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## Global warming next mass tort? Local attorneys say no

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The question of whether global warming will become the next mass tort is being addressed in courts throughout the nation.

Plaintiffs owning property along the Mississippi Gulf Coast sued oil and energy companies for compensatory and punitive damages in *Comer v. Murphy Oil USA*, claiming the greenhouses emitted by the defendants contributed to global warming. The plaintiffs alleged the companies' gases caused a rise in air and water temperatures, which led to higher sea levels and added to Hurricane Katrina's force, which destroyed homes and other properties.

Mississippi's federal trial court decided the plaintiffs lacked standing and that their claims dealt with political questions, and granted the defendants' motion to dismiss.

The case was appealed, and a the 5th U.S. Circuit Court of Appeals reversed in part, finding the plaintiffs had standing in their claim of nuisance, trespass and negligence by the companies.

David Nash, a partner at McMahan DeGulis LLP, said proving whether a plaintiff has standing is among the biggest issues in global warming cases.

Making a connection between global warming and a personal injury or property damage, and proving that a defendant caused to the climate change, both are extremely difficult, he explained.

"(Standing) is tough to show, as opposed to just sort of general, climactic climate change that affects everybody in the same way," Nash said.

"And then there's causation, and take the Hurricane Katrina example. How are you going to show that increased carbon dioxide from a particular source or set of sources actually caused the climate to change in such a way to spawn a particular storm or hurricane? I don't think science is there."

And because standing and causation are so difficult to prove, Nash said, he doesn't believe global warming will be the next mass tort any time soon. Several cases similar to *Comer v. Murphy Oil USA* have been filed and dismissed over the last year on procedural grounds, he added.

In 2009, a California federal trial court dismissed a global warming case in *Native Village of Kivalina v. Exxon Mobil Corp.*

The case involved a village of nearly 400 Alaskans who sued several oil and energy companies in an attempt to receive monetary damages for global warming effects due to defendants' alleged emission of greenhouse gases. The plaintiffs claimed the pollution eroded the Arctic sea ice that protects the Kivalina coast from storms and waves during the winter, and sought compensation for their village's future relocation.

The trial court based its dismissal on the fact that the

case presented a nonjusticiable political question and lacked standing, Nash said.

In 2007, the U.S. Supreme Court discussed the topic of standing in the global warming case *Massachusetts v. Environmental Protection Agency*. Twelve states and several U.S. cities brought suit against the EPA in order to force the agency to regulate carbon dioxide and other greenhouse gases as pollutants.

Nash said two main issues in the case were whether the petitioners had standing, and whether the federal Clean Air Act defines carbon dioxide as an "air pollutant" causing "air pollution."

However, the court did find the petitioners to have standing, and by a 5-4 vote, the Supreme Court ruled in favor of Massachusetts. Justice John Paul Stevens held that because of Massachusetts' "stake in protecting its quasi-sovereign interests," it had standing to sue the EPA over potential damage caused by global warming to the state. The Supreme Court also decided that carbon dioxide is a pollutant that can be regulated by the Clean Air Act through EPA regulations.

Although *Massachusetts v. Environmental Protection Agency* and a few other cases have gotten through the door, most of these cases have been policy-based, not mass tort cases, Nash said, and he doesn't expect to see people coming out in droves to file climate change suits in the near future.

Maria Armstrong, chair of the Green Strategies Group at Bricker & Eckler LLP, agreed.

"At this point, it seems too early to speculate on the potential for mass tort actions in this arena," O'Donnell said. "Regardless, with increasing energy costs, heightened public awareness, escalating government regulation, and record-setting levels of available monetary incentives, energy consumers have ample reason to get into the advanced energy market without the added incentive of possible tort claims."

Suzanne Fisher-Edwards, a partner at McMahan DeGulis LLP, said some commentators on the issue have indicated or opined that law suits that do deal with global warming are simply a way to drive climate change legislation.

Nash said the 15th United Nations Climate Change Conference was recently held in Copenhagen, Denmark, to draw attention to the issue of global warming. However, the conference didn't come out with any clear cut results and was "pretty muddled" in terms of where things are with global warming within mass tort cases, he said.

Additionally, the effort in the U.S. Congress to pass cap-and-trade legislation on carbon emissions has stalled, he said.

"I think there are so many unanswered questions about whether there is a path to success for plaintiffs on climate change tort actions, I don't see the number of suits ramping up in a big way any time soon," Nash said.