A Supplemental Whitepaper Addressing Sandy's Impact on Commercial and Residential Property Owners and Construction Companies

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Superstorm Sandy, which made landfall near Atlantic City, N.J. on October 29, 2012, brought virtually unprecedented destruction to a large swath of the northeastern United States including, in particular, coastal New Jersey, New York City and nearby Long Island. Hundreds if not thousands of structures, many of them private homes, were completely destroyed or substantially damaged, most by flooding and record storm surges, some by wind. Millions were left without electric power for days and in some cases for weeks. Businesses throughout the region and beyond were severely impacted, and more than 130 people were killed. Total losses, while still speculative, have been estimated to be in excess of $50 billion.

This whitepaper represents an overview of some of the legal issues that unquestionably will arise as a result of the storm, and is intended, among other things, to act as a guide for parties affected by the storm in addressing these issues at the present time, and also in the future. Although the nature and identity of the claims – and claimants – are seemingly endless, we concentrate herein on several different categories of damage claims that might be asserted by and against affected persons and businesses including building and structural claims, construction delay claims, toxic and environmental claims, and climate change/global warming-based claims.

BUILDING/STRUCTURAL CLAIMS

Introduction

Superstorm Sandy brought torrential downpours, record storm surges and tidal flooding, and significant winds to the East Coast, causing substantial property damage, especially in New York and New Jersey. This natural disaster will likely give rise to claims by property owners in both tort and property insurance. The following is a discussion of some of the potential tort claims property owners might assert against municipalities, contractors and design professionals for the damages sustained in the storm allegedly due to negligent design or construction.

The purpose of this discussion is not to give legal advice or to comment on the strength or weakness of the various claims, or on the potential defenses to such claims, but, rather, to identify the issues for consultation by the affected parties with their respective legal and insurance advisors.

Municipality Liability

Municipalities have a duty to maintain the public systems they build. New Jersey specifically imposes such a duty on municipalities.[1] In New York, property owners cannot recover from municipalities on the basis that a municipality negligently designed such a system, but they can claim a municipality

1 *See, e.g., Jones v. Borough of Bogota, 2008 WL 4648455, at *3-4 (N.J. App. Div. 2008); Henry Clay v. Jersey City, 181 A.2d 545, 548 (N.J. App. Div. 1962).*

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negligently inspected and maintained systems such as sewer lines and storm drainage systems.[2] To prevail on such a claim in New York, a property owner must show: (1) the municipality "had notice of a dangerous condition ... likely to cause injury," (2) the municipality failed to "make reasonable efforts to inspect and repair the defect," and (3) "such failure caused the plaintiffs' injuries."[3] Property owners who can show that the negligent maintenance of sewer systems or other public systems caused them to sustain greater losses in the storm than they would otherwise have sustained may have a basis for a claim under these theories.

Liability of Design Professionals

Architects and builders[4] have a duty to perform their contractual obligations with reasonable care.[5] Property owners may have a claim that they suffered greater losses in Sandy than they should have suffered because of negligent work by the architect, designer or builder. Such claims have the same elements as other negligence claims, namely: (1) a duty by the defendant, (2) a breach of that duty, (3) that caused plaintiff's injuries. In the case of an architect, a property owner would have to show the design professional violated its duty of care to perform as a reasonable design professional would have, perhaps with evidence that subpar materials were called for, or the structure failed to comply with applicable building codes or otherwise failed to reasonably anticipate the nature of the conditions the building was exposed.

The owner must also show that the action that breached the duty of care caused the harm that was sustained. Evidence, likely including expert testimony, will be needed to show, absent the negligence of the architect or builder, the owner would have sustained less damage from Superstorm Sandy than it did. If a property owner seeks recovery on the basis that the structure's design should have accounted for a storm with Sandy's force, the owner will have to show either a contractual obligation to prepare the building in such a manner, or that a reasonable design professional would have built the structure to withstand a storm like Sandy.

Construction Delay Claims

In the wake of a natural disaster, the cost of a construction project will be drastically increased. There will be costs associated with any damage on-site resulting from flooding or high winds. This includes the cost of purchasing replacement equipment and supplies as well as any costs associated with cleanup efforts, including dewatering the site.[6] It is also likely the cost of supplies will increase as a result of transportation difficulties and gas shortages.

Of critical importance, in addition to all of the above issues and associated costs, are the costs associated with unforeseen delays resulting from the storm. These delays include not only the period of time during the storm itself, but also ensuing delays in its aftermath. As was the case with Superstorm Sandy, there will be a period of time where the construction site and equipment may be inaccessible and/

2 *Holmes v. Inc. Vill. of Piermont, 863 N.Y.S.2d 774, 776 (N.Y. App. Div. 2008).*

3 *Id.*

4 While the focus in this section is on potential claims involving design professionals, there are similar claims that may be made against contractors in the event their work was not performed properly and/or they did not properly protect their work or the project in anticipation of and during the storm.

5 *See, e.g., Bloomsburg Mills, Inc. v. Sordoni Construction Co., 164 A.2d 201, 203 (Pa. 1960).*

6 It is not the intent of this whitepaper to discuss all potential construction-type claims. However, given the force of wind and rain on construction projects in process and infrastructure in place – either as part of the improvements themselves and/or relating to scaffolding, cranes and other equipment that might have been exposed – any owner or contractor should take the time to conduct an in depth inspection of those areas, including subsurface or ground conditions, to ensure their safety. There may also be builder's risk insurance issues regarding damage to the work in progress and stored materials.

or unstable, due to damage, flooding or loss of power on-site. Delays will also result from the period of time needed to clean up and de-water the site and prepare it for the resumption of work, and to obtain replacement parts and materials for those that have been damaged as a result of the storm. As an example, if proprietary items have been lost or damaged, there could be a substantial period of time needed to order and obtain suitable replacements.

These circumstances lead to one central question – who is responsible for these additional costs? Does the burden fall on the project owner or the contractor? As explained below, the answer to this inquiry will depend largely on the language of the construction contract itself,[7] specifically, its provision governing damages for delay and *force majeure*. In addition, the parties to the contract may find support for their often opposing positions in common law theories of physical impossibility, commercial impracticability or frustration of purpose.

This section of the whitepaper will address these issues and explore the applicable law in those jurisdictions hit hardest by Superstorm Sandy. This guidance should provide owners and contractors with some foundation for dealing with construction contract claims resulting from Sandy and should be instructive as to how to deal with these issues in the future.

No Damages for Delay Clauses

As stated above, Superstorm Sandy caused unanticipated and hard to quantify delays at construction sites. Often, contractors will be required to expend additional time and money dealing with these delays. In doing so, they may try to seek additional compensation from the project owner. Whether they can recover depends largely on the contract's "no damages for delay" clause and other similar clauses.

A "no damages for delay" clause is a provision found in most construction contracts that gives a contractor the specific right to seek an extension of time for its performance in the event of a justifiable delay not within the contractor's reasonable control, in return for an agreement by the contractor not to seek damages for such delay.[8] Stated differently, these clauses provide an extension of time, as opposed to the recovery of damages, is the contractor's sole remedy in situations where delays not caused by the contractor occur on construction projects.[9] As a general rule, no-damages-for-delay clauses are valid and enforceable and not contrary to public policy.[10]

However, the rule that no-damages-for-delay clauses are enforceable is not without exceptions. In New York, for example, the Court of Appeals has enumerated four exceptions to the general rule that no-damages-for-delay clauses must be enforced. Damages may be recovered for: (1) delays caused by the contractor's bad faith or its willful, malicious, or grossly negligent conduct; (2) uncontemplated delays; (3) delays so unreasonable they constitute an intentional abandonment of the contract by the contractor; and (4) delays resulting from the contractor's breach of a fundamental obligation of the contract.[11]

7 Any reference herein to a construction contract should be understood to include the various provisions of the project manual and special conditions.

8 *See S&B/Bibb Hines PB3 Joint Venture v. Progress Energy Florida, 365 Fed. Appx. 202, 204 n.3 (11th Cir. 2010) (citing Marriott Corp. v. Dasta Constr. Co., 26 F.3d 1057, 1066-67 (11th Cir. 1994)).*

9 *See Travelers Cas. & Sur. Co. v. Dormitory Auth.*, 735 F. Supp. 2d 42, 58 (S.D.N.Y. 2010) ("The parties' inclusion of a no-damages-for-delay clause, which is not uncommon in construction contracts, evidences the contracting parties' unmistakable intent that, as between those parties, the contractor rather than the contractee, is to absorb damages occasioned by contractee-caused delay.") (internal quotations and citation omitted)

10 *See id.*

11 *Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 309 (Sup. Ct. 1986).*

Under these circumstances, a contractor may try to argue that a hurricane, or other natural disaster, including Sandy, falls within the "uncontemplated delays" exception. This exception applies where the claimant can demonstrate the delays, or their causes, "were wholly unanticipated."[12] If the alleged delays were foreseeable under the circumstances of the particular project (including, for example, delays caused by traditional weather patterns), or were discussed in or otherwise contemplated by the contracting parties, damages arising from those delays most likely will be barred.[13]

New York courts will apply several general principles to determine whether a delay was "uncontemplated." In *Premier-New York, Inc. v. Travelers Prop. Cas. Corp.*, the court explained, first, that "it is not necessary that the contract specifically contemplate the exact occurrences giving rise to the delay; all that is required is that the class of occurrence have been contemplated."[14] Second, where a contract discusses a potential cause of delay, subsequent delays arising from that same cause are considered to have been contemplated by the parties to the contract. Third, ordinary, garden variety poor performance by the owner is within the contemplation of the parties. Finally, delays resulting from failures of coordination are within the contemplation of the parties in cases of complex multicontractor litigation.[15]

Under these general tenets, it is not clear whether a hurricane would be considered by courts to be "wholly uncontemplated." On the one hand, a hurricane would seem to be "uncontemplated" because it is not the result of the parties' actions in performing the contract. On the other hand, however, a hurricane is not wholly unimaginable in an area such as the coastlines of New York and New Jersey, especially when these areas have been impacted by similar storms in the past. Thus, if nothing else, construction project owners should bear in mind the drastic consequences of Sandy and take care when drafting construction contracts to take account of the possibility of hurricanes and other natural disasters, so they do not find themselves responsible for damages under the "uncontemplated delays" exception.

Force Majeure

Another critical contract provision governing liability for delays occurring at construction sites is the contract's *force majeure* provision, assuming the contract contains one. "*Force majeure*" refers to the concept of excusing contractual performance as a result of unforeseen circumstances that can neither be anticipated nor controlled.[16] The primary purpose of a *force majeure* clause is to "relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated."[17]

A leading treatise on contracts provides the following explanation of the purpose of a *force majeure* clause in a contract:

> Because most courts have held that failure to cover a foreseeable risk in the contract deprives a party of the defense of impossibility, the best way to protect a party's interest is to address the risk of supervening events expressly in the agreement. Such a clause can take many forms and serve many purposes. It may be a force majeure clause discharging the party, an excusable-delay clause giving the party additional time to complete performance, a termination clause granting the party the right to terminate if certain events transpire, or a flexible-pricing clause allowing it to pass on increased costs to the other party.[18]

12 *Premier-New York, Inc. v. Travelers Prop. Cas. Corp., 867 N.Y.S.2d 20, 32-33 (Sup. Ct. 2008).*

13 *Id.*

14 *Id.*

15 *Id.*

16 It is important to note, in many instances, an applicable *force majeure clause permits only an extension of time, but does not ensure compensation to the contractor for its damage resulting from the event.*

17 *Rochester Gas & Elec. Corp. v. Delta Star, Inc., No. 06-CV-6155, 2009 U.S. Dist. LEXIS 11489, at *18 (W.D.N.Y. Feb. 13, 2009) (quoting Phillips v. Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd., 782 F.2d 314, 319 (2d Cir. 1985)).*

18 14-74 Corbin on Contracts § 74.19.

Most *force majeure* clauses provide for an extension to a completion date of the construction project rather than for recovery of losses or damages resulting from a delay. Generally, the burden of invoking the clause is on the party seeking to have its performance excused.[19] That party will need to demonstrate it made reasonable efforts to perform its contractual obligations despite the occurrence of the event, and that the ensuing delay was unavoidable.[20] In order to properly invoke the *force majeure* clause, certain general requirements must be met.

First, the event at issue must fall within the terms of the *force majeure* clause, which clauses often list the types of events that can invoke the provision. Most *force majeure* clauses will excuse performance of a contract where it is impossible to perform as a result of an "act of God."[21] An act of God is an act or condition "beyond the control of mere human agency and occurs where there is an intervention of an 'extraordinary, violent, and destructive agent, [which because of] its very nature raises a presumption that no human means could resist its effect.'"[22] Such an event includes, for example, droughts, flooding, freezing temperatures, fog, high winds or hurricanes, ice storms and lightening.[23]

It is important, however, to note that courts will construe the language of a *force majeure* provision narrowly. In New Jersey, as in many jurisdictions, courts have invoked the rule of *ejusdem generis*. Under this principle, the "catch-all" provisions in *force majeure* language are to be "narrowly interpreted as contemplating only events or things of the same general nature or class as those specifically enumerated."[24] Similarly, New York law provides that "a *force majeure* clause must include the specific event that is claimed to have prevented performance."[25] Accordingly, it is imperative a party seeking protection in the form of a *force majeure* provision make sure the provision generally, if not specifically, includes events such as hurricanes among the items enumerated therein.

In addition to setting forth the kinds of events that are covered by a *force majeure* clause, the contract should specifically detail each party's obligations in the event the clause is invoked. The contract should delineate the exact beginning and ending of a *force majeure* event, as best as possible. It should also clearly explain whether each party's obligations are suspended for the duration of the event, or are terminated completely. Furthermore, if the clause excuses or suspends the performance of one party, it should set forth the obligations of the other party to the contract, and state whether or not it is required to continue to perform its part of the contract.

Although the language of a *force majeure* clause generally is determinative of whether an event such as the superstorm excuses a party's performance of its contractual obligations, the absence of such a clause will not always be fatal to the party seeking to invoke the doctrine, particularly where the precipitating event is a catastrophe of the magnitude of Superstorm Sandy. A majority of jurisdictions will excuse a party from fulfilling its obligations under a contract as a result of a *force majeure* event of a great magnitude or wide scope, even in the absence of a *force majeure* clause in the contract.[26] Thus, for example, courts in New Jersey have excused the performance of a contract in the face of an unexpected occurrence, notwithstanding the absence of a *force majeure* clause in the contract.[27]

19 *See R&B Falcon Corp. v. Am. Exploration Co., 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001).*

20 *Id.*

21 *See Perlman v. Pioneer Ltd. Partnership, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990).*

22 Sniffen, Jennifer, In the Wake of the Storm: *Nonperformance of Contract Obligations Resulting from a Natural Disaster, 31 Nova. L. Rev. 551, 555 (2007) (quoting Louisville & N.R. Co. v. Finlay, 158 So. 904, 905 (Ala. 1939)).*

23 *See 1 AmJur.2d Act of God § 4 (2005).*

24 *Seitz v. Mark-O-Lite Sign Contractors, Inc., 510 A.2d 319 (N.J. App. Div. 1987).*

25 *Rochester Gas & Elec. Corp., 2009 U.S. Dist. LEXIS 11489, at *18-19.*

26 Sniffen, 31 Nova. L. Rev. at 560.

27 *See Facto v. Pantagis, 915 A.2d 59, 61 (N.J. Super. Ct. 2007) ("[E]ven in the absence of a force majeure clause, a power failure is the kind of unexpected occurrence that may relieve a party of the duty to perform if the availability of electricity is essential for satisfactory performance.").*

Further, the event must have been unforeseeable at the time of contracting. Under New York law, courts have determined that "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[28] The rationale for this requirement is that a party's failure to contractually protect itself from a foreseeable event is an assumption of that risk. As is the case with the uncontemplated delays exception to a no damages for delay clause, questions will arise as to whether Superstorm Sandy was an unforeseeable event within the ambit of various *force majeure* clauses.

Moreover, the event must have reasonably been beyond the reasonable control of either party. According to the 5th Circuit, "reasonable control" involves a two-step inquiry.[29] First, the *force majeure* event cannot be affirmatively caused by a party to the contract.[30] Second, a party may not rely on an event excusing performance if the party could have taken reasonable steps to prevent the event.[31] This second inquiry is often phrased in terms of a party's responsibility to mitigate the effects of the *force majeure* event, which may be a critical issue in the case of Sandy given the advance warnings that were made concerning the severity of the expected storm. In fact, most construction contracts contain language expressly providing that the contractor "shall use all reasonable efforts to mitigate the impact of the *force majeure* event." There surely will be controversy over what reasonable steps should have been taken in any particular case.

Finally, the party seeking relief under a force majeure clause must provide notice to the other party to the contract. This requirement, which generally is set forth in the language of the *force majeure* clause, requires the party seeking to use *force majeure* as a defense to its nonperformance, of or delay in, performing the contract to notify the other party of its intention to invoke the protection of the provision. This gives the nonperforming party an opportunity to mitigate damages. Failure to comply with this notification requirement may result in waiver of a party's claim to force majeure.

Compliance with these requirements for the duration of the force majeure event will allow a contractor an extension of time to complete the project. Less clear, however, is the application of these requirements to the continuing extended, and consequential, impacts associated with these disasters. For example, although it may be clear that a hurricane is within the definition of force majeure events in the contract, it may not be clear whether that includes the aftermath of the hurricane as well. Thus, even though it generally is clear a force majeure condition exists in the immediate aftermath of the storm when the site remains inaccessible, it is less clear whether the force majeure will be deemed to continue during the weeks or months it takes to clean up the site, obtain supplies and materials, and address the other consequences of the storm, cited above. Questions may also arise regarding each party's responsibility for mitigating the effects of these continuing impacts. There are no clear-cut answers to these questions. Project owners and contractors are, therefore, cautioned to be aware of potential continuing impacts arising from natural disasters and address them at the outset of the construction contract in the drafting of its provisions.

28 *Rochester Gas & Elec. Corp., 2009 U.S. Dist. LEXIS 11489, at *19.*

29 *See Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984).*

30 *Id.*

31 *Id.*

Fixed-Price Contracts

When attempting to recover additional costs associated with delays due to an event such as Sandy, contractors typically face a different set of issues if a fixed-price contract is involved.[32] A fixed-price contract is one that requires the contractor to furnish goods or services for a fixed amount of compensation regardless of the costs of performance and is, more often than not, the contract form used, whether lump sum or guaranteed maximum price.[33] Under such a contract, the risk of unforeseen costs of performance falls on the contractor.[34] "[I]f the final total costs of the agreed upon services exceed the contracted price, the contractor takes the loss."[35]

The case of *S&B/Bibb Hines PB3 Joint Venture v. Progress Energy Florida*[36] is instructive. This breach of contract action concerned two multimillion dollar, fixed-price contracts for the construction of two generating plants in Florida. The contractor agreed to perform the construction work on the plants for a fixed price. During the course of performance of the contracts, seven hurricanes hit the area, resulting in a shortage of labor and materials and an increase in the cost of construction for the contractor. The contractor filed suit against the owner to recover approximately $40 million in additional compensation over the contracts' fixed price. The district court concluded that the fixed-price contracts precluded any recovery of additional compensation beyond the contract price. The 11th Circuit agreed and the contractor was barred from additional recovery under this theory.[37] Contractors should obviously be cautious in entering into fixed-price contracts, particularly where the work site is in an area prone to weather related events or natural disasters (e.g., hurricanes, floods, wildfires, mudslides, etc.) or other potential delays, except in cases where the contract provides a specific right to recover delay damages.

Other Common Law Issues

In addition to issues concerning specific provisions found in, or missing from, construction contracts, there are several common law theories that may serve to excuse performance of or delay in performing a construction contract in the aftermath of a hurricane, flood or other natural disaster.

One such theory is that performance of the contract is physically impossible. Under New York law, in order to excuse performance, the impossibility of performance must be brought about by an unanticipated event that could not have been foreseen or guarded against in the contract.[38] Another theory occasionally invoked is that performance of the contract is not possible due to frustration of purpose of the contract. Under New York law, this theory excuses performance when a "virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party."[39] Finally, the doctrine of commercial impracticability may excuse performance where an unforeseen condition arises that makes performance impracticable.[40] The Supreme Court has described the general scope of impracticability as requiring a nonperforming party to show: (1) a supervening event made performance impracticable; (2) the non-occurrence of the event was a basic assumption upon which the contract was based; (3) the party was not at fault for the occurrence of the event; and (4) the party did not contractually assume the risk for the occurrence.[41]

32 Of course, where the contract provides, explicitly or otherwise, for the right to damages for delay – or possibly equitable adjustment – and the consequences thereof, this may not be so much of an issue.

33 *See S&B/Bibb Hines PB3 Joint Venture, 365 Fed. Appx. at 203.*

34 *See id.*

35 *Id. (quoting United States v. White, 765 F.2d 1469, 1472 (11th Cir. 1985)).*

36 365 Fed. Appx. at 203.

37 *Id.*

38 *See Beardslee v. Inflection Energy, LLC, 3:12-CV-00242, 2012 U.S. Dist. LEXIS 163177, at *18 (N.D.N.Y. Nov. 15, 2012).*

39 *Id. (quoting Gen. Douglas MacArthur Senior Vill., 508 F.2d 377, 381 (2d Cir. 1974)).*

40 *See Facto, 915 A.2d at 61(citing Restatement (Second) of Contracts* § 261 cmt. a (1981)).

41 *See United States v. Winstar Corp., 518 U.S. 839, 904-910 (1996).*

As is the case with contractual provisions precluding damages for delay and *force majeure* clauses, these theories depend largely on the notion of foreseeability. Although it is not completely unforeseeable that a hurricane may strike the northeast corridor, the magnitude of the damages and the long-term effects may not be as predictable. Thus, it is critical for owners and contractors to anticipate these events to the extent possible when negotiating and drafting their contract documents. Undoubtedly, in the aftermath of Sandy, a number of owners and contractors will be both surprised and disappointed at the limitations of their rights and remedies under their contracts. This is the time to address those deficiencies, in order to avoid the recurrence of such unpleasant surprises in the future.

Toxic And Environmental Claims

Superstorm Sandy's effects are broader than direct wind and flood damage to property. The storm surge that accompanied Sandy also overwhelmed industrial and commercial facilities throughout the area, releasing potentially dangerous contaminants into surrounding property. For example, fuel tanks that were damaged in the flooding released 378,000 gallons of low-sulfur diesel into the Arthur Kill tidal strait between New York and New Jersey.[42] Several Superfund toxic waste sites were impacted by the storm and assessments of possible damage are ongoing.[43] In addition to these major spills, there were numerous small releases of toxic chemicals and raw sewage that could result in damage to persons, property or natural resources.[44] In the aftermath of Sandy, property owners should be aware of the losses and claims that can arise related to toxic and environmental problems, and the considerations that accompany them.

CLIMATE CHANGE/GLOBAL WARMING-RELATED CLAIMS

Introduction

With natural disasters taking place with increasing frequency in the last decade, there have been a number of lawsuits alleging human activities have exacerbated the destructive impact of various weather-related events. The general theory asserted in these cases has been that emissions contributed to global warming, which caused or worsened a natural disaster.

These actions generally have faced two significant hurdles: (1) a challenge to Article III standing (most often involving a failure to prove causation); and (2) an assertion that the claim involves a nonjusticiable political question not appropriate for a court of law to rule on. A review of some of the most significant global warming cases to date showcases the current landscape of this type of litigation.

1. *Barasich v. Columbia Gulf Transmission Co.*, 467 F.Supp.2d 676 (E.D. La. 2006)

Dating back to 2006, this case involved class actions alleging the activities of defendant companies contributed significantly to the destructive impact of Hurricane Katrina and Hurricane Rita in south Louisiana. Plaintiffs alleged defendants damaged the marshland that lies between Louisiana's habitable regions and the Gulf of Mexico, thereby weakening a protective barrier against hurricanes and exposing Louisianans to greater harm, including "billions of dollars in economic losses, catastrophic destruction

42 Ryan Hutchins, *Oil Spills, Other Hurricane Sandy Damage Present N.J. With Potential Pollution Headaches*, The Star-Ledger, Nov. 14, 2012, http://www.nj.com/news/index.ssf/2012/11/hurricane_sandy_oil_spills.html.

43 Rob Barry, Dionne Searcey, and John Carreyrou, *Sandy Stirs Toxic-Site Worry*, The Wall Street Journal, Nov. 11, 2012, at A6.

44 Roxanne Palmer, *Sandy Environmental Toll: Polluted Rivers, Lost Seabirds*, International Business Times, Nov. 2, 2012, http://www.ibtimes.com/sandy-environmental-toll-polluted-rivers-lost-seabirds-858287.

of property and substantial loss of life."[45] Plaintiffs sought to hold defendants liable for their activities in Louisiana's marshlands and recover for corresponding damages.[46]

As typical in this type of case, the *Barasich* court engaged in the nonjusticiable political question analysis.[47] Applying the political question framework laid out by the Supreme Court in *Baker v. Carr*,[48] the court came to the conclusion that plaintiffs' claims were justiciable, explaining, "The Court is aware that from the face of the plaintiffs' complaint this could be a complex case to adjudicate. But that does not necessarily turn the plaintiffs' lawsuit into a nonjusticiable political question."[49] The court emphasized that the plaintiffs sought monetary damages rather than injunctive relief, which made their claims less likely to raise political questions, as such a ruling would not require the court to "dictate policy to federal agencies."[50]

However, even with a finding of justiciability, the plaintiffs still did not prevail, as the court dismissed the case for plaintiffs' failure to state a claim for which relief may be granted.[51] Rather than asserting the actions of each individual defendant caused the harm suffered, the plaintiffs alleged the defendants activities considered together, as an industry, caused their injuries.[52] The court rejected plaintiffs' group liability theory, holding that an individual connection between each defendant and the plaintiffs' harm would need to be alleged and demonstrated in order for plaintiffs to state a claim worthy of relief.[53]

2. The Supreme Court of the United States and Climate Change Litigation

In 2007, the Supreme Court weighed in on the new wave of global warming litigation for the first time in *Massachusetts v. EPA*.[54] The case originated on October 20, 1999, when a group of 19 private organizations filed a rulemaking petition requesting the Environmental Protection Agency (EPA) regulate greenhouse gas emissions from new motor vehicles.[55] The petitioners alleged that 1998 was the warmest year on record and that greenhouse gas emissions "significantly accelerated climate change," endangering human health and the environment.[56] The EPA entered an order denying the rulemaking petition on September 8, 2003.[57] The EPA gave two reasons for the denial: (1) the Clean Air Act did not authorize the EPA to mandate regulations in response to climate change, and (2) "even if the Agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time."[58]

Petitioners, comprising a group of states, local governments and private organizations, sought review of the EPA's order, alleging the EPA abdicated its responsibility under the Clean Air Act to regulate emissions of greenhouse gases, including carbon dioxide.[59] The following three aspects of the Supreme Court's analysis of plaintiffs' claims significantly impacted future climate change litigation:

(1) The Supreme Court recognized that respected scientists have attributed the rise in global temperatures to an increase in carbon dioxide in the atmosphere;

45 *Id.*
46 *Id.*
47 *Id.*
48 369 U.S. 186 (1962).
49 *Barish, 467 F.Supp.2d at 688-89.*
50 *Id. at 685.*
51 *Id. at 695.*
52 *Id. at 694.*
53 *Id. at 695.*
54 549 U.S. 497 (2007).
55 *Id. at 510.*
56 *Id.*
57 *Id. at 511.*
58 *Id.*
59 *Id. at 505.*

(2) The Court held that the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions in the event it finds that such emissions contribute to climate change; and

(3) Petitioners' allegations of injuries suffered, causation, and redressibility were sufficient to establish standing to challenge the EPA.[60]

The Court also held that the EPA's order denying the rulemaking petition was arbitrary and capricious, and it remanded the case to the EPA to base its reasons for "action or inaction in the [Clean Air Act]."[61] Cited frequently since it issued in 2007, *Massachusetts v. EPA* changed lower courts' treatment of global warming litigation.

The Supreme Court revisited climate change litigation in 2011 when it granted certiorari in *American Elec. Power Co., Inc. v. Connecticut*.[62] Several states, the city of New York and three private land trusts brought a federal common law public nuisance suit against four private power companies and the Tennessee Valley Authority for their carbon dioxide emission.[63] The plaintiffs sought injunctive relief in the form of a "decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually."[64] Plaintiffs did not seek monetary damages.

Prior to the Supreme Court's grant of certiorari, the 2nd Circuit Court of Appeals had held that the plaintiffs had Article III standing, and the suit was not barred by the political question doctrine. Four members of a divided Supreme Court agreed that "at least some plaintiffs have standing under *Massachusetts*," while four members found that none of the plaintiffs had Article III standing, citing either a dissenting opinion in *Massachusetts* or regarding the two cases as distinguishable.

Regarding the merits of the action, the Court ruled that its holding in *Massachusetts v. EPA* authorizing federal regulation of greenhouse gases under the Clean Air Act "displaced" the claims pursued by plaintiffs, explaining, "The Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act."[65] As a result of its finding of preemption, the Court did not address whether the case presented a nonjusticiable political question, explaining that such an analysis would present a mere "academic question" in view of the outcome of the case.

3. *Comer v. Murphy Oil USA, Inc.,* 839 F.Supp.2d 849 (S.D. Miss. 2012)

In one of the first cases to tackle global warming issues since *American Elec. Power Co.,* property owners filed suit against a group of oil companies and insurance companies asserting public and private nuisance, trespass and negligence claims. Plaintiffs' claims were grounded in allegations that defendant companies released by-products that increased global warming and led to the conditions that formed Hurricane Katrina and caused the sea level to rise.[66] Plaintiffs sought compensatory and punitive damages.

In stark contrast to the 2nd Circuit in *American Elec. Power Co.*, the Court held the plaintiffs lacked Article III standing and their claims presented nonjusticiable political questions.[67] The standing ruling turned on the Court's conclusion that the plaintiffs' alleged injuries were not "fairly traceable" to the defendants'

60 *Id. at 505-526.*

61 *Id. at 535.*

62 131 S.Ct. 2527 (2011).

63 *Id. at 2533.*

64 *Id.*

65 *Id. at 2537.*

66 *Id. at 852.*

67 *Id. at 868.*

conduct.[68] Regarding the political question issue, the Court found the claims could not be resolved in a manner that was "judicially discoverable and manageable," and the case would force the Court to make a policy determination entrusted to the EPA by Congress and preempted by the Clean Air Act.[69]

4. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012)

Kivalina, the most recent global warming opinion to come out of the federal courts, was filed on September 21, 2012. The Native Village and City of Kivalina, Alaska, appealed the district court's dismissal of their action against oil, energy and utility companies for federal common law nuisance, based on massive greenhouse gas emissions that contributed to global warming.[70] Following the Supreme Court's holding in American Elec. Power Co., the Court held that the Clean Air Act and the EPA action that the Act authorizes displaced plaintiffs' claims.[71] The Court summarized its opinion as follows:

> the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.[72]

Thus, the 9th Circuit disagreed with the *Barasich* court's holding that had differentiated between actions seeking injunctive relief, and those seeking damages, finding there is no meaningful distinction in climate change cases based on the nature of the relief sought.

CONCLUSION

Surveying the most seminal global warming lawsuits to date provides guidance for how similar lawsuits might unfold in the future. The Supreme Court cast a wide net allowing lower courts to avoid engaging fully in an analysis of climate change litigation on the grounds that such a ruling is preempted by the Clean Air Act and the EPA action it authorizes. However, with the Supreme Court avoiding an explicit rule of law relating to the two most pressing climate change litigation issues, standing and the political question doctrine, uncertainty remains.

Sandy left much devastation in her wake, which could spark another grant of certiorari by the Supreme Court on these issues. The next Supreme Court climate change ruling might finally fully engage the two unanswered questions relating to Article III standing and the nonjusticiable political question doctrine in the global warming litigation context. Until then, although plaintiffs are likely to continue their attempts at holding corporations accountable for global warming via lawsuits, the regulation of greenhouse gas emissions will likely remain in the purview of the EPA rather than the federal courts.

68 *Id. at 862.*

69 *Id. at 865, 869.*

70 *Id. at 853.*

71 *Id. at 858.*

72 *Id.*