles*, 96 Or App 121, 772 P2d 419 (1989), and *Hartford Acc. & Indem. Co. v. Pyle*, 271 Or 97, 530 P2d 843 (1975).
- 7 The Ninth Circuit's decision on the other issues involved was abrogated by *Lamie v. United States Trustee*, 540 US 526, 124 S Ct 1023, 157 LEd2d 1024 (2004).
- 8 ORS 87.435 allows a client to substitute a surety bond or letter of credit for the disputed fees. ORS 87.440, in turn, gives the lawyer a right to petition a court to determine the adequacy of the bond or letter of credit. Under ORS 9.360, a client may seek an order compelling the lawyer to deliver to the client papers or money received in the course of handling a case. See *McClure v. Hess*, 91 Or App 281, 754 P2d 37 (1988). ORS 9.370, in turn, permits a court to determine the validity of an accompanying attorney lien within the context of a proceeding to compel the release of the lawyer's file under ORS 9.360. See *Crawford v. Crane*, 204 Or at 66.
- 9 Under the same authority, a client unable to pay but in need of a file would not be required to pay photocopy charges as a condition of receiving a file. See OSB Formal Ethics Op 2005-125 at 4 n.3 (2005).

# Exit Rights, Withdrawal and the Captive LLC Member: A Need for the Minority Oppression Doctrine?

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The limited liability corporation (LLC) and the corporation are today's most widely used business entities. The corporation is the oldest form of business organization, with the first corporations dating to medieval times. In contrast, the LLC is a relatively new entity form. LLCs and corporations share limited liability attributes but differ in how they are taxed. Despite their similarities, when allegations of oppression and member disagreements arise, remedies for minority owners vary substantially.

The minority oppression doctrine is well-established in Oregon law. Pursuant to ORS 60.661, a court has the power to remedy oppressive majority conduct in a close corporation. ORS 60.661 allows for judicial dissolution when those in control of the corporation "have act-



Kate Wilkinson

ed, are acting or will act in a manner that is illegal, oppressive or fraudulent [.]” In addition, Oregon case law has developed an extensive repertoire that courts may employ in devising an equitable and appropriate remedy for oppression. See *e.g.*, *Baker v. Commercial Body Builders*, 264 Or 614, 631-33 (1973) (noting that various remedies such as dissolution, appointment of a receiver, requiring the purchase of the minority's stock or an award of damages are among appropri-



ate equitable relief).

In contrast, the remedies available for “minority oppression” in an Oregon LLC are statutorily narrower, and the court's authority to fashion relief is much less broad than in the close corporation context.

## Judicial Dissolution of an LLC

The only statutory provision for judicial dissolution of an LLC is found in ORS 63.661. That statute provides for judicial dissolution “[i]n a proceeding by or for a

member if it is established that it is not reasonably practicable to carry on the business of the LLC in conformance with its articles of organization or any operating agreement.” ORS 63.661 (2).

No Oregon case law interpreting the meaning of or circumstances when it is not “reasonably practicable to carry on the business” exists. Case law from other jurisdictions with virtually the same statutory provisions on judicial dissolution has articulated varying definitions. See *Kirksey v. Grohmann*, 754 N.W. 2d.

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## Minority Oppression Doctrine

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825, 828-831 (S.D. 2008) (surveying other jurisdictions).

As explained by the South Dakota Court in *Kirksey*, one approach taken by several courts is to examine the facts and circumstances in light of the company's stated purpose and then to determine if it is reasonably practicable to continue the business. *Kirksey, supra* at 828. Another consideration is the financial state of the company and whether the company is producing returns for its investors. *Id.* at 829. Courts have varied in the strictness of the standard applied to requests for judicial dissolution. In courts that have upheld a strict standard, legislative deference to the parties' contractual agreements is often cited, even when this strictness leaves some members at the mercy of other members. *Id.*

In contrast, some courts have analogized the dissolution of an LLC to a corporate or partnership dissolution. See e.g., *Haley v. Talcott*, 864 A2d 86 (Del. Ch. 2004) (concluding that dissolution was warranted where the companies' two 50% owners were unable to agree on whether to close the business or on how to dispose of company assets). Other considerations are whether the assets of the company still exist, and whether the business for which the partnership was formed is impracticable. For example, in *Kirksey*, the court concluded that the LLC's intended business was a livestock and ranching operation. *Kirksey, supra* at 830. Despite the deadlock and dissension between the four owners (all sisters), the court determined that the business could continue. However, the court continued, the question is whether it is reasonably practicable for the company to continue in accordance with its operating agreement. *Id.* In *Kirksey*, two members of the LLC held all the power, the members were deadlocked with no procedure to break that deadlock, the

members did not communicate and the company remained static – serving the interests of only half of its owners. Based on those circumstances, the court remanded for an order of judicial dissolution. *Id.* at 831.

Some courts have ordered dissolution when extreme dissension between the members was prevalent. See e.g., *Navarro v. Perron*, 19 Cal Rptr 3d 198 (2004). However, these types of cases also evidenced other factors that led the court to dissolution; for example, the parties had filed lawsuits and restraining orders against each other or the business had been effectively transferred.

Rarely have courts required a showing that it is completely impossible to carry on the business and have, instead, looked to individual factual circumstances such as (1) deadlocked voting; (2) the operating agreement gives no means of breaking that deadlock; or (3) due to the financial condition of the company, there is effectively no business to operate. *Fisk Ventures, LLC v. Segal* (Del. Ch. 2009).

Based on case law from other jurisdictions and the plain language of ORS 63.661, disagreement among LLC members is likely not enough to warrant judicial dissolution.

### Expulsion or Voluntary Withdrawal of an LLC Member

A court may also consider expulsion of an LLC member, pursuant to ORS 63.209. "[I]f the Court determines that:

"(A)[t]he member has been guilty of wrongful conduct that adversely and materially affects the business or affairs of the limited liability company; or

"(B) [t]he member has willfully or persistently committed a material breach of the articles of incorporation or any operating agreement or otherwise breached a duty owed to the

limited liability company or the other members to the extent that it is not reasonably practicable to carry on the business or affairs of the limited liability company with that member."

ORS 63.205 provides for voluntary withdrawal of an LLC member, but does not provide statutory provisions for buying out that withdrawing member's interest. Presumably, a member may withdraw and retain his or her equity interest—under no obligations to sell nor any obligation for the LLC to redeem that interest. Lack of statutory provisions on this point and a lack of specifications in the LLC's operating agreement can leave a withdrawing member in the unfortunate position of having his or her interest essentially captive in the LLC. See e.g., *Lieberman v. Wyoming.com, LLC*, 82 P.3d 274 (Wyo. 2004) (concluding that because the parties failed to contractually provide for mandatory liquidation or a buyout and that Wyoming statutes are also silent with regard to the rights and obligations of withdrawing members, the court would enforce the contract as written and the withdrawing member was not entitled to a court liquidation of his equity interest.)

### Other Remedies

Aside from applicable specific statutory remedies, parties should consider claims for breach of fiduciary duty, and for breach of the implied covenant of good faith and fair dealing. See *Prehall v. Whitaker*, 05CV2304CC (Or App 2009) (noting that Plaintiff alleged that Defendants owed him a fiduciary duty as a result of their joint LLC membership and Defendants' controlling interest in that LLC) and *Stevens v. Foren*, 154 Or App 52, 58 (1998) (noting that every contract contains an implied covenant of good faith and fair dealing which serves to protect the objectively reasonable contractual expectations of the

*Please continue on back page*



## Minority Oppression Doctrine

*continued from page 26*

parties). Such claims could be based on ORS 63.155, which sets forth the duties and standards of conduct for LLC members and managers.

Although the duties and standards in ORS 63.155 appear more narrow than the fiduciary duties underlying the “illegal or oppressive” conduct specified in ORS 60.661, courts in other jurisdictions have signaled that even in the absence of statutory fiduciary or good faith duties, common law fiduciary duties still have sway. See *e.g.*, *VGS, Inc. v. Castiel*, 2000 WL 1277372 (Del. Ch. 2000) (finding a breach of the duty of loyalty, looking to the intent rather than to the form) and *Anderson v. Wilder* (2003 WL 22768666) (Tenn. Ct. App. 2003) (looking to the common law to find a breach of fiduciary duty and duty of good faith and fair dealing following a majority vote to expel shortly before selling LLC units to a third party at a higher price than that paid to the expelled members).

*Castiel* and *Wilder* are noteworthy in that in both cases, the majority members’ actions technically complied with the operating agreements and with the specific statutes on point. Despite these seemingly permissible actions, both the Connecticut and Tennessee courts harkened to principles of equity and looked beyond the transaction to measure essential fairness and employ a good faith analysis. As the Connecticut court concluded “[n]othing in the statutes suggests that this court of equity should blind its eyes to a shallow, too clever by half, manipulative attempt to restructure an enterprise...” *Castiel*.

### Importance of Drafting/Entity Selection

An LLC is a non-corporate business entity that provides its owners with limited liability protection and with substantial freedom to structure their arrangements among themselves.

The governing documents of an LLC are the articles of incorporation and the operating agreement. See ORS 63.047 and ORS 63.077. The operating agreement may generally specify whatever duties, rights, rules or principles that the members wish. The underlying principle of the LLC entity is freedom of contract. LLC’s offer far greater ownership freedoms than a corporation. LLCs have virtually no ownership restrictions, are not subject to corporate formalities and offer operational ease and flexibility. In an LLC, the owners can distribute profits how they see fit.

This freedom, and opportunity, among members to structure the LLC entity as they wish militates against court involvement. As the parties are free to contract as they wish, a court in equity may well feel less inclined to act to rescue these parties. Thus, the importance of solid exit rights in an LLC operating agreement cannot be over.

With an LLC, in contrast to a corporation, the court has no power to dissolve except upon a showing of impracticability to carry on the business, pursuant to ORS 63.661. Upon a showing of breach, possibly pursuant to ORS 63.155, the court may be inclined to use its equity powers to fashion a remedy, as in the oppression cases, but that remains to be seen as Oregon case law in this area develops.

### Conclusion

Despite similarities between the LLC and the corporation, when claims of oppression arise, remedies vary substantively. In an LLC, if a court determines that a member’s wrongful conduct materially affects the LLC, it may expel that member. If the court determines that it is not reasonably practicable to carry on the LLC’s business, it can dissolve the entity. Statutorily, these are the only two remedies

available to an oppressed LLC minority member.

If neither remedy is applicable (or provides the desired relief), parties may resort to equity, good-faith based arguments. However, given the freedom of contract inherent in the LLC form a court may not exercise its equity power. In contrast to minority oppression in a corporate context, practitioners should be aware of the narrower universe of relief for minority LLC owners who claim oppression and the absence of guiding Oregon case law on this issue. □

### Endnotes

- 1 Some courts have explicitly rejected a cause of action for minority member oppression in a limited liability company. See *Diefenderfer v. Boose Machine Co. and RBJD LLC*, No. 08-01322 (Pa. C. 2009) (explaining that “in light of the lack of authority granted this court by the legislature or the Pennsylvania Supreme Court, we are unwilling to recognize a cause of action for minority member oppression.”). *But see Douglas K. Moll, Minority Oppression and the Limited Liability Company: Learning (or Not) From Close Corporation History*, 40 Wake Forest L. Rev. 883 (2005) (advocating that courts should extend the oppression doctrine to safeguard minority LLC members). No. 08-01322 (Pa. C. 2009)
- 2 These claims are in equity and require a court to make determinations of wrongdoing. In contrast, ORS 60.661 authorizes a court to impose a remedy upon a finding of wrong-doing – presumably a jury could make this finding.
- 3 See *e.g.*, Del Code Ann. 6, §18-1101 (1998) (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”)

## Acting Like Lawyers

*continued from page 1*

ning and get to the middle or even the ending first. If you do this, the jury will miss the most compelling part, which is the start of it all.

**5** The jury is basically going to hear two stories during the duration of the trial, so the evidence is just one factor. The other factor is how good and believable your co-storytellers are—your witnesses and experts. They can bring the best opening and closing down, or boost them into the stratosphere. Tom points out that, just like a great casting of your favorite movie, each character has a purpose or an objective for saying their lines that moves the movie along. Each line that is spoken in court also should move the case forward, with just the right amount of information that keeps it interesting. Most importantly, it all relies on you asking just the right question to keep the pace you need, to keep the jury glued to the next question and the next answer.

On this issue, I first challenged Tom that answers should be about the truth and about finding the justice in the process, and further that attorneys might question the ethics of making the courtroom into a scripted, entertaining concept. Experts and witnesses should only tell the truth and then the jury must decide which side has proven its case. Tom's response was "the truth can still be made interesting...."

**6** There are typically two versions of the truth during trial, so where does the difference take place if both truths are plausible? What is it that sways the jury? It is how the story or truth is told. While a lawyer may be a very persuasive speaker, and that certainly is very important, he has a host of characters in his story that may not have the same ability, but they also have an important part. The lawyer must be able

to incorporate their strengths and weaknesses in his delivery. Again, it comes down to the story and making sure each part of the story has a good character helping you tell it.

**7** Preparing a witness for trial is no different than rehearsing lines in a movie. Tom's job was to make them believable so the audience would not sit back and think of them as an actor saying lines, but as the character that is moving the story along. Likewise, a client or witness, once in front of an audience after multiple rehearsals, typically finds it difficult to be spontaneous, and unfortunately the truth then sounds anything but truthful. The human element of the delivery of testimony is crucial to its believability.

**8** Sometimes witnesses hurt the story by saying too much. We as lawyers encourage this by compulsively making sure that every point is brought out and discussed in detail. We then cloud and confuse the story line with excessive detail. This is a mistake. Less is more.

**9** To that end, a jury is very in tune to inflections in not only your voice but also your body language. You cannot necessarily observe all of this while you are in trial, but they are crucial nonetheless. In developing your question, you have to have an understanding of what emotion you are causing the witness. Tom reminds me that Academy Awards have been won on one word or even a look. The jury can do the same. You are evoking an emotional response from them as well.

**10** These skills are applicable in any situation, not just limited to the few weeks

a year we are actually in trial. Good acting and, Tom submits, good lawyering requires that listening skills need to be sharper than ever. The very best actors in the world are the ones that make sure their characters are listening to the lines spoken to them. We all intuitively know when someone is truly listening to us. When a judge speaks, that judge is likely, even at a subconscious level, looking at who is listening and who is not. The second part of listening is body language. Body language can speak volumes, but sometimes when a lawyer is arguing solely to a judge, body language is not taken into account, which can result in a significant misunderstanding or mistake in terms of how you respond.

**11** Finally, being focused is an art all to itself. You still have to be just as dynamic before a judge as you are with a jury, and you have to be just as focused. Tom translates at least one element of focus into eye contact. He has observed enough courtroom demeanor to have noted several lawyers who start talking while the judge is writing or typing. Wait until you have the complete attention of the court or opposing counsel. This particular tool is an extremely valuable one for the basic discovery building block of depositions, as well as other face-to-face contacts with opposing counsel or the court.

**12** Tom insists that in most of life, whether we like it or not, we are "acting"—what we wear, how we look, how we walk into a room, how we speak, how we listen—are all at a conscious or subconscious level portraying us to the outside world. Good lawyering is based on the same principles that create good acting. □



## Claims and Defenses

*Lasley v. Combined Transport, Inc.*, 234 Or App 11 (2010)

*Lasley* is a wrongful death action arising out of an accident on I-5. A truck owned by defendant Combined Transport dropped 12,000 pounds of glass on the highway. The glass did not hit any other vehicles, but the clean-up of broken



Judge Bushong

glass caused a four-mile traffic jam. An hour after the glass spill, defendant Clemmer approached the traffic jam going 65 miles per hour. Clemmer's vehicle hit decedent's vehicle; decedent's vehicle then struck a semi-truck and burst into flames, resulting in decedent's death. Clemmer later pleaded guilty to manslaughter and DUII, and admitted liability in this case. The jury found Combined Transport 22 percent at fault and Clemmer 78 percent at fault. Combined Transport argued on appeal that its motion for a directed verdict should have been granted because (1) "decedent's injuries and death did not foreseeably result from Combined Transport's conduct"; and (2) "Clemmer's negligence was an intervening harm-producing force that made decedent's injuries and death unforeseeable." 234 Or App at 18. The Court of Appeals disagreed, concluding that a reasonable juror could find that decedent's injuries

## Recent Significant Oregon Cases

Hon. Stephen K. Bushong  
Multnomah County  
Circuit Court Judge

and death were foreseeable because (1) "it was foreseeable that a traffic jam would result from a [glass] spill of such a magnitude on a major interstate highway" (*Id.*); (2) "[multiple experts testified at the trial that rear-end collisions are common when traffic is stopped on an interstate highway" (*Id.*); (3) "an accident reconstruction expert testified that the most dangerous part of a traffic jam is always the back, wherever that might be in relation to the place and time where the traffic jam begins" (*Id.*); and (4) "Clemmer's actions were not the kind of intervening harm-producing force that would sever the causal link between the glass spill and the harm that befell decedent." *Id.* at 19. The court reversed and remanded for a new trial, however, concluding that the trial court erred "in

excluding evidence of Clemmer's intoxication and her prior conviction for DUII, and the exclusion of that evidence was prejudicial." *Id.* at 22.

*Eads v. Borman*, 234 Or App 324 (2010)

The plaintiff in *Eads* was partially paralyzed after he "underwent back surgeries, which injured his spinal cord." 234 Or App at 326. He brought a medical malpractice action against the surgeon (Dr. Borman), and sought to hold defendant Willamette Spine Center (Willamette)—a limited liability company that leased a medical office building where Borman's office was located—vicariously liable on the theory that Borman was Willamette's actual or apparent agent. The trial court granted summary judgment to Willamette; the Court of Appeals affirmed. The court explained that, for an agency relationship to exist, the principal must "have a right to control the acts of its agent" and "both parties must also agree that the agent will act on the principal's behalf." *Id.* at 329. The fact that plaintiff was referred to Borman by one of Willamette's members—also a practitioner in the Willamette Spine Center building—was not enough, the court concluded. "A referral of a patient by one medical provider to another does not, by itself, establish any right to control or an agreement to an agency relationship." *Id.* at 330. The court rejected plaintiff's argument that the "right to control" test did not

*Please continue on next page*



## Recent Significant Oregon Cases

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apply because there was no evidence that defendant “employed Borman to provide a service that defendant had a legal obligation to provide.” *Id.* at 332. The court also concluded that plaintiff’s subjective belief that Borman was “acting on behalf of his clinic, Willamette Spine Center...is insufficient to give rise to an apparent agency relationship.” *Id.* at 334. The court explained that, “to withstand summary judgment, plaintiff needed to present some evidence of conduct by defendant from which a reasonable jury could conclude that defendant, itself, held Borman out as its agent and that plaintiff sought treatment from Borman in reliance on defendant’s representations and conduct.” *Id.* at 334-35 (emphasis in original).

*Tubra v. Cooke*, 233 Or App 339 (2010)

*Taylor v. Ramsay-Gerding Construction Co.*, 233 Or App 272 (2010)

The issue in *Tubra* was “one of first impression for Oregon appellate courts: whether the First Amendment bars recovery for a plaintiff in a claim of defamation that arose from defendants’ statements that plaintiff had misappropriated church funds and was dishonest during his time as a pastor.” 233 Or App at 341. The court concluded: “[i]f the organization is of a religious character, and the alleged defamatory statements relate to the organization’s religious beliefs and practices and are of a kind that can only be classified as religious, then the statements are purely religious as a matter of law, and the Free Exercise Clause bars the plaintiff’s claim.” *Id.* at 357. But where the alleged defamatory statements “would not always and in every context be religious in nature[,]” then the statements are subject only to a qualified privilege. *Id.* at 357-58. To prevail, the plaintiff would have to prove “that the qualified privilege was abused—that is, that the defendant did

not believe the statement to be true or lacked reasonable grounds for believing that it was true, or that the statement was made for a purpose outside the scope of the privilege.” *Id.* at 358.

In *Taylor*, the owners and operator of a hotel in Lincoln City sued the manufacturer of a stucco siding system for breach of express warranty after discovering defects in the stucco system. The jury found that defendant breached the express warranty, but that plaintiffs were 49 percent at fault. Plaintiffs contended on appeal that the trial court erred “in allowing the presentation of evidence of the parties’ comparative fault, in submitting that matter to the jury, and in entering a judgment that reduced plaintiffs’ damages by their apportioned fault.” 233 Or App at 281-82. Plaintiffs argued that “an express warranty is a contract and comparative fault does not apply in breach of contract claims.” *Id.* at 282. Defendant responded that comparative fault “went to the element of causation.” *Id.* at 290. The Court of Appeals concluded that, “whether the issue is properly characterized in Oregon as an issue of the parties’ comparative fault or negligence, or as one of alternative or comparative causation, the trial court did not err in admitting evidence or instructing the jury on that issue, or in entering judgment and denying plaintiffs’ motion for a new trial accordingly.” *Id.*

### Procedure

*McCollum v. Kmart Corporation*, 347 Or 707 (2010)

*Charles v. Palomo*, 347 Or 695 (2010)

In *McCollum*, a personal injury action, the jury returned a verdict for defendant. The trial judge signed an opinion and order granting plaintiff’s motion for a new trial within the 55 days

allowed by ORCP 64 F(1). The opinion was entered 54 days after the judgment, but the order was not entered until 5 days later. Defendant filed a notice of appeal of the order granting plaintiff’s motion for a new trial. The Supreme Court held that, “[b]ecause the trial court’s order granting the new trial was entered in the register beyond the 55-day period that [ORCP 64 F(1)] allows, the trial court did not timely determine the motion, and the motion therefore was conclusively denied by operation of law.” 347 Or at 717. As a result, the court vacated the trial court’s order granting plaintiff’s motion for a new trial, and remanded the case with instructions to reinstate the judgment for defendant. *Id.* In *Charles*, a personal injury action, the jury returned a verdict for defendant. The Supreme Court reversed and remanded for a new trial, holding that “the trial court erred in denying [plaintiff] the opportunity to present a rebuttal closing argument” and that “the denial of rebuttal argument substantially affected plaintiff’s rights.” 347 Or at 706.

*Snider v. Production Chemical*

*Manufacturing, Inc.*, 348 Or 257 (2010)

*Prime Properties, Inc. v. Leahy*, 234 Or App 439 (2010)

In *Snider*, the Supreme Court held that ORS 36.730 provides “the exclusive means for appealing from an order denying a petition to compel arbitration.” 348 Or at 267. Consequently, “defendant’s failure to take an interlocutory appeal [under ORS 36.730] from the trial court’s order meant that the order was not reviewable on appeal.” *Id.* at 267-68. The defendant in *Prime Properties* argued that, “because plaintiff’s attorney was represented in an unrelated matter by an attorney in the arbitrator’s law firm, the court was required to vacate the award under ORS 36.705 based on

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## Recent Significant Oregon Cases

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'evident partiality' by the arbitrator." 234 Or App at 441. The Court of Appeals held that "evident partiality" requires a showing "that the arbitrator manifested an actual, discernable inclination to favor one side, whether or not the award was affected by that inclination." *Id.* at 448-49. The trial court found that "defendant's evidence was not sufficiently persuasive to establish evident partiality." *Id.* at 449. Because that was a question of "historical fact," the Court of Appeals was bound by the trial court's finding unless the evidence "is such that the trial court as finder of fact could decide [it] in only one way[.]" *Id.*

*Wilson v. Tri-Met*, 234 Or App 615 (2010)

*Kile/Coffey v. York*, 234 Or App 358 (2010)

In *Wilson*, the Court of Appeals examined "the interplay between ORS 742.061, a statute that applies to recovery of attorney fees in an action on an insurance policy, and ORCP 54 E, a rule that limits recovery of attorney fees after a party presents an offer of judgment to an opponent." 234 Or App at 617. The court explained that, because ORS 742.061 "is an exception to ORCP 54 E[,] ...an offer of judgment, made after six months from proof of loss, will not serve to limit a plaintiff's entitlement to attorney fees under ORS 742.061." *Id.* at 628. In *Kile/Coffey*, the trial court awarded attorney fees under ORS 20.080(1) to a plaintiff who prevailed on a small tort claim. The Court of Appeals reversed, holding that defendant's tender of payment "made in advance of a plaintiff's filing of a complaint—even if made on the same day that the complaint is later filed—may nonetheless qualify as a tender made 'prior to the commencement of the action'" sufficient to justify denying an attorney fee award under the statute. 234 Or App at 362.

## Miscellaneous

*Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457 (2010)

*Ackerman v. OHSU Medical Group*, 233 Or App 511 (2010)

In *Thunderbird*, plaintiff brought a declaratory judgment action challenging the validity of city ordinances that regulate the conversion of mobile home parks to other uses. The Court of Appeals held that (1) plaintiff "presented a justiciable controversy that was ripe for adjudication" (234 Or App at 465); (2) "the trial court erred in determining that the city's ordinances were preempted or otherwise displaced by state law" (*Id.* at 479); and (3) "the trial court erred in determining that the ordinances violate the Due Process Clause of the Fourteenth Amendment." *Id.* at 483.

The plaintiff in *Ackerman* was injured as a result of medical treatment he received at Oregon Health and Science University (OHSU). He sued two of his physicians and their employers, OHSU and OHSU Medical Group. A jury "returned a verdict in favor of one of the physicians, but found that the other, West, was negligent, that his negligence resulted in injury to plaintiff, and that the injury caused plaintiff \$1,412,000 in damages." 233 Or App at 513. The parties agreed that OHSU's liability was limited to \$200,000 under the Oregon Tort Claims Act (OTCA).<sup>1</sup> The issue on appeal was the effect of the OTCA on the remaining \$1,212,000. The court held that (1) OHSU Medical Group's liability "should have been limited to \$200,000" (*Id.*); and (2) "applying the OTCA to West would violate Article I, section 10" of the Oregon Constitution. *Id.* at 513-14. Thus, the "proper judgment would find OHSU liable for \$200,000; Medical Group liable for \$200,000; and West liable for \$1,012,000." *Id.* at 533.

*Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or 159 (2010)

*Vannatta v. Oregon Government Ethics Comm.*, 348 Or 117 (2010)

In *Emerald Steel*, the Supreme Court held that, "under Oregon's employment discrimination laws, employer was not required to accommodate employee's use of medical marijuana." 348 Or at 161. The court explained that, "[t]o the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it 'without effect.'" *Id.* at 178. The court noted that its holding "is limited to ORS 475.306(1)"; the court did "not hold that the [federal] Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability." *Id.* at 190. In *Vannatta*, plaintiffs who prevailed on their constitutional challenge to a statutory restriction on offering gifts and entertainment to public officials sought to recover their attorney fees under the court's inherent equitable power, as described in *Deras v. Myers*, 272 Or 47, 65-66 (1975). The court declined to award fees, concluding that its ruling on the merits was "not such a significant public benefit that the public at large should pay petitioners' attorney fees." 348 Or at 124. □

## Endnote

- 1 The two OTCA provisions at issue in *Ackerman* were ORS 30.265(1) and former ORS 30.270(1) (2007), repealed by Or Laws 2009, ch. 67, § 20. 233 Or App at 514. The OTCA's liability limits for personal injury and death were substantially increased in 2009. See ORS 30.271(2009).

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