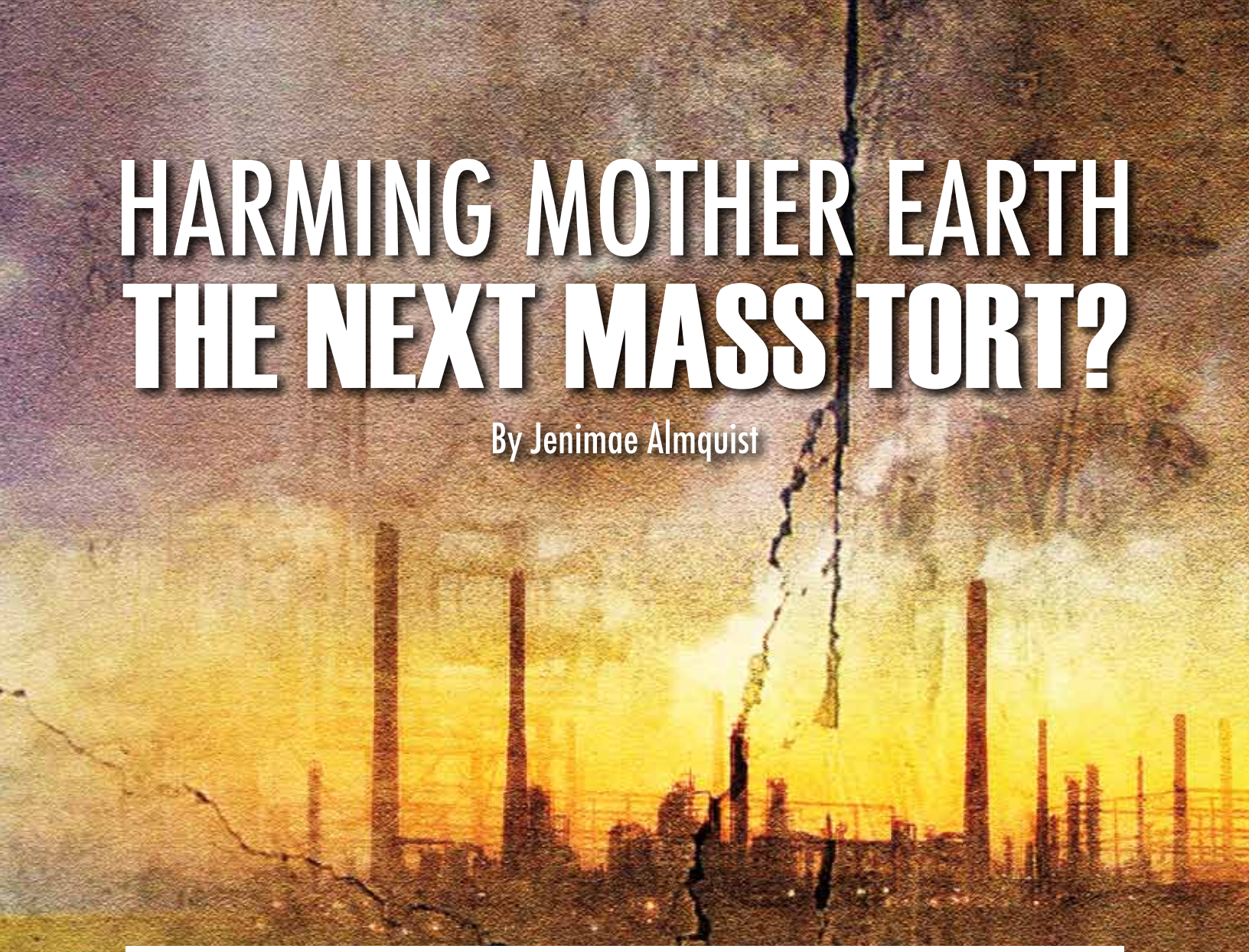

# HARMING MOTHER EARTH
# THE NEXT MASS TORT?

By Jenimae Almquist

Since the advent of asbestos litigation and EPA cleanup efforts, creative attorneys have sought ways to hold polluters responsible. With a mix of legal concepts deriving from environmental, nuisance, regulatory and mass tort law, suits protecting against environmentally harmful practices have encountered varying success. In the wake of the BP oil spill, lawmakers find themselves balancing scores of spill claimants against the rights of BP in a "bet-the-company" crisis. This article reviews the fate of such tort actions thus far. Perhaps because these lawsuits go to the heart of our survival and the fate of vital resources, they raise fascinating constitutional issues implicating the balance of power among state, federal and international authorities.

### DETERMINING PARTIES AND JUSTICIABILITY

Mother Earth may always win when it comes to natural disasters, but she may lack standing to sue. Putative plaintiffs of global warming lawsuits include property owners, environmental organizations and ordinary citizens. Both the redressability and traceability standing requirements are implicated in climate change litigation, causing suits to fail at the pleading stage.

The extent of the BP spill illustrates the challenge of precisely defining damages when filing a nuisance or other tort complaint. Pinpointing the liable manufacturers for such nebulous harms proves even more difficult. Whereas the owner of the offending BP oil well can easily be established, determining the origin of far-flung pollutants is more challenging. Protagonists in the films "A Civil Action" and "Erin Brockovich" encountered similar problems, which are endemic to environmental litigation.

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These hurdles came into play in one of the first U.S. global warming suits brought in 2006 by the state of California against six car manufacturers. The complaint alleged that Japanese carmakers had created a public nuisance, requiring the state to spend millions of dollars to combat beach erosion, pollution, and impact to wildlife. Hesitant to usurp the legislature's role and finding foreign policy conflicts, the case was dismissed. District Judge Martin Jenkins wrote: "The court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the earth's atmosphere, or in determining who should bear the costs associated with global climate change that admittedly result form multiple sources around the globe."

Likewise, a small Alaskan village faced justiciability problems in a 2008 nuisance action. In *Village of Kivalina v. ExxonMobil Corp. et al*, a fishing community sought more than $400 million after erosion of the ice shelf that provided their livelihood. The plaintiffs argued that the tenets of joint and several liability that apply to Superfund cleanup and typical injury suits also bind polluters for damages, even where the defendants were not solely responsible for global warming. The suit included misrepresentation claims, pointing to the $16 million spent by ExxonMobil between 1998 and 2005 to "promote disinformation on global warming." Plaintiffs' attorneys likened the oil companies' media campaign to the tobacco industry's denial of the harmful effects of smoking that emerged throughout asbestos mass tort litigation.

The U.S. District Court for the Northern District of California dismissed the *Kivalina* suit on Sept. 30, 2009, reasoning that the political questions involved were not within its purview. Further, the court held that plaintiffs had no standing because of the tenuous link between damages and the long list of oil and energy company defendants.

One month later, the Fifth Circuit reversed a district court's ruling that plaintiffs in *Comer v. Murphy Oil* lacked standing. Comer was a proposed class action on behalf of Mississippi residents and landowners affected by Hurricane Katrina. Plaintiffs alleged that the defendants' emissions, a host of chemical and energy companies, had "added to the ferocity" of the hurricane by raising sea levels. The lower court dismissed nuisance, trespass, and negligence claims, which were reinstated on appeal.

In explicating a liberal Mississippi traceability standard, the Fifth Circuit stated in *Comer* that "an indirect causal relationship will suffice." The plaintiffs likely relied upon *Palsgraf* heavily in advancing their causation arguments; the court referred to the "long chain of causation" offered by plaintiffs' scientific experts. At the pleading stage, plaintiffs

sustained a private nuisance claim, which required a showing of both an unreasonable and intentional invasion of private land interest. While nuisance theories survived, other innovative theories failed: the Fifth Circuit upheld the dismissal of unjust enrichment, fraudulent misrepresentation, and civil conspiracy theories of liability, again because of standing doctrine.

### LAWS AND CONTRACTS GOVERNING CORPORATE CONDUCT

Regulatory and international law play a critical role when constructing protective lawsuits. For example, the Canadian government found itself in the crosshairs of a global warming lawsuit in mid-2007, when Friends of the Earth Canada sought judicial review of Canada's greenhouse gases regulation. The nonprofit Canadian organization, Sierra Legal, challenged Canada to comply with agreed-upon international targets for reducing pollution under the Kyoto Protocol. Like the Kivalina Court, the Federal Court of Canada found the issues nonjusticiable. The case is currently on appeal to the Canadian Supreme Court.

Back on U.S. soil, equally thorny issues arise in the context of U.S. environmental standards. When California passes aggressive anti-pollution laws, for example, lesser national standards arguably preempt state requirements. The complex issues surrounding carbon emissions cutoffs and automobile pollution will increasingly color the legal landscape in the future. As lobbyists push for tighter pollution controls, differing regulatory standards will result in intense debate in Congress and the courts, with the executive branch playing a crucial role.

No matter the source of environmental benchmarks, changing guidelines will affect the daily life of companies in terms of production costs and output, as well as legal budgeting. The climate crisis is keeping attorneys from assorted business practice areas busy. Creative litigation to protect natural resources has shaped insurance and licensing agreements, and the available compensatory resources under such agreements will in turn affect how plaintiffs' lawyers craft their legal theories.

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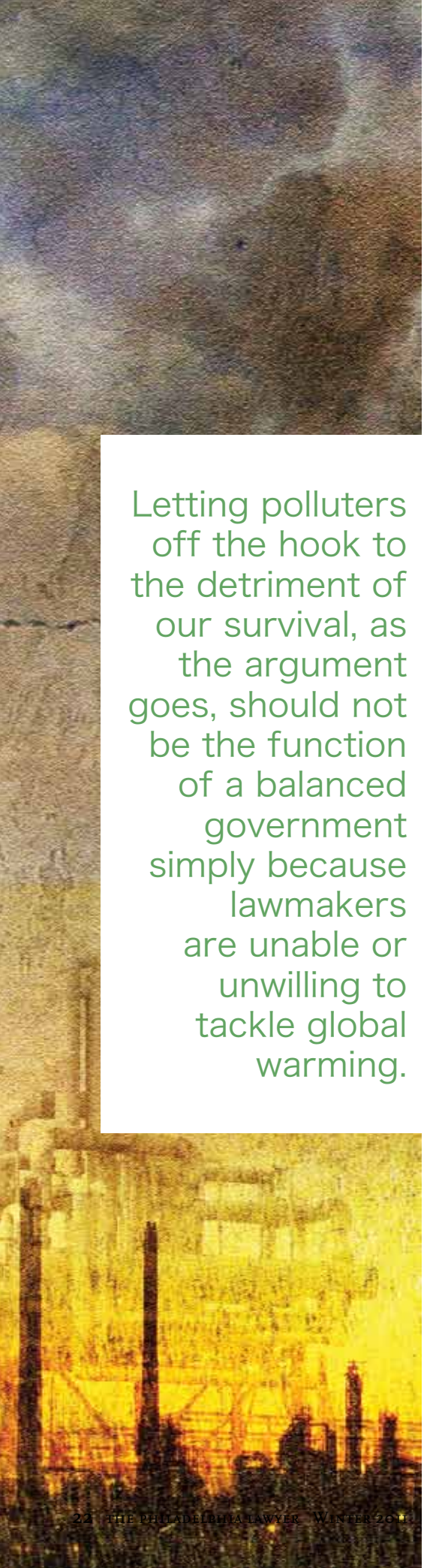
As part of this trickle-down effect created by environmental suits, risk managers must carefully consider whether future litigation could embrace environmental damage claims. For instance, suits holding corporations responsible for hurricane damage will affect policy definitions of "occurrence." In 2009, the Indiana Court of Appeals upheld summary judgment for insurers seeking a favorable definition of indemnity and coverage clauses relating to Clean Air Act violations, holding that "preventing future emissions and environmental harm is not an occurrence." Cinergy Corp. v. St. Paul Surplus Lines Ins. Co. 915 N.E.2d 524, 527 (Ind.App.,2009).

In Pennsylvania, contractual interpretation dramatically affects whether new technology can be used to extract natural gas from geological deposits. More than just a euphemism for an expletive in "Battlestar Galactica," "fracking" refers to hydraulic fracturing of shale and other natural structures to access energy sources, which in this commonwealth cannot be publicly owned. Lawyers in fracking disputes must revisit century-old agreements, as fossil fuels may be defined as "leasable" minerals in covenants forged by landowners generations ago.

While some argue that inventive fracturing technology promotes American ingenuity to keep pace with energy consumption, others see only the environmental fallout. Where watershed areas are subject to the aftermath, such as in Northeastern Pennsylvania, residents complaint of brown water and hair loss to their livestock. Like all



litigation balancing corporate interests against environmental concerns, lawyers and courts will raise various interpretations of existing regulations, contracts, and doctrines to determine the fate of the resources and rights at stake.

### BALANCING INTERESTS: EARTH VS. THE ECONOMY. THE BP EXAMPLE.

In developing environmental policies, U.S. lawmakers might be just as apt to advance the interests of large employers and oil industry lobbyists as to protect citizens' interest in clean air and water. The legislative process is slow, especially when drawing a compromise between corporate concerns and planetary interests.

Plaintiffs' mass torts attorneys increasingly turn to the courts to fill the gaps left among the three branches of government. Trial lawyers serve a regulatory function by using novel legal theories or revamping existing causes of action when Congress fails to address an issue, or does so ineffectively. Letting polluters off the hook to the detriment of our survival, as the argument goes, should not be the function of a balanced government simply because lawmakers are unable or unwilling to tackle global warming.

On the other hand, defense counsel strive to keep companies we depend upon for products and jobs afloat. After all, it is the capitalist desire for more that drives our economy, and we demand energy for our daily needs. In the context of costly litigation involving innumerable injured parties, the recent BP spill illustrates how the branches of government interact to mete out "aggregate justice," protecting all parties to some degree.

The sheer number of potential claimants affected by the BP spill, including restaurant owners, fisheries and homeowners, jeopardizes the ability to make inured parties whole. Likewise, conglomerate companies have a finite ability to compensate so many. Together, claimants can form one voice, but risk competing within their own ranks to tap into a pool of limited legal resources.

Prioritizing the BP claims has become more of an executive or legislative task than a judicial one, with compromise for all concerned. Past mass torts experience proves instructive. Authorities propose a matrix-type compensation scheme for the BP spill similar to that of the 9/11 compensation fund, which limited compensation to victims to less than traditional torts remedies. Special Master Kenneth Feinberg, who ran the 9/11 fund, is at the forefront of the BP plan, and $20 billion has been set aside by the oil company for payouts.

Grid-like schemes, such as the BP and 9/11 programs, typically set specific compensation criteria. Ideally, these guidelines are easier to meet than the causation and damages elements in a tort suit. However, claimants' recovery is more limited in order to protect companies from bankruptcy, particularly where social policy declares that airlines and oil are essential to our way of life.

Another benefit of such an administrative scheme is the much-heralded avoidance of protracted litigation with simplified pleading and proof standards. Yet speedy recoveries are by no means assured when the government is the payor and factfinder. Approximately 97,000 of the 337,000 BP claims received to date have been resolved.

Whether the claim involves injunctive relief, nuisance law appeals, traditional tort theories, or payouts from a limited administrative fund, attempts to balance individual against group interests reveal our constitutional structure at work. The intersection of the judicial, legislative and executive arms in resolving these competing claims makes the climate crisis one of the most legally interesting of our times. The future of environmental protection suits remains murky at best. What remains certain is that litigators and transactional lawyers on both sides will play a critical role in creatively shaping protections for Mother Earth and corporations alike. ■

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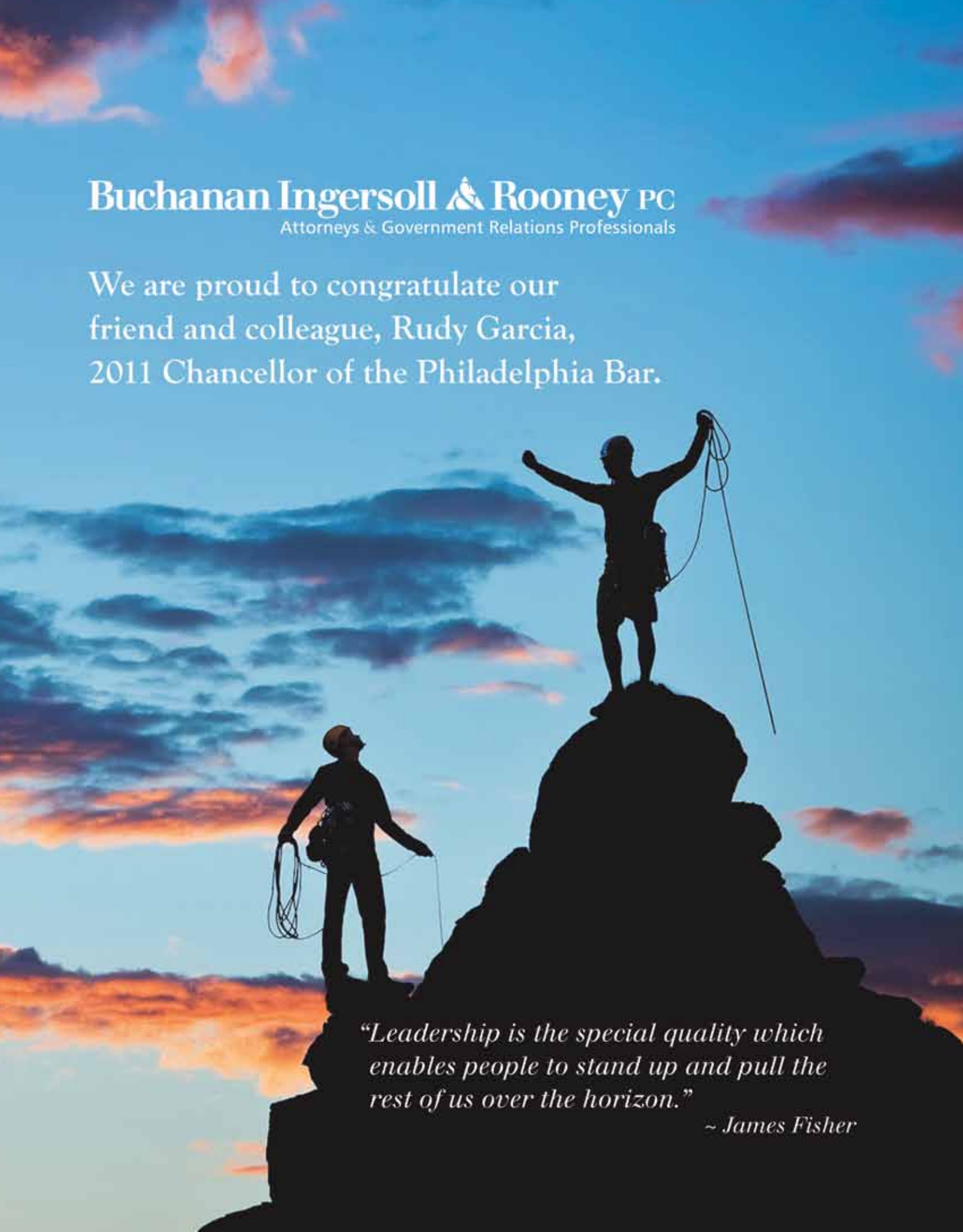
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