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Civil Conspiracy Up in Smoke: How Similar are Cigarettes and Smokestacks?

Henry Steinberg*

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I. Introduction

These days, you may be hard-pressed to find an American who thinks smoking is healthy or that tobacco companies are trustworthy stewards of the public health.¹ However, it is still an easy matter to find Americans who

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1. *Smoking and Health Issues*, Phillip Morris USA, http://www.philipmorrisusa.com/en/cms/Products/Cigarettes/Health_Issues/default.aspx (last visited March 24, 2011) (Phillip Morris USA admits on their website that the company "agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, than nonsmokers. There is no safe cigarette.").

don't believe the energy industry is largely responsible for climate change that may seriously threaten our way of life.² Why the disparity?

The past few decades have brought about an "extraordinary change" in the public's perception of tobacco companies.³ Today it is a common belief that cigarettes are harmful and the American consumers were deceived. Cigarette companies no longer even bother to deny the myriad of health detriments attributable to smoking.⁴ Highly successful products liability and civil conspiracy lawsuits against these companies are evidence of this change in the social perception and legal responsibility of these defendants.⁵

While it is difficult to know if the successful tobacco litigation of the last two decades was a symptom of changing public perception and access to information, or if the successful suits were in fact instrumental in shifting public perception, there may likely be a mutually reinforcing cycle between litigation and public perception of the related issue.

Currently in the Ninth Circuit, in *Native Village of Kivalina v. ExxonMobil Corp.*, an Alaskan village is following the civil conspiracy tobacco litigation strategy.⁶ The villagers allege that oil, coal, and power companies unlawfully conspired to deny climate change, sharing and acting upon a common purpose to deceive American consumers about the effects of their business operations on climate change.⁷ The plaintiffs claim that the conspiracy resulted in state common law nuisance damages by melting arctic sea ice and eroding their shoreline.⁸ If climate change litigation follows a similar path as tobacco litigation, these conspiracy allegations may be proven in a court of law or confirmed in the public eye through large settlements.

2. Pew Research Center Publications. *Few Americans See Solid Evidence of Global Warming*, Pew Research Center (Oct. 22, 2009) <http://pewresearch.org/pubs/1386/cap-and-trade-global-warming-opinion>.

3. Richard A. Daynard, *Media Backgrounder and Commentary, Los Angeles Jury Rejects New Philip Morris Defense and Issues \$28 Billion Punitive Damages Verdict Against Tobacco Giant*, Tobacco Products Liability Project (Oct. 4, 2002), <http://www.tobacco.neu.edu/litigation/cases/Backgrounders/bullock2.htm> (last visited Sept. 29, 2011).

4. *Smoking and Health Issues*, Philip Morris USA http://www.philipmorrisusa.com/en/cms/Products/Cigarettes/Health_Issues/default.aspx (last visited March 24, 2011).

5. Daynard, *supra* note 3.

6. Complaint for Damages at 65-6, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA), Feb. 26, 2008. See also *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) at 859-69 (a putative class action tort claim, including civil conspiracy, against oil companies and energy companies).

7. Complaint for Damages, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA).

8. *Id.*

Legal or social recognition that the climate change debate is fueled through civil conspiracy by the largest U.S. emitters of greenhouse gases could enormously affect the social, political, and legal realities in the U.S. around the causes and proper responses to climate change. Although Washington would still be influenced by pressure from oil, coal, and power companies, if the debate about the causes of climate change were to be viewed somewhat analogously to the debate about the health effects of tobacco, the political feasibility of increased regulation of greenhouse gases would increase.⁹

Indeed, if plaintiffs overcome the procedural hurdles to climate change nuisance suits in state courts, including standing, the political question doctrine, and the issue of preemption,¹⁰ and are then able to prove that greenhouse gas emissions are a public or private nuisance, we may see Congressional action around climate change policy, statutory protection of these companies from these state common law nuisance claims, or both.¹¹

Assuming these hurdles can be overcome, if state common law civil conspiracy claims around climate change are eventually heard in a courtroom, there may be a factual and legal basis to find oil, coal, and power companies liable for illegally conspiring against the American public. While successful civil conspiracy and nuisance claims for the emission of greenhouse gas are very unlikely to be a silver-bullet for Republican Congressional action on climate change, confirmation of allegations of civil conspiracy by the energy industry could create a dramatic shift in the public perception of the climate change debate, thereby making climate change regulation more politically feasible for Congress. Furthermore, civil conspiracy findings could further relieve plaintiffs injured by the effects of

9. The idea of using climate change nuisance claims to pressure political action is already a few years old. Political motivations to force action on climate change were likely motivating factors to the eight states that brought a common law nuisance claim against American Electric Power Company and other utilities for emitting carbon dioxide during the Bush Administration. Ann Carlson, *U.S. Supreme Court to Hear Climate Change Nuisance Case*, LEGAL PLANET, Dec. 6, 2010, <http://legalplanet.wordpress.com/2010/12/06/u-s-supreme-court-to-hear-climatechange-nuisance-case>. See *Conn. v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009) cert. granted, 10-174, 2010 WL 4922905 (U.S. Dec. 6, 2010). Decided 131 S.Ct. 2527 (2011), negative treatment.

10. The Supreme Court reviewed the issues of standing and preemption in a climate change nuisance suit this past term in *Am. Elec. Power Co. v. AEC*, 131 S.Ct. 2527 (2011). This decision expressly left open the possibility of state common law causes of action in climate change nuisance suits, *id.* at 2540, discussed further in section IV(A) *infra*.

11. Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal* at 3 (Public Law and Legal Theory Working Paper No. 148, 2007) (arguing that if American industries were liable for common law nuisance damages related to climate change, Congress would modify tort law to protect these industries from "such a profound global disadvantage.").

global warming if a court believes it can properly apportion damages in a way suitable to bring relief.

This note compares the success of civil conspiracy claims against the tobacco industry with current civil conspiracy claims against oil, coal, and gas companies (“the energy industry”) for their alleged deception around global climate change. The first section outlines general state common law elements of civil conspiracy and explores the advantages of this cause of action to plaintiffs. The note then describes the role of civil conspiracy in tobacco litigation, largely based on the allegations made in the complaint in *California v. Philip Morris Inc.* (3rd Party Rec. Cal. Super. Ct. 1997 Settled),¹² a case which helped lead to a multi-state settlement for over \$350 billion.¹³ The following section examines civil conspiracy in the climate change context, beginning with a brief explanation of the difficulties of bringing a climate change nuisance claim sufficient to support a civil conspiracy claim, followed by an exploration of the civil conspiracy allegations stated in the complaint of *Native Village of Kivalina v. ExxonMobil*.¹⁴ An analysis of the legal basis for these conspiracy claims concludes this section. Finally, the note concludes with a comparative analysis of the utility of state civil conspiracy claims in the climate change context with the past use of similar claims in tobacco litigation.

II. Unpacking Civil Conspiracy: Legal Elements and Plaintiffs’ Attraction

A. Common Law Elements Of Civil Conspiracy

To best compare the history and future of civil conspiracy claims in climate change and tobacco litigation, understanding the legal fundamentals of a civil conspiracy claim is essential. Although the elements of civil conspiracies are a production of state common law, the various state doctrines are substantially similar that for the purposes of this paper it will suffice to refer to a general common law civil conspiracy.¹⁵

A civil conspiracy is defined as a “combination of two or more persons who, by some concerted action, intend to accomplish some unlawful

12. First Amended Complaint at 7-11, *Cal. v. Philip Morris, Inc.*, (No. 97AS03031).

13. Kelder and Davidson, eds., *Multistate Master Settlement Agreement and the Future of State and Local Tobacco Control: An Analysis of Selected Topics and Provisions of the Multistate Master Settlement Agreement* of Nov. 23, 1998, Tobacco Control Resource Center, Inc., Northeastern Univ. School of Law (March 24, 1999), http://www.tobacco.neu.edu/tobacco_control/resources/msa/ (last visited Sept 29, 2011).

14. Complaint for Damages, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA).

15. See, e.g., 16 Am. Jur. 2d Conspiracy §50-57 (LexisNexis 2010).

objective for the purpose of harming another which results in damage.”¹⁶ Thus, a civil conspiracy must include:

- (1) some object or purpose to be accomplished;
- (2) a meeting of minds on course of action or object;
- (2) one or more overt acts;
- (3) and damages as a proximate result thereof.¹⁷

Climate change suits will tend to be against corporate defendants, and corporations are persons for the purpose of civil conspiracy claims.¹⁸ However, since a corporation is considered one legal “person,” a corporation cannot conspire with itself or among its employees, board members, etc.¹⁹

Furthermore, while it is not necessary that each participant know the exact details of the plan,²⁰ the conspiring parties must reach “a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.”²¹ However, there is no requirement for an express agreement.²² Rather, the agreement may be implied based upon course of conduct.²³ It is also worth noting that while some states require malice by one or both parties, most states, including California, have no malice requirement whatsoever.²⁴

The element of an overt act may be met by any “unlawful, overt, or tortious act committed in furtherance of the conspiracy.”²⁵ Civil conspiracy does not represent a separate tort; it must be supported by another state or federal claim that causes damage to the plaintiff.²⁶ The essential element of a civil conspiracy claim is not the formation of an unlawful agreement, but rather the damage that results from the unlawful overt acts in furtherance of the agreement.²⁷ For example, if two oil companies agreed to mislead the public about the effects of carbon emissions in the atmosphere, there is no

16. *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999) (*en banc*) (quotation omitted). See also 16 Am. Jur. 2d Conspiracy §50 (LexisNexis 2010).

17. 16 Am. Jur. 2d Conspiracy § 51 (LexisNexis 2010) (citing to both federal and state cases).

18. *Catlett v. Wyeth, Inc.*, 379 F. Supp. 2d 1375, 1382 (M.D. Ga. 2004).

19. *Id.*

20. *Id.*

21. *Gilbrook*, 177 F.3d at 856.

22. 16 Am. Jur. 2d Conspiracy § 51.(LexisNexis 2010).

23. *Id.*

24. *Id.*

25. 16. Am. Jur. 2d Conspiracy § 52 (West 2011), *Balt. Football Club, Inc. v. Super. Ct.*, 171 Cal. App. 3d 352, 359 (1985).

26. 16. Am. Jur. 2d Conspiracy § 53 (West 2011).

27. *Okun v. Super. Ct.*, 29 Cal. 3d 442, 454 (1981). See also 16. Am. Jur. 2d Conspiracy § 53 (West 2011).

civil conspiracy unless such emissions are deemed to be tortious in their own right. For this reason a plaintiff must be able to successfully plead a state or federal claim to support the civil conspiracy claim.²⁸

Proximate causation is also an element of conspiracy, requiring that the overt acts pursuant to the agreement were the proximate cause of damage to the plaintiff.²⁹ However, some courts seem to not place much emphasis on this requirement, and instead focus on whether the defendants conspired to continue the nuisance and whether this nuisance caused damage.

B. Benefits of Civil Conspiracy Claims for Plaintiffs

In recent years, the rise in civil conspiracy claims in mass tort litigation is likely due in part to the various advantages the plaintiff bar perceives in pleading a civil conspiracy claim.³⁰ These advantages include the possibility of high punitive damage awards accompanying civil conspiracy findings,³¹ the receptivity of jurors to the idea of industries conspiring against the public,³² the rise in trade organization and industry groups,³³ litigation strategy to overcome summary judgment and increase settlement value,³⁴

28. 16 Am. Jur. 2d Conspiracy § 53 (West 2011).

29. *In re Welding Fume Prod. Liab. Litig.*, 526 F. Supp. 2d 775, 802 (N.D. Ohio 2007).

30. James D. Pagliaro, Brian W. Shaffer, and Joseph Duffy, *The Alarming Rise in the Use of Civil Conspiracy Theories in Mass Tort Litigation*, Morgan, Lewis & Bockius LLP. Available at http://www.emccray.com/.../471_1_-_CONSPIRACY_The_Alarming_Rise_in_the_Use_of_Civil_Conspiracy_Theories_in_Mass_Tort_Litigation.pdf. (Another perspective, one unsurprisingly not adopted by the defense attorneys cited above, views the recent rise in civil conspiracy claims as a product of concerted industrial malfeasance as opposed to a strategically minded plaintiff bar. Both theories may be true, but since here we are exploring the benefits to a plaintiff in pleading a civil conspiracy claim, the legal realism view of our cited defense counsel suffices.)

31. Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 Wake Forest L. Rev. 979, 983-84 (2001) (discussing the prevalence of punitive damages in civil conspiracy tobacco litigation).

32. Pagliaro, *supra* note 31, at 1-2.

33. *Id.*

34. Arvin Maskin, *Litigating Claims for Punitive Damages: The View from the Front Line*, 31 Loy. L.A. L. Rev. 489 (1998) (discussing the strategic bargaining power plaintiffs enjoy when punitive damages are a possibility); John S. Gray, Partner in Env'tl. Law, Gardere Wynne Sewell LLP, Address at the UC Hastings College of the Law West-Northwest Journal of Environmental Law and Policy Symposium: A Public Nuisance: Tort Law's Response to Global Warming (Feb. 28, 2011) (discussing how civil conspiracy claims can create unresolved issues of fact to overcome a summary judgment motion).

and, for politically motivated climate change plaintiffs, the possibility of changing public perception.

One obvious advantage of civil conspiracy claims over other nuisance claims is the likelihood of high punitive damages. The major tobacco cases highlight this point. In those cases, conspiracy of concealment, misrepresentation, and nondisclosure by the tobacco industry committed in the pursuit of fraud for profit resulted in tremendous punitive damage awards.³⁵ When punitive damages are a real possibility, plaintiffs possess heightened bargaining power in settlement negotiations leading up to a jury verdict.³⁶

In addition, aside from a juror's likely natural aversion to the idea of an industry intentionally or knowingly defrauding the American public for profit, jurors may be predisposed to claims of civil conspiracy as a result of media influence and the prevalence of "conspiracy theories" in general.³⁷ Furthermore, because jurors are also consumers and employees outside the courtroom, they may be inclined towards conspiracy theories when plaintiff attorneys explain that such claims legally spread the liability throughout the industry in question.³⁸ If jurors feel a connection to plaintiffs based on consumption or employment patterns, this may increase their motivation to hold a greater portion of the industry liable.

The prevalence of trade organizations, industry groups, and public relations groups further aids plaintiffs making such claims.³⁹ Since circumstantial evidence is enough to show common intent⁴⁰ and the agreement may be implied rather than express,⁴¹ the existence of forums such as trade organizations, seminars, research groups and coalitions make it difficult for a member of a given industry to assert ignorance regarding the allegedly unlawful conduct of other members of that industry.⁴² As discussed below, the energy industry has extensive involvement in industry

35. Cabraser, *supra* note 32, at 983-984 (See *infra* pp. 12-13 for further details of damage awards involving civil conspiracy claims).

36. Maskin, *supra* note 34.

37. Pagliaro, *supra* note 31, at 3 (discussing the influence of shows such as "The Insider" and "A Civil Action" on potential jurors).

38. *Id.*

39. *Id.*

40. *Revert v. Hesse*, 184 Cal. 295, 302-3 (1920).

41. *Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 669 (D. Colo. 2008) (holding that express agreements are not necessary for civil conspiracy) and *O'Neil v. Daimlerchrysler Corp.*, 538 F. Supp. 2d 304 (D. Mass. 2008) (discussing the permissibility of implied agreements for civil conspiracy).

42. Pagliaro, *supra* note 32, at 3.

front groups, and the conspiracy claims can easily focus on the activities of these groups.⁴³

Also, a civil conspiracy can rest on either a statutory violation or a common law violation.⁴⁴ Therefore, whether there is a statutory violation, such as an unfair competition statute as was the case in the tobacco cases, or if plaintiffs make common law tort claims, as is the case in climate change litigation, civil conspiracy claims are still an option.

A civil conspiracy claim in a lawsuit may also improve a plaintiff's litigation strategy.⁴⁵ In addition to the heightened bargaining position outlined above,⁴⁶ a properly plead civil conspiracy claim may help a plaintiff overcome a motion for summary judgment. Summary judgment is available when "there is no genuine dispute as to any material fact."⁴⁷ If a complaint properly pleads civil conspiracy allegations, it can be difficult for a court to grant a defendant's summary judgment before allowing at least limited discovery.⁴⁸ Based on this theory, if plaintiffs believe discovery will afford a "smoking gun document" that proves a conspiracy, the inclusion of a civil conspiracy claim in a nuisance suit may limit the possibility of losing at summary judgment to procedural issues such as standing and the political question doctrine. Finally, civil conspiracy claims may play a role in shifting public perception of a public debate. Consider, for example, how the debate about the causes and effects of climate change would evolve if a judicial decision stated that those on one side of the debate were breaking the law through the distribution of misinformation. Considering the political or ideological motivation of some climate change cases, certain plaintiff groups may be interested in finding cases that can exploit the potential to shape public opinion around an idea.⁴⁹

Despite the numerous strategic and politically attractive aspects to pleading a civil conspiracy, the vagueness of the legal elements required may be pitfalls for plaintiffs.⁵⁰ For example, the causation element of civil conspiracy claims is an example of an often unclear area that could be difficult for plaintiffs, depending on what level of causation courts require. Although in many circumstances, plaintiffs may plead civil conspiracy simply

43. First Amended Complaint at 7-11, *Cal. v. Philip Morris, Inc.*, (No. 97AS03031) and Complaint for Damages at 65-6, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008).

44. 16. Am. Jur. 2d Conspiracy § 53 (West 2011)

45. Maskin, *supra* note 34; Gray, *supra* note 36.

46. Maskin, *supra* note 34.

47. Fed. R. Civ. P. 56.

48. Gray, *supra* note 35 (suggesting that this strategy was a motivating factor for the plaintiff attorneys in *Kivalina*).

49. Carlson, *supra* note 9.

50. PAGLIARO ET AL., *supra* note 31, at 3.

because the alleged facts suggest such a claim will be successful, a consideration of the benefits of civil conspiracy claims allows a more thorough understanding of what is at stake for plaintiffs.

III. The Role Of Civil Conspiracy In Tobacco Litigation

A. The Success of Tobacco Litigation and Civil Conspiracy

Although successful civil conspiracy claims and large damage awards and settlements dominate contemporary tobacco litigation, this was not always the case.⁵¹ For many years, the tobacco industry successfully defended on the basis of lack of causation, assumption of risk, or lack of awareness.⁵²

The tobacco industry also successfully claimed preemption under the Federal Cigarette Labeling and Advertising Act (“FCLAA”).⁵³ However, in 1992, in *Cipollone v. Liggett Group, Inc.*, the Supreme Court widened the door for plaintiffs, holding that, although the FCLAA preempts state court claims based on failure to warn, federal law does not preempt state law claims based on theories of express warranty, intentional fraud and misrepresentation, and, most importantly, civil conspiracy.⁵⁴

Discovery documents obtained in *Cipollone* and incriminating confidential industry documents sent anonymously to a San Diego law professor complemented the decision that federal law does not preempt certain state common law claims such as civil conspiracy.⁵⁵ These documents provided evidence of “the tobacco industry’s calculated and successful efforts [since] the 1930s to confuse the American public and their doctors about the dangers of cigarette smoking.”⁵⁶

Not surprisingly, tobacco claims after *Cipollone* centered on the nearly fifty-year-old conspiracy among tobacco manufacturers and their public

51. Richard L. Cupp, Jr., *A Morality Play’s Third Act: Revisiting Addiction, Fraud and Consumer Choice in “Third Wave” Tobacco Litigation*, 46 U. KAN. L. REV. 465, 469-70 (1998) (describing the first “wave” and second “wave” of unsuccessful tobacco litigation from 1954-1973 and from 1983-1992).

52. *Id.* at 481; see also Angela Lipanovich, *Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation Is Feasible*, 35 GOLDEN GATE U. L. REV. 429 (2005).

53. Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 991-92 (2001) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 148 (2000)).

54. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524-30 (1992).

55. Lipanovich, *supra* note 53, at *6.

56. *Id.* (citing *Supplement to Press Release, Incriminating Cigarette Documents Released*, TOBACCO PRODUCTS LIABILITY PROJECT, (March 26, 1988) (on file with author), (from R.J. Reynolds archives, Published Document 19880326).

relations groups to conceal and misrepresent the science behind the health risks of smoking.⁵⁷ Following this, the tobacco industry began losing lawsuits.⁵⁸ After refusing to settle any claim for decades, the industry began settling with individuals, class actions, and third parties in derivative suits brought by governmental agencies and healthcare providers on the basis of fraud and civil conspiracy claims.⁵⁹

Although most of the tobacco suits followed a similar format, two are particularly noteworthy examples of successful civil conspiracy claims. These cases are *California v. Philip Morris, Inc.*⁶⁰ and *Engle v. Liggett Group, Inc.*⁶¹

Shortly after *Cipollone*, tobacco litigation reached a new frontier when the Attorney General for California filed *California v. Philip Morris, Inc.*⁶² California joined this third-party health-care recovery suit with thirty-nine other attorneys general from other states.⁶³

California alleged that, since 1953, the tobacco companies conspired and agreed to unreasonably restrain the market for cigarettes in violation of the Cartwright Act by limiting and suppressing research and information that could have led to product innovations.⁶⁴ This claim, along with the claims made in other states, led to the November 23, 1998, Multistate Master Settlement Agreement, whereby the tobacco industry agreed to pay \$368.5 billion over twenty-five years for state medical costs of tobacco related illness as well agreements to discontinue certain outdoor advertising and take other measures to limit youth access to cigarettes.⁶⁵ Through this settlement, every defendant implicitly acknowledged potential liability. This case was a turning point in public opinion regarding the illegality of the tobacco industry's actions.⁶⁶

In *Engle v. Liggett Group, Inc.*, smokers and survivors brought a class action lawsuit against RJ Reynolds and other tobacco companies and industry organizations.⁶⁷ The jury awarded approximately \$12.7 million in

57. Cabraser, *supra* note 54, at 991.

58. *Id.* at 991, 1017; Lipanovich, *supra* note 56, at 3 (citing Robert L. Rabin, A *Sociolegal History of the Tobacco Tort Litigation*, 44 *STAN. L. REV.* 853, 878 (1992)).

59. *Id.*

60. 3rd Party Rec. CA Superior Ct. 1997 Settled.

61. 945 So. 2d 1246 (Fla. 2006).

62. 3rd Party Rec. CA Superior Ct. 1997 Settled.

63. Lipanovich, *supra* note 56, at 3.

64. First Amended Complaint at 17, *Cal. v. Philip Morris, Inc.*, 36 (No. 97AS03031).

65. KELDER & DAVIDSON EDS., *supra* note 13.

66. Lipanovich, *supra* note 56, at 43.

67. 945 So. 2d 1246 (Fla. 2006).

compensatory damages and \$145 billion in punitive damages.⁶⁸ Although the Florida Supreme Court later held that the award of punitive damages was excessive⁶⁹ and decertified the class,⁷⁰ the court upheld the findings of general liability against defendants, including liability for civil conspiracy-misrepresentation and civil conspiracy-concealment.⁷¹ After *Engle*, it was clear to the tobacco industry that punitive damages could reach the limits of due process.⁷²

B. Civil Conspiracy Allegations in *California v. Philip Morris*

Engle and *California v. Philip Morris* both relied on claims that the tobacco industry engaged in fraud and conspiracy to mislead the public about the health effects of tobacco.⁷³ Whether individual smokers, state-classes, state attorneys general, or the United States government filed the cases, all the tobacco litigation since *Cipollone* has had similar conspiracy claims.⁷⁴ Thus, the “core of basic, operative facts” is the same in *Engle*, *California v. Philip Morris*, or prospective tobacco litigation.⁷⁵ To gain a better understanding of the history of conspiracy in the tobacco industry, this section will explain the specific allegations of conspiracy in *California v. Philip Morris*. This is essential for the following analysis, examining the differences and similarities between conspiracy claims in tobacco and climate change litigation.⁷⁶

The State of California claimed that since the 1950s the tobacco industry knew of the health risks of tobacco and repeatedly made deceptive representations of safety and medical endorsements.⁷⁷ Tobacco companies were aware of the importance of health and safety related claims to consumers since the 1940s.⁷⁸ After two significant studies established a

68. *Engle v. RJ Reynolds Tobacco*, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000).

69. *Engle*, 945 So. 2d at 1265.

70. *Id.* at 1266.

71. Richard A. Daynard et al., *Despite Headlines, Florida's Supreme Court's Decision in Engle Case Will Prove to be an Enormous Blow to Cigarette Companies*, TOBACCO PRODUCTS LIABILITY PROJECT (July 6, 2006), <http://www.tobacco.neu.edu/litigation/cases/pressreleases/ENGLEVLSUPCT2006.htm>.

72. Cabraser, *supra* note 54, at 1017.

73. *Id.*

74. *Id.*

75. *Id.*

76. To gain a more detailed understanding of the allegations listed in the *California* complaint, see NAOMI ORESKES & ERIC M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING*, at 136-168 (Bloomsbury Press 2010).

77. First Amended Complaint at 8. *Cal. v. Philip Morris, Inc.*, 36 (No. 97AS03031).

78. *Id.* at 8.

causal link between exposure to tobacco products and cancer, the tobacco companies met in 1953 and formed an industry front group, the Tobacco Industry Research Committee (“TIRC”), to spread disinformation among the public and to suppress information from health officials that could have led to increased regulation or reduced sales of tobacco.⁷⁹ California argued that the acts of the tobacco companies and industry groups constituted a conspiracy to restrain and manipulate health information about tobacco and to stabilize the market for tobacco products.⁸⁰

California’s complaint argued that both TIRC and its successor group, Council for Tobacco Research (“CTR”) applied a coordinated, industry-wide strategy to mislead and confuse the public about the dangers of tobacco by challenging or suppressing any negative information on tobacco.⁸¹ It was alleged that the conspirators created a campaign of disinformation by suppressing research showing negative health effects of tobacco and by misrepresenting the information it did not suppress, all while purporting to provide unbiased information to consumers and regulators.⁸² It was argued that the companies mislead the public about the addictive qualities of nicotine, agreed not to conduct individual research on the health effects of smoking tobacco, and suppressed the research and development of a safer cigarette.⁸³ California stated that Philip Morris even attacked its own scientists, firing its researchers for beginning the development of a safer cigarette as well as threatening them with legal action if they published unfavorable reports.⁸⁴

California asserted that advertisements claiming that the tobacco industry was committed to protecting the public health and to disclosing unbiased research were fundamental steps in the conspiracy to suppress information that could lead to a reduction in sales of tobacco.⁸⁵ In 1958, the companies formed the Tobacco Institute, to exchange information, police agreements, and coordinate activities between the companies.⁸⁶ It was

79. *Id.* at 8.

80. *Id.* at 9.

81. *Id.* at 10.

82. *Id.* at 9, 11.

83. *Id.*

84. *Id.* at 11.

85. *Id.* at 9-10. See also Union of Concerned Scientists, *Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco’s Tactics to Manufacture Uncertainty on Climate Science*, at 6. (2007). http://www.ucsusa.org/global_warming/science_and_impacts/global_warming_contrarians/exxonmobil-report-smoke.html (quoting “A Frank Statement to Cigarette Smokers” from the Tobacco Industry Research Committee, published in 1954, claiming: “We will never produce and market a product shown to be the cause of any serious human ailment.”).

86. First Amended Complaint at 8. *Cal. v. Philip Morris, Inc.*, (No. 97AS03031), at 10.

argued that TIRC, CTR, and the Tobacco Institute knowingly distributed false advertisements claiming that tobacco companies were committed to promoting progress of independent scientific research in the field of tobacco and health.⁸⁷ These industry groups also disseminated articles and publications that were meant to have the same effect.⁸⁸

In *California*, the underlying claim for the conspiracy was a statutory cause of action that the tobacco companies conspired to unreasonably restrain the market for tobacco in violation of the Cartwright Act (Business and Professions Code section 16720 et seq.), by limiting, suppressing, and misrepresenting research and health effects of tobacco.⁸⁹ In climate change litigation, the underlying claim for conspiracy is nuisance.⁹⁰

IV. The Role Of Civil Conspiracy In Climate Change Litigation

A. The Underlying Nuisance Claim In Climate Change Tort Cases

Nuisance is a proper underlying tort to support a claim of civil conspiracy.⁹¹ Two recent cases, *Kivalina*⁹² and *Comer v. Murphy Oil USA*,⁹³ use nuisance claims to support allegations of civil conspiracy. It is necessary to explain the common law climate change nuisance claims upon which civil conspiracy allegations rest in order to realistically discuss the feasibility of these civil conspiracy claims. A complete discussion of the difficulties of using nuisance claims in the climate change topic is beyond the scope of this paper, but a cursory examination of the dynamic state of climate change nuisance law will allow a broader understanding of the potential for climate change civil conspiracy claims. Before unpacking the feasibility of nuisance

87. *Id.*

88. *Id.*

89. *Id.* at 16.

90. See Section IV.A *infra*.

91. See, e.g., *Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1284 (M.D. Ala. 1999) (plaintiffs “have sufficiently stated causes of actions for the claims underlying the conspiracy claims, to wit, trespass, nuisance, and fraudulent concealment”); *Chappell v. SCA Servs., Inc.*, 540 F. Supp. 1087, 1091 (C.D. Ill. 1982) (“the allegations of this complaint sufficiently allege an actionable conspiracy, since creation of a nuisance is itself an actionable wrong”); see also *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398, 404 (C.D. Cal. 1970) (automakers’ conduct at issue in antitrust case by States “is in effect a conspiracy to maintain a public nuisance—smog”).

92. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

93. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) at 859-69. *reh’g en banc granted*, 598 F.3d 208 (5th Cir. 2010) Appeal dismissed. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

in the climate change context however, it is worthwhile to pause and consider why plaintiffs are bringing common law nuisance claims to climate change in the first place.

In the last few years plaintiffs are increasingly attempting to use common law nuisance to hold the energy industry liable for damages that will occur or have occurred as a result of climate change.⁹⁴ The diverse reasons for this trend include a theoretical appropriateness of tort law, the creation of political pressure, and plaintiffs' immediate needs for compensation for harm allegedly related to climate change.⁹⁵

Judge Guido Calabresi explains that the dual aims of tort law are to reduce of the cost of accidents and to provide corrective justice.⁹⁶ Plaintiffs harmed by climate change are prime candidates for corrective justice if the harms alleged (such as rising seas, coastal erosion, or more frequent and powerful storms) would not have occurred but for climate change.⁹⁷ Furthermore, society may be burdened by high accident costs of climate change due to the unequal distribution of the costs of climate change, the high transaction costs of organizing potential victims before damage occurs, and the lack of public knowledge about climate change.⁹⁸ In light of these factors, attaining reductions in the accident cost of climate change through litigation may be particularly necessary to find the optimal balance for society as a whole.⁹⁹

Indeed, some suggest that tort law is "a private law subject with a public vision,"¹⁰⁰ and that U.S. courts are already significant drivers of climate change policy.¹⁰¹ Although it may seem doubtful that there are any effective drivers of climate change policy in Washington, judicial pressure

94. Kevin A. Gaynor, et al., *Challenges Plaintiffs Face in Litigating Federal Common law Claims*, 40 ENV'T L. REP. NEWS & ANALYSIS 108454, 10845 (2010).

95. See *infra* pp 19-21.

96. Eduardo M. Penalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 NAT. RESOURCES J. 563, 570-71 (citing GUIDIO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS*, 24-31 (1970) (discussing the reduction of accident costs and justice as the two main goals of tort law).

97. Penalver, *supra* note 96, at 574,75; see also, David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUMB. J. ENVTL L 1, 3-5 (2003).

98. David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUMB. J. ENVTL L 1, 3-5 (2003).

99. *Id.* at 4. (An irony to note is that the factors that make litigation useful to obtain a socially optimal accident cost of climate change may also act as impediments to climate change nuisance litigation. Impediments to climate change nuisance litigation in general are discussed below.)

100. Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 511 (2001).

101. David Markell & J. B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENV'T L. REP. NEWS & ANALYSIS 10644, 10644 (2010).

could, in theory, affect energy policy. The recent Supreme Court case, *Massachusetts v. EPA*, is one example of judicial decisions driving executive action.¹⁰² Thus, despite the seeming intractability of Congress regarding climate change legislation, it is likely that political goals drive some climate change nuisance suits.

Tobacco litigation stands as an example of the social and public policy roles of tort law, representing the largest reallocation of damages in US history.¹⁰³ Climate change threatens to cause more damage than cigarettes ever could, and from this perspective, nuisance law may seem appropriate to reallocate damages and prompt a paradigmatic policy shift in Washington.

Nuisance law, like civil conspiracy claims, may also shift public opinion, which can also be useful for regulatory efforts. This approach worked with tobacco litigation, where government methods for discouraging smoking became more effective once public perception began to shift after the major tobacco settlements.¹⁰⁴ Plaintiffs in the 1990s followed the tobacco litigation strategy and filed lawsuits against the fast-food industry regarding obesity, hoping to at least create public support or pressure the industry to change its ways.¹⁰⁵ It seems reasonable that plaintiffs in climate change litigation might be similarly attracted to this strategy. Indeed, to the extent that the court system is viewed as a legitimate forum to air reasonable complaints, the very presence of a nuisance claim for damages from climate change quell the debate as to the causes and outcomes of climate change and could cause media and society to take climate change more seriously.

Finally, aside from potential political motivations for using tort law to address climate change, there are enormous practical reasons as well. Some plaintiffs are already facing hundred million dollar damages from loss of sea ice and erosion of shorelines¹⁰⁶ or destruction of their homes through increased storms such as hurricane Katrina.¹⁰⁷ In the absence of any other methods for relief, plaintiffs perceive tort law as a potential method to seek due compensation for losses suffered.

However, other commentators argue that using nuisance for climate change suits would be too rife with causation, standing, and justiciability

102. *Mass. v. EPA*, 549 US 497 (2007). Although this case involved agency inaction rather than a common law claim, it is still a prime example of a judicial decision forcing energy policy measures.

103. *See Id.* at 512.

104. Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153, 177 (2004).

105. *Id.*

106. Complaint for Damages, *supra* note 6, at 45-6.

107. *Comer v. Murphy Oil*, 585 F.3d 855, 859 (5th Cir. 2009).

issues to be useful.¹⁰⁸ Many of these issues are either currently under review in United States courts or were recently addressed. A brief examination of three relevant cases shows that some courts are receptive to granting plaintiffs' standing to plead state common law nuisance claims and that courts are choosing to hear climate change nuisance suits rather than dismissing them for procedural or substantive grounds.

The most important case by far in the world of climate change nuisance suits is the recent Supreme Court decision in *AEC v. Connecticut*.¹⁰⁹ In *Connecticut*, eight state attorney's generals sued six electric power corporations claiming that greenhouse gas emissions caused by the defendants constituted a public nuisance.¹¹⁰ In its holding this past June, the Supreme Court, after finding that the Clean Air Act preempts federal common law climate change nuisance claims, expressly left open the possibility of state common law nuisance actions and remedies.¹¹¹ The parties in that case had neither briefed preemption nor otherwise addressed the availability of a claim under state nuisance law, and thus the Court left the matter open for consideration on remand.¹¹² The Court explained that state common law causes of action would be subject to a thorough demonstration of congressional intent before the preemption issue can be determined: "In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act."¹¹³ Thus, as civil conspiracy is a state common law claim, *Connecticut* leaves open the possibility of plaintiffs bringing a state common law based civil conspiracy claim.

In *Comer v. Murphy Oil*, the court allowed private plaintiffs to move forward with a climate change torts claim.¹¹⁴ The court held that the landowners satisfied Article III and prudential standing requirements to bring private nuisance, trespass and negligence claims against oil and energy companies, alleging these companies caused emission of greenhouse gasses that contributed to global warming and added to the force of Hurricane Katrina which destroyed their property.¹¹⁵ The appellate

108. Posner, *supra* note 11, at 3; *see also* Richard O. Faulk & J. Gray, *A Political Question*, 28 THE ENVIRONMENTAL FORUM, no. 2, 2011 at 30-33 (arguing that climate change public nuisance cases present a nonjusticiable question).

109. 131 S.Ct. 2527 (2011).

110. 582 F.3d 309 (2d Cir. 2009) *cert. granted*, 10-174, 2010 WL 4922905 (U.S. Dec. 6, 2010).

111. *Connecticut*, 131 S.Ct. at 2540.

112. *Id.*

113. *Id.*

114. *Comer v. Murphy Oil USA*, 585 F.3d 855, 859-69 (5th Cir. 2009) *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010) *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

115. *Id.*

court also held that these claims did not present non-justiciable political questions.¹¹⁶ This was the first time a federal appellate court allowed private plaintiffs to move forward with a climate change torts claim.¹¹⁷

Comer also involved a civil conspiracy claim against the utility companies for disseminating misinformation about the dangers of climate change and greenhouse gas emissions. The court held that plaintiffs did not have Article III standing to bring this civil conspiracy claim because the plaintiff landowners failed to identify a particularized injury and that the claims were generalized grievances common to all citizens or litigants in United States.¹¹⁸

However, this outcome isn't as conclusive as it may seem. After an initial appeal, the Fifth Circuit granted rehearing *en banc*.¹¹⁹ But by the time a late recusal caused the Fifth Circuit to be unable to rehear the case, the court had already dismissed the prior Fifth Circuit decision, leaving neither case law nor precedent in the area, and stopping the *Comer* case in its tracks.¹²⁰

In contrast to the rulings in the Fifth Circuit and the Second Circuit above, in *Native Village of Kivalina v. ExxonMobil Corp.*, the Northern District of California court held that common law nuisance claims for greenhouse gas emissions do, in fact, present non-justiciable political questions.¹²¹ Furthermore, the District court found that plaintiffs also lacked Article III standing.¹²² These decisions are currently on appeal in the Ninth Circuit.

While this looks like a striking blow to common law nuisance claims, this may be a sign of nothing more than judicial efficiency on the part of a district court judge.¹²³ Justiciability and standing are questions of law that appellate courts are better suited to hear, and it might seem like a waste of judicial resources to a district court judge to manage discovery, motions to compel, depositions, summary judgment motions and perhaps even a trial,

116. *Id.* at 869

117. Melissa Maleske, *Comer v. Murphy Oil Leaves the Future of Climate Change Litigation Uncertain*, Inside Counsel (Aug. 12, 2010), <http://www.insidecounsel.com/Issues/2010/August-2010/Pages/Comer-v-Murphy-Oil-Leaves-the-Future-of-Climate-Change-Litigation-Uncertain.aspx?page=1>

118. *Comer*, 585 F.3d at 867-8.

119. *Comer v. Murphy Oil USA*, 598 F.3d at 208.

120. Maleske, *supra* note 115; Although there are differences in state standing doctrine, the Supreme Court in *AEP v. Connecticut* will likely guide plaintiffs on the standing issues left unclear by the strange outcome of *Comer*.

121. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

122. *Id.*

123. Jonathan Zasloff, *The Kivalina Climate Change Lawsuit: Wrong is Right*, LEGAL PLANET (Oct. 19, 2009), <http://legalplanet.wordpress.com/2009/10/19/the-kivalina-climate-change-lawsuit-wrong-is-right/>.

all the while running the risk that the district judge might be told on appeal that the case should not have been heard for procedural reasons.¹²⁴ A similar situation occurred in *City of Milwaukee v. Illinois*, where the lower courts spent seven years on the case before the Supreme Court heard it and ruled that the Clean Water Act displaced the common law upon which the original claim was made.¹²⁵ In this sense one might view the district court's decision in *Native Village of Kivalina* similar to an interlocutory appeal.¹²⁶ Indeed, the defendants in that case have moved to stay the appeal until the Supreme Court rules in *Connecticut*,¹²⁷ which suggests that the district court judge was simply biding her time. However, *Native Village of Kivalina*'s civil conspiracy claims were based on state law. The District court found that it did not have jurisdiction to address state claims after dismissing the federal claims, and thus it dismissed the civil conspiracy claims without prejudice.¹²⁸

Lower courts have moved in different directions regarding the ability of plaintiffs to bring common law climate change nuisance claims. *Connecticut* and *Comer* both suggest that state common law claims could move forward. Thus, provided that the underlying climate change nuisance suits are brought on state common law grounds and not federal common law, it is reasonable to continue our analysis of civil conspiracy claims on the assumption that underlying climate change nuisance suits are feasible.

B. Civil Conspiracy Allegations In *Kivalina*.

Although both *Native Village of Kivalina* and *Comer* involved conspiracy claims, our analysis will focus on *Native Village of Kivalina* since the federal elements of the case are still pending and since the state-law civil conspiracy claims have yet to be addressed by any court. The allegations of conspiracy below are taken from the Complaint for Damages in the *Native Village of Kivalina* case.¹²⁹ The complaint lists fifty-nine paragraphs of allegations, spanning over fifteen pages.¹³⁰ This section will highlight only the most relevant aspects.¹³¹

The *Native Village of Kivalina* complaint alleges that ExxonMobil, AEP, BP America Inc., Chevron Corporation, ConocoPhillips Company, Duke Energy,

124. *Id.*

125. *City of Milwaukee v. Illinois*, 451 U.S. 304, (1981).

126. Zasloff, *supra* note 122.

127. Kyle Danish, et al., Weekly Climate Change Policy Update, VanNess Feldman (Jan. 31, 2011) <http://www.vnf.com/news-alerts-553.html>

128. *Native Village of Kivalina*, 663 F. Supp. 2d at 868.

129. Complaint for Damages at 47-62, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008).

130. *Id.* at 47.

131. To gain a more detailed understanding of allegations similar to those listed in the *Native Vill. of Kivalina* complaint, see ORESKES, *supra* note 77 at 169-215.

Peabody, and Southern (“Conspiracy Defendants”) undertook a campaign to mislead the public about the science of global warming by originally denying its existence and then later falsely claiming that either 1) there is too much scientific uncertainty to act, or 2) that global warming can be good for the planet.¹³² ExxonMobil allegedly led the industry efforts to disseminate misinformation about global warming.¹³³ The complaint states that to achieve their goals of misleading the public to avoid regulation, the industries formed and used public relations groups, front groups, and fake citizen and scientific organizations such as the Greening Earth Society,¹³⁴ the George C. Marshall Institute, and the Global Climate Coalition (“GCC”).¹³⁵

Some of the front groups are actually the same bodies that were used in the tobacco conspiracies. For example, The Advancement of Sound Science Coalition (“TASSC”) was formed in 1993 through funding from Philipp Morris to discredit the mainstream science establishing health hazards of second hand tobacco smoke.¹³⁶ TASSC funded a web site, JunkScience.com, where it coined the Orwellian terms “junk science” to refer to mainstream, peer-reviewed science adverse to industry interest, and labeled industry-sponsored science as “sound science.”¹³⁷ At some point in the 1990s, TASSC began working for the energy industries, ExxonMobil funded TASSC, and the energy industry adopted these terms to subvert the global warming debate.¹³⁸

The GCC, founded in 1989 by forty-six corporations and trade associations, provides another example of alleged concerted industry action to spread misinformation about climate change in order to continue emitting greenhouse gasses unabated.¹³⁹ In the 1990s the GCC allegedly raised tens of millions of dollars from its members, including the conspiracy defendants, to distort the public debate around global warming with the intention to enable its members to contribute to a public nuisance through the continued emission of greenhouse gases.¹⁴⁰ The GCC met in the offices of many of the Conspiracy Defendants and as part of its work it distributed a

132. Complaint for Damages at 47, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008)

133. *Id.* at 9.

134. The Greening Earth Society was formed on Earth Day in 1998 by the Western Fuels Association to advocate the rising levels of CO₂ is beneficial for the environment. *Id.* at 55.

135. *Id.* at 47.

136. *Id.* at 48.

137. Complaint for Damages at 48, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008)

138. *Id.*

139. *Id.* at 49.

140. *Id.*

video to hundreds of journalists falsely claiming that increased levels of carbon dioxide will increase crop production and help feed the hungry people of the world.¹⁴¹ According to the complaint, internal documents written by the GCC show that the GCC and its members knew that such claims were false.¹⁴²

Likewise, the George C. Marshall Institute, allegedly, with ExxonMobil funding, played a central role in the Conspiracy Defendants' disinformation campaign, acting as a clearinghouse for global warming contrarians and releasing a report falsely claiming that peer-reviewed studies indicated temperature increases were consistent with "natural climate change."¹⁴³ The George C. Marshall Institute, along with the GCC and the American Petroleum Institute, even attacked credible and preeminent expert scientists, namely Dr. Santer, the lead author of a crucial chapter of the 1995 Second Assessment Report of the Intergovernmental Panel on Climate Change ("IPCC").¹⁴⁴ The leader of the attack was Dr. Frederick Seitz, a man who was not present at any of the IPCC meetings to which he referred in his attack.¹⁴⁵ Interestingly enough, Dr. Frederick Seitz previously worked for R. J. Reynolds in the tobacco industry and he would frequently correspond with R. J. Reynolds' legal counsel in order to help produce authorities for the tobacco industry to rely upon in lawsuits.¹⁴⁶

During the 1990s, certain Conspiracy Defendants such as ExxonMobil, Chevron Corporation, The Southern Company and trade associations such as the American Petroleum Institute (which represented all U.S. oil company defendants), formed part of the Global Science Communication Team ("GSCT").¹⁴⁷ Directly emulating the tobacco industry's disinformation campaign, the GSCT allegedly outlined an explicit strategy to invest millions of dollars to create uncertainty regarding the issue of global warming.¹⁴⁸

The conspiracy claims directed at ExxonMobil in particular are that ExxonMobil "engaged in a multi-faceted attack on global warming which included exploiting science, denying the consensus on global warming, running misleading advertising denying the existence of global warming or its causes, and funding organizations who attacked global warming on these

141. *Id.* at 50.

142. Complaint for Damages at 51, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008).

143. *Id.* at 53.

144. *Id.* at 54.

145. *Id.*

146. ORESKES, *supra* note 77, at 29-30.

147. Complaint for Damages at 55, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008).

148. *Id.*

bases and/or the factors causing global warming.”¹⁴⁹ The complaint cites a Union of Concerned Scientist publication, “Smoke, Mirrors, and Hot Air” claiming that from 1998 to 2005 ExxonMobil directed \$16 million to forty-two organizations promoting misinformation on global warming.¹⁵⁰

C. Legal Analysis of Kivalina’s Civil Conspiracy Claims

The Kivalina complaint detailed the factual averments in support of the elements of conspiracy.¹⁵¹ A conspiracy claim can be brought only when there is a valid underlying federal or state claim.¹⁵² Here, there are federal public nuisance claims and state public and private nuisance claims.¹⁵³ A conspiracy claim can’t survive when the supporting nuisance claim is dismissed.¹⁵⁴ Although defendants argue that none of the elements of a nuisance claim are met,¹⁵⁵ the availability of nuisance claims are beyond the scope of this paper. This analysis will assume that plaintiffs can meet the procedural and substantive elements of a nuisance claim against the named defendants.

The Native Village and City of Kivalina claims that the defendants had a common plan or course of conduct to spread misinformation and increase doubt about the science of global warming.¹⁵⁶ This, in turn, seems to have allowed the defendants to continue their tortious pollution unabated, knowing full well the injurious effects of their emissions.¹⁵⁷ The use of front groups and industry groups to spread misinformation also make it easier for the tribe to show that the defendants encouraged and assisted each other’s injurious conduct.¹⁵⁸

One interesting argument that could be raised on appeal is whether the First Amendment Free Speech clause, which protects public debate in matters of public discourse including science, should bar the tribe’s

149. *Id.* at 56-57.

150. *Id.*; and Union of Concerned Scientists, *Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco’s Tactics to Manufacture Uncertainty on Climate Science*, Jan. 2007, at 10. http://www.ucsusa.org/global_warming/science_and_impacts/global_warming_contrarians/exxonmobil-report-smoke.html.

151. Compl., for Damages, at 47-62, 65-6. (¶¶ 189-248, 268-77).

152. *See, e.g.*, *Gilbrook v. City of Westminster*, 177 F3d at 856-57.

153. Compl., for Damages, at 62, 64.

154. *See, e.g.*, *Woodrum v. Woodward County*, 866 F.2d 1121, 1126-27 (9th Cir. 1989); 2 Dan B. Dobbs, *The Law of Torts* § 340 (2001).

155. Br. of Def.’s-Appellees *American Electric Power Compl., Inc. et al.*, at 50-3. *Native Vill. Of Kivalina v. ExxonMobil Corp.* (No. 09-17490). *See also* Appellants Reply Br., at 39-42. *Native Vill. Of Kivalina v. ExxonMobil Corp.* (No. 09-17490)

156. Compl. for Damages, at 47.

157. *Id.*

158. Compl. for Damages at 48, 51-2.

conspiracy claim.¹⁵⁹ However, free speech protection does not extend to deliberately false or reckless statements,¹⁶⁰ and it is likely that a jury could find that the conspiracy defendants were making deliberately false statements or were reckless as to the truth of their statements. For example, if the internal GCC documents show, as the complaint alleges, that the GCC knew its statements regarding the supposed benefits of increased carbon dioxide were misleading, this seems to preclude the possibility of free speech protection.¹⁶¹

Another argument regards the causation element of conspiracy. The defendants argue that the tribe's conspiracy claim rests upon the "impermissible speculation that, absent the alleged publicity campaign, either the political branches would have effected unspecified regulation or consumers would have engaged in an unprecedented boycott of the fossil fuel industry."¹⁶² This is an interesting way to frame the issue, but it is not necessarily legally appropriate.¹⁶³ A conspiracy must result in damages, but the damages may derive from the causal chain of the underlying nuisance, not from the conspiracy itself.¹⁶⁴ Here, the tribe claims that the defendants engaged in a conspiracy intended to enable them to continue their nuisance, and it is the nuisance that caused the harm to the tribe. Not all courts hold that it is necessary that the conspiracy cause the harm, rather, the conspiracy can simply be an agreement to accomplish the harm that occurs.¹⁶⁵

Certain cases in other circuits seem to require proximate causation between the conspiracy and the damages arising from the harm.¹⁶⁶ However, since this case will be heard in the Ninth Circuit and the Ninth Circuit doesn't specify whether damage must be proximately caused by the conspiracy or from only the underlying unlawful action.¹⁶⁷ It seems reasonable for a court to conclude that if parties agree to perform an illegal act, and their act causes damage, their agreement should be an unlawful

159. Br. of Def.'s-Appellees *American Electric Power Comp., Inc. et al.*, at 55 (citing *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006)).

160. Appellants Reply Br., at 46. *Native Vill. Of Kivalina v. ExxonMobil Corp.* (No. 09-17490), (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

161. See *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006).

162. Br. of Def.'s-Appellees *American Electric Power Comp., Inc. et al.*, at 54.

163. See *supra* pp. 7-8.

164. See *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999) (*en banc*) (holding that civil conspiracy is a "combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage").

165. *Id.*

166. 16 Am. Jur. 2d Conspiracy §51 (LexisNexis 2010).

167. *Gilbrook*, 177 F.3d at 856.

conspiracy regardless of if the agreement proximately caused the act. If the court agrees with this reasoning, as *Gilbrook* suggests, it is likely that the plaintiffs could win on this point as well.

While there are elements over which to argue regarding conspiracy, such as whether the *Noerr-Pennington* doctrine shields defendants' conduct¹⁶⁸ and whether the heightened FRCP 9(b) pleading requirements were met, the heart of the matter in terms of legal debate is clearly over whether there is a valid underlying nuisance claim.

If the nuisance were to be found, what is the relevance of conspiracy claims, and might the presence of these claims actually help lead to a similar outcome as the tobacco litigation, or are the differences too profound?

V. Civil Conspiracy in Tobacco and Climate Change Compared

Comparing the allegations in the tobacco and the climate change cases above, it appears that the energy industry and the tobacco industry both engaged similar campaigns to create uncertainty and doubt about the risks associated with their products. Both industries systematically created and maintained doubt about their products to prevent industry regulation and continue product support.¹⁶⁹

The plaintiffs' lawyers in *Kivalina* and *Comer* are not the only ones who have noticed the similarities between the strategies of the tobacco and energy industries. The Union of Concerned Scientists, a science-based nonprofit organization working for a "healthy environment and a safer world"¹⁷⁰ released a report in 2007 outlining the resemblance between big tobacco's strategy to deceive the American public and ExxonMobil's approach to climate change.¹⁷¹ This report claims that both the tobacco and energy industries "manufactured uncertainty" by raising doubts about

168. It does not. The *Noerr-Pennington* doctrine does not extend the Petition Clause of the First Amendment beyond petitioning the government, (*Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000)). *Kivalina* plaintiffs make no claims that the Conspiracy Defendants petitioned the government.

169. In fact, this theory is mentioned in the Br. of Def.'s-Appellees *American Electric Power Comp., Inc. et al.*, at 54. While the Defendants confuse causation requirements regarding civil conspiracy claims (discussed in the proceeding section of this paper) their comment of the possible motivation behind such activities by the energy industry is telling, since it is the same motivation that drove tobacco.

170. Union of Concerned Scientist, *About Us*, <http://www.ucsusa.org/about/> (2010).

171. Union of Concerned Scientists, *Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science*, Jan. 2007, at 10. http://www.ucsusa.org/global_warming/science_and_impacts/global_warming_contrarians/exxonmobil-report-smoke.html.

adverse scientific evidence, adopted a strategy of “information laundering” through seemingly independent front groups, promoted scientific spokespeople who misrepresented science and cherry-picked facts, and shifted the focus from meaningful action claiming the need for “sound science.”¹⁷²

The complaints above support these conclusions. In fact, some of the very front groups and individuals that were creating doubt for tobacco were the same groups that manufactured doubt for the energy industry. One example is TASC, which was employed by both the energy and tobacco industries to refute mainstream science, labeling it “junk science.”¹⁷³ Another example is Dr. Seitz, who developed expert witnesses for the tobacco industry¹⁷⁴ and later attacked an established IPCC scientist for the energy industry.¹⁷⁵

Indeed, the tobacco groups TIRC and CTR functioned nearly identically to groups like the GCC and the George C. Marshall Institute for the energy industries.¹⁷⁶ Furthermore, both industries have established research institutions while also funding ideological and advocacy organizations to carry out disinformation campaigns.¹⁷⁷ These seemingly inconsistent activities allow the industries to tout a pro-scientific, unbiased position, while simultaneously undercutting the established science in the area.¹⁷⁸

Both the tobacco and energy industries have directed attacks at scientists as well. For example, the *California* complaint outlines how Philipp Morris fired and threatened to sue its own researchers after they reported unfavorable findings.¹⁷⁹ Likewise, the energy industry undertook an unprecedented attack on a lead author of an IPCC chapter report.¹⁸⁰

Considering that these industries capitalized on creating doubt and sought to avoid regulation,¹⁸¹ doing such activities make sense, so long as the industry was not caught. For example, as one tobacco industry memo stated: “Doubt is our product, since it is the best means of competing with the ‘body of fact’ that exists in the minds of the general public. It is also the

172. *Id.* at 1.

173. Compl. for Damages, at 48, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008).

174. ORESKES, *supra*, note 77, at 29-30.

175. Complaint for Damages at 51, *Native Vill. of Kivalina v. ExxonMobil Corp.*, N.D. Cal. (4:08-cv-01138-SBA, Feb. 26, 2008)

176. *Id.* at 47-56; See First Amended Complaint, *supra* note 12, at 8-11.

177. *Smoke, Mirrors, & Hot Air*, *supra* note 86, at 1-2.

178. *Id.* at 7.

179. First Amended Complaint, *supra* note 12, at 11.

180. Complaint for Damages, *supra* note 4, at 54.

181. *Id.*; *E.g.*, Oreskes, *supra* note 67.

means of establishing a controversy.”¹⁸² Indeed, the energy industry has made similar comments about their strategy of manufactured doubt.¹⁸³

However, is promoting doubt or undermining peer-review science in order to continue selling a product illegal? The history of tobacco litigation points to an affirmative answer, provided that there is an underlying illegal act behind the industry misinformation. In the case of tobacco, the underlying illegal acts claimed were product defects or unfair competition.¹⁸⁴ In climate change, the underlying act must be nuisance. If the court does not require proximate causation for the conspiracy, then any false information or false doubt produced in order to continue the emission of greenhouse gasses could be a civil conspiracy.

More importantly, if both the underlying nuisance and conspiracy claims are found to be true, what will be the outcome? Are plaintiffs likely to see punitive damage awards that stretch the limits of due process, such as the \$145 billion award in *Engle*,¹⁸⁵ or would juries and Congress react more sympathetically to the energy industry?

One important difference to consider is the type of products to which these cases refer. When juries considered the lies told by tobacco companies, it might have been relevant that the products sold by the defendants served little purpose except to create profits for their industry, while harming the health of society. In the context of climate change litigation, should juries ever hear arguments on civil conspiracy claims, defense attorneys would certainly point out that their industry is not selling a luxury product such as cigarettes, but rather an indispensable product for society: energy.¹⁸⁶ In contrasting the conspiracy claims against the tobacco industry, it is possible juries would be more lenient to the energy industry were the issue successfully framed as an earnest attempt to keep energy affordable for America’s working families. On the other hand, the harm from climate change could potentially be so great that juries may not accept this “lesser of two evils” method of framing the alleged conspiracy. Rather, it is possible that juries could be persuaded that civil conspiracy claims in the climate change context are far more egregious than those in tobacco litigation since the energy industry allegedly abused the public’s trust about a product society cannot do without, in stark contrast to misrepresentations

182. *Smoke, Mirrors, & Hot Air*, *supra* note 86, at 7 (citing Brown & Williamson, (Nov. 23, 1998), *Smoking and Health Proposal*, available at <http://tobaccodocuments.org/landman/332506.html>).

183. Oreskes, *supra* note 77.

184. *Supra* Section III: The Role of Civil Conspiracy in Tobacco Litigation.

185. *Engle v. RJ Reynolds Tobacco Co.*, No. 94-08273 CA-22, (Fla. Cir. Ct. 2000).

186. Although the extent to which fossil fuel energy is essential to society is debatable, it is unlikely that any plaintiff could convince a jury that fossil fuel use is a societal luxury item such as cigarettes.

made about a luxury item consumers can choose whether or not to purchase.

Another big difference between tobacco litigation and climate change litigation is the apportionment of damages. In climate change cases, joint and several liability may not be appropriate, since the plaintiffs could be viewed as at fault.¹⁸⁷ This is because nearly all plaintiffs have used the energy industry's products, which means they have also contributed to global warming, and any damages received are likely to be apportioned.¹⁸⁸ Here the contrast between climate change and tobacco cases is telling.

In *California v. Philip Morris*, the California attorney general was joined by thirty-nine other states, all seeking compensation for their Medicare expenses.¹⁸⁹ Had these cases gone to a jury trial, it would have been difficult for defense attorneys to convince jurors that the state of California had "unclean hands," or that California was at fault for the incurrence of Medicare expenses related to its residents tobacco-related illnesses.

However, in climate change litigation, whether the suits are filed by private plaintiffs or by the states, plaintiffs will nearly always be responsible for some of the energy use that leads to global warming — the nuisance forming the basis of the complaint.¹⁹⁰ This argument is particularly valid if the plaintiff is a large state, such as California. There, the state's energy use is the cause-in-fact of the greenhouse gas emissions that the state would be attempting to limit through its lawsuit.¹⁹¹

In *Kivalina*, the Inuit plaintiffs — despite being considered by some to be "ideal" climate plaintiffs for their low carbon lifestyle¹⁹² — still potentially use too much carbon dioxide to be eligible for joint and several liability.¹⁹³ If damages are apportioned, then even ideal plaintiffs might have to sue a huge number of defendants to receive even a minimal recovery.¹⁹⁴

187. Gaynor, *supra* note 94 *Common law*, at 10-12.

188. *Id.*

189. Kelder and Davidson, eds., *supra* note 13, at 4; First Amended Complaint, *supra* note 12.

190. Gaynor, *supra* note 94, at 10-12.

191. *Id.* at 10-11. It is important to note that this comparison of the apportionment of damages is between a case involving states as plaintiffs against tobacco companies, rather than individual smokers. In a case involving a plaintiff smoking class, comparative fault and apportionment of damages becomes an issue, similar to the situation in a climate change case where the plaintiff class burns fossil fuels for their electricity, transportation, and heating needs.

192. *Id.* at 11, (citing Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 724 (2008)).

193. *Id.* at 11.

194. Gaynor, *supra* note 94, at 10.

However, joint and several liability refers to compensatory damages. One of the main attractions of civil conspiracy claims, based on the history of tobacco litigation, is the potential for high, punitive damage awards. However, these issues may be more intertwined than they seem.

If juries are exposed to the complexities of causation and apportionment, combined with the arguable necessity of fossil fuel use, it is possible that jurors, who rely on energy consumption every day, may be less inclined to offer large awards. However, perhaps the actions of certain defendants, such as ExxonMobil, may be viewed as so egregious as to prompt *Engle*-like punitive awards, despite the relatively low percentage, on a global scale, of carbon dioxide emissions that originated from that particular defendant.

Furthermore, if state climate change nuisance suits are allowed to move forward, the compensatory damages alone could be enormous, even if apportioned, if the damages are assessed in a plaintiff-friendly manner. For example, the relocation of the Village of Kivalina may cost as much as \$400 million.¹⁹⁵ If this case is filed in state court and returns an award, there will be countless other plaintiffs lining up at the courthouse doors.

There is another dramatic difference between climate change litigation and tobacco litigation. A unique element of the tobacco litigation was that the plaintiff bar, state attorneys general, politicians, and the press made powerful, coordinated attacks against the tobacco industry.¹⁹⁶ Together, they persuaded American society that tobacco use was an issue worthy of societal concern.¹⁹⁷ Conversely, politicians and the media have not yet placed a great deal of importance on climate change. Indeed, the Executive decision to work on the Health Care Reform Bill last term rather than a climate bill is indicative of this point. Thus, perhaps because their supporters are so different, the plaintiff bar should not expect a similar show of support as they received in the tobacco litigation. But despite an apparent disinterest from the media, politicians, and attorneys general, the civil conspiracy claims in *Native Village of Kivalina* and other future suits, may help to create societal awareness that climate change deserves as much attention as cigarette smoke, and that the industry misled the public.

195. Complaint for Damages, *supra* note 6, at 49.

196. Roger Parloff, *Is Fat the Next Tobacco? For Big Food, the Supersizing of America is Becoming a Big Headache*, FORTUNE, Feb. 3, 2003, available at http://money.cnn.com/magazines/fortune/fortune_archive/2003/02/03/336442/index.htm.

197. *Id.* (quoting a tobacco defense attorney distinguishing between tobacco litigation and fast food litigation following the tobacco strategy).

For example, much of the public still believes there is a valid debate around climate change.¹⁹⁸ A Pew Poll from 2009 shows that only thirty-six percent of Americans believe that the earth is warming from anthropogenic activities.¹⁹⁹ Considering that peer-reviewed scientific research suggests precisely the opposite view, this debate is likely fueled by misinformation from the conspiracy defendants. If courts were to declare this debate a farce fueled by civil conspiracy, perhaps the Pew Polls would shift in a more scientifically supported direction. Would such a shifting perspective on the climate change debate help to bring about action from the states, politicians, and media, creating a similar situation as in tobacco litigation? Although a realpolitik attitude could easily label this outcome as a pipedream, the ecological, social, and legal importance of this paradigm shift makes it impossible to discounting.

It is certainly an attractive idea to some environmental or social groups to cast ExxonMobil and Chevron in the same light as Philipp Morris and R. J. Reynolds, and perhaps civil conspiracy claims, if they are ever heard, might help bring this about. However, perhaps the most attractive and certain aspect of civil conspiracy claims, at least for an advocacy driven attorney or organization, could be the societal shift in the debate around the causes and effects of climate change.

VI. Conclusion

Considering the potential risk to tobacco profits from unfavorable health-related information, it may not be surprising that tobacco interests used trade groups to conspire against the health of the American public by casting false doubt upon the dangers of cigarettes. Likewise, it is plausible that oil, coal, and power companies would use trade groups similarly to conspire against the American public to continue conducting their business as usual.

However, the largest difference between these two stories is not the possibility of a conspiracy, but the procedural bars facing the plaintiff class in climate change litigation. Class action attorneys in the tobacco litigation had good procedural footing on the grounds of strict liability. Standing is rarely an issue when plaintiffs are dying from cancer,²⁰⁰ and strict liability is rarely a political question.

In the case of climate change conspiracy however, the procedural footing upon public nuisance is softer, perhaps similar to the unstable

198. Pew Research Center Publications, *Few Americans See Solid Evidence of Global Warming*, October 22, 2009, <http://pewresearch.org/pubs/1386/cap-and-trade-global-warming-opinion>.

199. *Id.*

200. The hurdle there may be causation, but not likely standing.

consistency of melting permafrost in a warming Arctic community. Furthermore, there are substantial substantive issues to overcome, such as the apportionment of damages and the proximate causation of the civil conspiracy. However, if state courts accept climate change nuisance plaintiffs as is currently possible under *Connecticut v. AEP*²⁰¹ and these courts find the underlying nuisance actionable, it is possible that civil conspiracy claims may be successful.

The outcome in *Connecticut v. AEP* foreclosed any possibility of federal climate change nuisance cases, but it did not, however, foreclose state law nuisance-based cause of actions entirely.²⁰² Therefore, the possibility of civil conspiracy claims, for the time being, remain untainted and are available avenues to pursue. However, if state courts should similarly refuse to recognize climate change nuisance suits, plaintiff lawyers will think of tobacco's conspiracy as the big catch, but climate change as, "the one that got away."

201. *Connecticut*, 131 S.Ct. at 2540.

202. *Id.*

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