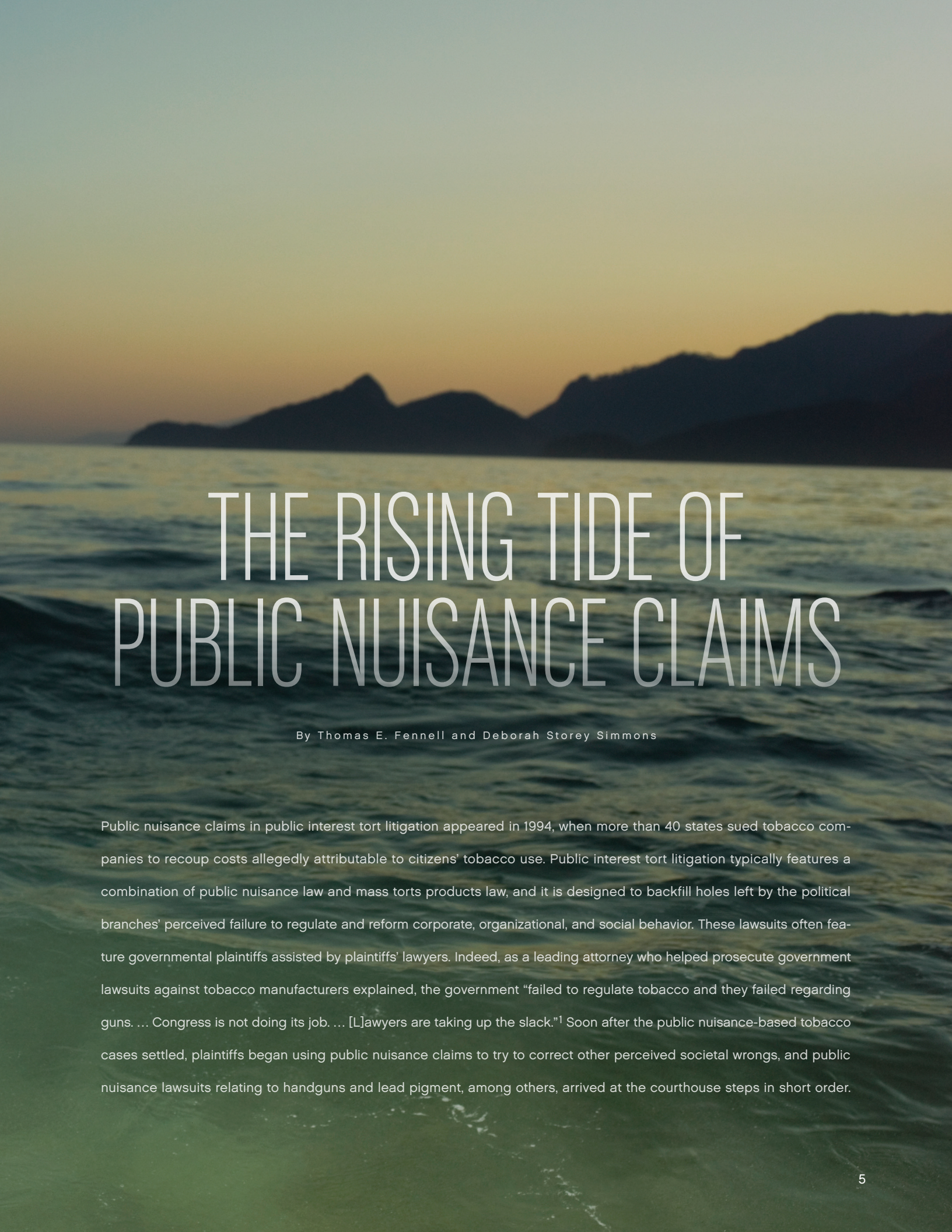

THE RISING TIDE OF PUBLIC NUISANCE CLAIMS

By Thomas E. Fennell and Deborah Storey Simmons

Public nuisance claims in public interest tort litigation appeared in 1994, when more than 40 states sued tobacco companies to recoup costs allegedly attributable to citizens' tobacco use. Public interest tort litigation typically features a combination of public nuisance law and mass torts products law, and it is designed to backfill holes left by the political branches' perceived failure to regulate and reform corporate, organizational, and social behavior. These lawsuits often feature governmental plaintiffs assisted by plaintiffs' lawyers. Indeed, as a leading attorney who helped prosecute government lawsuits against tobacco manufacturers explained, the government "failed to regulate tobacco and they failed regarding guns. … Congress is not doing its job. … [L]awyers are taking up the slack."[1] Soon after the public nuisance-based tobacco cases settled, plaintiffs began using public nuisance claims to try to correct other perceived societal wrongs, and public nuisance lawsuits relating to handguns and lead pigment, among others, arrived at the courthouse steps in short order.

The newest extension of this effort is public nuisance-based climate change litigation, the most prominent example of which is *American Electric Power v. Connecticut*, 131 S. Ct. 1807 (2011). That case began in earnest in July 2004, when two groups of plaintiffs filed separate complaints in the Southern District of New York against five major electric power companies. One plaintiffs' group consisted of eight states and New York City and the other of three nonprofit land trusts. The defendants comprised four private companies and the Tennessee Valley Authority. Alleging that the defendants "are the five largest emitters of carbon dioxide in the United States," the plaintiffs asserted that, by contributing to global warming, the defendants' carbon dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate public nuisance or, in the alternative, of state tort law. The states and New York City claimed that public lands, infrastructure, and health were at risk; the trusts asserted that climate change would destroy animal habitats and rare tree and plant species on trust-owned land. The plaintiffs sought injunctive relief requiring each defendant to cap carbon dioxide emissions at a certain level and reduce that level by a specified percentage each year for at least a decade.

The trial court dismissed the plaintiffs' claims as presenting nonjusticiable political questions, reasoning that no court could resolve the case without initially determining an acceptable global level of greenhouse gas emissions and then assessing which sectors, industries, and individual entities should be held responsible for reducing their emissions—and by what amounts—to achieve that acceptable global level. Those decisions, in the district court's view, involved a number of policy determinations properly reserved for Congress, including the implications of emissions reductions on ongoing negotiations with other nations concerning global climate change, on the United States' energy sufficiency, and thus on national security.

The Second Circuit reversed. It held that a public nuisance cause of action for climate change was implied under federal common law because of the interstate nature of greenhouse gas emissions and climate change. The Second Circuit also opined that the Clean Air Act ("CAA") did not displace a federal public nuisance cause of action for climate change because EPA had not, at the time of the Second Circuit's decision, exercised authority under the CAA to regulate greenhouse gas emissions. Because it held that federal common law governed, the plaintiffs' state-law claims were not addressed by the Second Circuit.

On June 20, 2011, the Supreme Court ruled. Among other rulings, it held that whether the plaintiffs had a federal common-law public nuisance claim for alleged climate change-related harms was an "academic question" because any such claim was displaced by the CAA, which authorizes EPA to regulate carbon dioxide emissions. The Court noted that Congress delegated to EPA the authority to determine whether and how to regulate greenhouse gases and that delegation of authority alone, not the extent to which EPA exercises its authority, was the critical factor in its analysis. Regarding the plaintiffs' state-law public nuisance claims, the Court did not address whether they were preempted, recognizing only that the availability of a state-based public nuisance claim depends, in part, on the preemptive effect of the CAA. The Court remanded the case to the Second Circuit for further consideration of whether the plaintiffs' state public nuisance claims had been preempted. On September 2, 2011, the plaintiffs notified the Second Circuit that they wished to withdraw their complaints and sought remand to the trial court to do so.

The *American Electric* Court's failure to decide whether the CAA preempts state-law public nuisance claims will certainly affect other pending climate change litigation. For example, *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863 (N.D. Cal. 2009), involves a native Alaskan village seeking damages from two dozen defendants and alleging that warmer weather generated by climate change caused injuries related to coastal erosion and flooding. The district court dismissed the case as involving a nonjusticiable political question and for lack of standing. The village appealed to the Ninth Circuit Court of Appeals. While the *American Electric* decision should mandate dismissal for lack of a federal common-law cause of action, the *Kivalina* appellants will be allowed to brief the impact of the Supreme Court's decision.

Also, on May 27, 2011, the plaintiffs in *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010), refiled their state-based public nuisance lawsuit in the Southern District of Mississippi, claiming that emissions of carbon dioxide, methane, halocarbons, and other substances by more than 80 defendants caused climate change, which allegedly contributed to sea-level rise

and to Hurricane Katrina's strength, resulting in damage to their property. The case had previously been dismissed by the district court; the plaintiffs' appeal was eventually dismissed by an en banc Fifth Circuit Court of Appeals due to loss of a quorum, *Comer v. Murphy Oil USA*; and a petition for writ of mandamus to the Supreme Court also was denied, *In re Comer*, U.S. No. 10-294 (Jan. 10, 2011). However, motion practice in the refiled *Comer* case is now moving forward.

The effect the *American Electric* decision may have on other potential applications of public nuisance law and the future evolution of public interest tort litigation remains to be seen. Since public interest tort lawsuits contort the public nuisance doctrine to remedy claimed collective, widespread harm from legal products, while simultaneously ignoring long-standing principles that govern tort law, it is no surprise that courts have reached largely negative conclusions about their viability. But plaintiffs, undaunted, continue using public nuisance claims as a creative springboard for public interest tort lawsuits. For example, after the tobacco, handguns, and lead-pigment litigation subsided, public nuisance enjoyed a brief moment as the *cause célèbre* in a lawsuit brought by a municipality claiming that banks and financial institutions that made subprime loans were liable for mass home foreclosures, depressed home values, and consequently lower municipal tax collections. Additionally, the plaintiffs in the MTBE litigation have asserted that gasoline refiners and MTBE manufacturers are liable on the basis of a public nuisance theory.

While federal common-law public nuisance lawsuits pertaining to climate change are presently barred by the *American Electric* decision, the viability of state-based claims seeking the same relief has not yet been resolved. It is imperative that attempts to use state public nuisance claims to achieve the same end be defeated, as they should be. The complex issues these types of lawsuits attack are properly left to the political branches of government and appropriate regulatory agencies, not to the courts.

As the *American Electric* decision discusses, courts are poorly equipped to decide climate change issues, the regulation of greenhouse gas emissions requires a careful assessment of competing economic and social interests, and EPA is entrusted with performing this complicated balance. The Court also noted that:

> [f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. … Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.

131 S. Ct. at 2540–41.

This common-sense view is echoed by the fact that at least two states, Texas and Georgia, have enacted laws limiting the use of the public nuisance doctrine to displace traditional tort causes of action. These laws evidence an encouraging limitation to the threatened proliferation of state-based public nuisance/public interest tort litigation, protecting businesses from the specter of liability for lawful conduct. ■

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[1] "Government Sponsored Regulation–What's Next?" in *Regulation By Litigation: The New Wave of Government Sponsored Litigation*, 1 Manhattan Inst. Conf. Series 51, 64 (1999), *available at* http://www.manhattan-institute.org/pdf/mics1.pdf (last visited Dec. 14, 2011).