

GLOBAL WARMING: HERE COME THE LAWYERS

It's the next wave of litigation—after tobacco, guns, and junk food. Why Detroit, Big Oil, and utilities should worry

BY JOHN CAREY AND LORRAINE WOELLERT

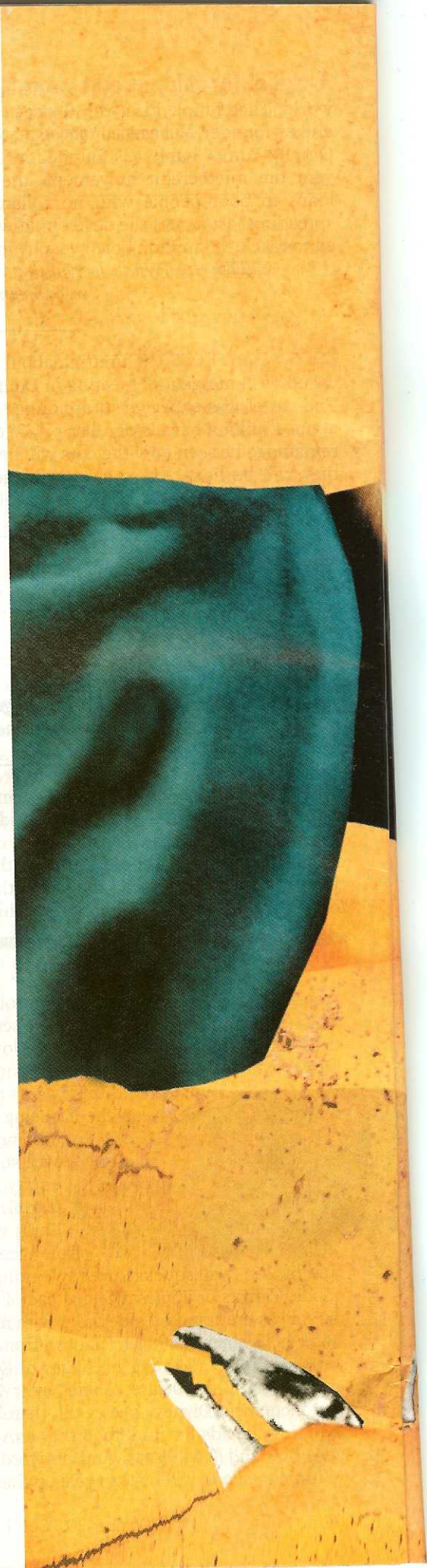
TWO DAYS AFTER HURRICANE Katrina smashed into the Gulf Coast, F. Gerald Maples returned to his hometown of Pass Christian, Miss., to utter devastation. Most of his neighbors' houses were totally destroyed. His was in ruins. "It broke our hearts and absolutely changed our lives," he says. It also made Maples, a veteran asbestos plaintiffs' attorney in New Orleans, determined to fight back. "I couldn't stand by when my entire cultural history was destroyed by an event that could become more frequent because of global warming," he says.

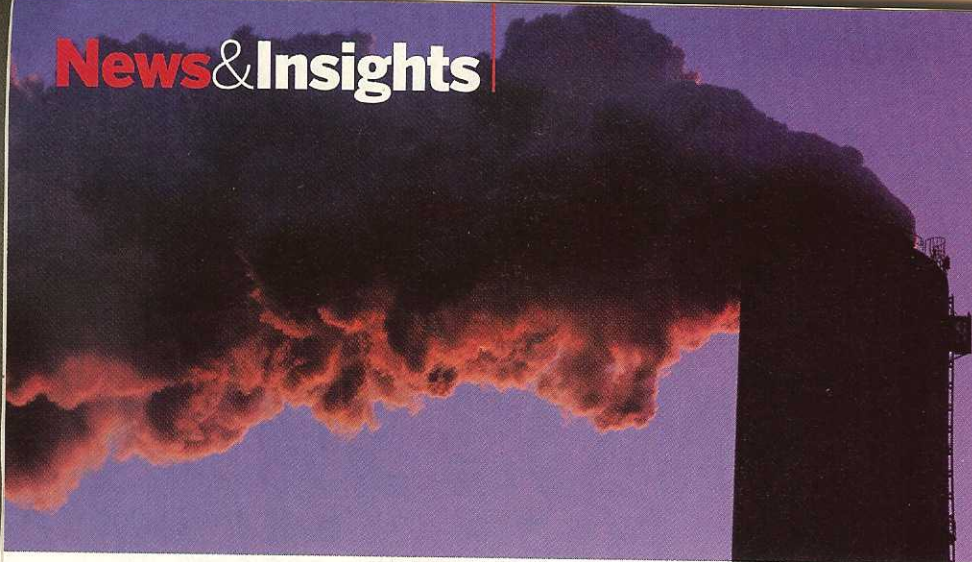
So when friend and fellow trial lawyer Timothy W. Porter showed up to help with food and water, the two plotted a legal assault. Since Katrina's fury was powered by unusually warm Gulf water, and since such warmth could result from global warming, companies that have pumped the atmosphere full of greenhouse gases like carbon dioxide should be liable for damages, they figured. "To me, Katrina was a clear result of irresponsible behavior by the carbon-emissions corporate economy," says Maples. He recruited suddenly homeless neighbors like Ned Comer and filed a class action on their behalf in federal court in Gulfport, Miss.

The defendants? Dozens of oil companies, utilities, and coal producers, from Chevron and Exxon Mobil to American Electric Power and Xcel Energy. "This is a heartfelt effort," Maples says. "I don't want to leave this global warming mess to my children."

BROAD ASSAULT

NEITHER, APPARENTLY, do a host of other lawyers, in what is becoming an ambitious legal war on oil, electric power, auto, and other companies whose emissions are linked to global warming. At least 16 cases, drawing on a variety of legal strategies, are pending in federal or state court. It may seem like an unconnected hodgepodge of initiatives, but whether it's a case now before the U.S. Supreme Court seeking to force the Environmental Protection Agency to crack down on greenhouse gases or the effort by a coalition of Texas cities to require cleaner plants than 17 now proposed by utilities, the challenges spring from a common concern: the lack of action in Washington. "This boomlet in global warming litigation represents frustration with the White House's and Congress' failure to come to grips with the issue," says John Echeverria, executive director of Georgetown University's Environmental Law & Policy Institute. "So the





courts, for better or worse, are taking the lead.”

It's hardly the first time the judiciary has emerged as the forum for those who have felt stymied trying to address a broad social issue on other fronts. And it's possible that this legal assault will prove quixotic, akin to failed suits by cities to hold gunmakers responsible for gun violence or by African Americans to win reparations for slavery.

SWORD OF DAMOCLES

BUT THERE'S ANOTHER example that's far more worrisome for polluters: tobacco. When state attorneys general began suing cigarette makers in the mid-1990s to recover smoking-related health-care costs, the litigation was widely dismissed as fanciful. Yet before the decade was out, tobacco companies had agreed to fork over more than \$300 billion and make big changes in the marketing of cigarettes.

What's more, plaintiffs can have an impact without prevailing in court. The mere threat of obesity lawsuits, for example, has sent soft drink and junk food purveyors scrambling to change their products and improve their public images. In fact, the ultimate goal for environmentalists isn't necessarily to win cases but to ratchet up the pressure on business and politicians to impose mandatory curbs on greenhouse gas emissions.

Business is fighting hard to toss the issue of global warming out of the courts entirely. “These kinds of judgments should be made by elected representatives,” insists Quentin Riegel, vice-president for litigation at the National Association of Manufacturers. While industry lawyers don't fear any imminent liability, they are taking the litigation seriously. Three big law firms—Hunton & Williams, Jones Day, and Sidley Austin—are coordinating defense efforts on behalf of a group of utilities.

There are signs that others see the writing on the wall. Bryan Cave partner J.

Kevin Healy says he advises corporate clients that they need to take “reasonable” steps to pare back emissions to reduce their legal exposure. And despite the strong opposition to mandatory limits from the White House and key lawmakers, many companies, some with an eye to potential litigation, are privately ready to sign on to such curbs. Louisiana utility Entergy Corp. even took the unusual step of filing a brief supporting the plaintiffs in the Supreme Court case.

As with tobacco, plaintiffs are trying out a variety of legal theories, some quite speculative. Judges and juries, however, particularly in hard-hit areas like the Gulf Coast, may be inclined to sympathize with even legally marginal claims. The Hurricane Katrina suit filed by Maples in Mississippi alleges that the emission of carbon dioxide is a “nuisance” under common law. That's a theory more typically relied on by those seeking to shut down noxious-smelling hog farms or rowdy nightclubs, though it has recently been used to win a big suit against paint manufacturers for lead contamination.

COAL SMOKE The most dangerous precedent for polluters may be cigarette smoke

The claim that global warming is a nuisance is “a tough case to bring,” says Arnold & Porter attorney Michael B.

Gerrard, who is monitoring the Maples suit for a corporate client. That's because it will be tremendously difficult to prove that greenhouse gases caused Katrina, and if a jury finds that they did, apportion responsibility among polluters. Maples will have a major win if, in a decision expected within weeks, the judge even allows the trial to take place.

In another case, Connecticut and other states have taken on five electric utilities, seeking to limit their carbon emissions. In San Francisco, a group led by Friends of the Earth has sued to force the Overseas Private Investment Corp. and the Export-Import Bank of the U.S. to consider the greenhouse gases emitted by the projects they help finance. Battle is also being waged in California over auto emissions. The state proposed ambitious regulations and was promptly sued by automakers. In late September, Attorney General Bill Lockyer countersued. He alleges harm from climate change, such as reduced water supplies, caused by greenhouse gases spewing from cars.

While these cases are testing uncharted waters, the Supreme Court is tackling a more basic question. On Nov. 29 it will hear arguments in a case Massachusetts and others brought against the EPA, alleging it has failed to acknowledge its authority under the Clean Air Act to regulate greenhouse gases. If the court finds that the EPA failed to follow the statute, and the agency then proceeds to actually issue regulations, that would be a huge step forward for environmentalists. Ironically, it would probably take some of the steam out of other global warming litigation.

Even more litigation could be in the offing. Stanford University and others plan symposiums on legal responses to global climate change. And Stephen D. Susman, one of the nation's top trial lawyers, is making the issue a personal crusade. His firm is representing the Texas cities pro bono in their effort to assure cleaner power plants, and he's looking for other opportunities to help the cause. In the 1990s, Susman defended Philip Morris Cos. in the tobacco lawsuits filed by state attorneys general and thought his opponents' legal theories were so “bizarre” that they didn't have a chance. “It turns out that I was the fool, and I'm not going to let that take place again,” Susman says. ■

Hot Seat

A few of the defendants in current cases:

SECTOR/COMPANY	2004 EMISSIONS (in millions of tons*)
ELECTRIC UTILITIES	
American Electric Power	164
Southern	149
AUTOMOBILES (U.S.)	
General Motors	108.5
Toyota	29.9
OIL AND GAS PRODUCTION**	
ExxonMobil	152
Royal Dutch Shell	123

*CO₂ and/or CO₂ equivalents.

**All global operations, including drilling and refining

Data: CERES, Environmental Defense