

Climate Change Lawsuits Advance

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Two federal appeals courts said recently that state and local governments and private property owners can proceed to trial with cases against companies that the plaintiffs charge are contributing to global warming.

In one of the cases, eight states and New York City sued a large number of power companies in an effort to force them to reduce greenhouse gas emissions from their power plants that use fossil fuels by a set percentage each year for the next 10 years.

In the other case, a large group of private property owners along the Mississippi Gulf coast charge that greenhouse gas emitted by 147 power, oil and chemical companies helped turn Hurricane Katrina into an unusually destructive storm. They want to be reimbursed for property damage.

A lower, federal district court ordered a third lawsuit dismissed.

While the rulings reach different results and could be subject to further review, they may be the leading edge of a new era of litigation against generators of carbon emissions.

However, even if the court of appeals decisions stand ultimately, the underlying claims in those cases present significant hurdles that may be exceedingly difficult for a plaintiff to overcome — including whether any of the cases may be properly certified as a class action and whether the plaintiff is able to establish the required causal connection between some specific conduct by each defendant and the plaintiff's particular alleged injury.

American Electric Power

In *Connecticut v. American Electrical Power Company Inc* (2d Cir. September 21, 2009), a two-judge panel of the US appeals court for the 2d circuit revived two lawsuits, originally brought in 2004 by eight states, New York City and various environmental groups, against various electric power company defendants alleging that the greenhouse gas emissions from the defendants' fossil fuel-fired operations constituted a public nuisance. Plaintiffs seek an injunction to force each defendant to abate its ongoing contributions to global warming, including by capping carbon dioxide

emissions and by reducing emissions by a specified percentage each year for at least 10 years.

In a lengthy ruling, the court reversed a 2005 dismissal of the case by the district court, which had found that the complaints raised "non-justiciable" political questions reserved to the executive and legislative branches of government. The court ruled that while "[i]t may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance . . . *until that comes to pass*, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance" by greenhouse gases. The court reasoned that

[n]owhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing, and will continue to cause them injury. A decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national or international* emissions policy (assuming that emissions caps are even in place).

The court found that plaintiffs' allegations that defendants' emissions "constitute a substantial and unreasonable interference with public rights in the plaintiffs' jurisdictions, including, *inter alia*, the right to public comfort and safety," sufficiently alleged an "unreasonable interference' with 'public rights.'"

The court rejected the argument that the plaintiffs lacked standing, finding that plaintiffs had sufficiently alleged injury in fact (asserting not only current injuries like reduced snowpack in California and coastal erosion in Massachusetts), but also future injuries like risk of severe flooding due to rising sea levels alleged to be "fairly traceable" to the actions of the

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defendants, which injuries were “redressable” by the injunctive relief sought.

Murphy Oil

In *Comer v. Murphy Oil USA* (5th Cir. October 16, 2009), a three-judge panel of the US appeals court for the 5th circuit resurrected a case dismissed below on the basis that it presented a non-justiciable “political question,” and held that a proposed class of private property owners along the Mississippi Gulf coast could proceed with its lawsuit against 147 oil, chemical and electric generation company defendants. The plaintiffs asserted that those defendants had intentionally and unreasonably used their property so as to produce massive amounts of greenhouse gases, thereby contributing to global warming — which had, in turn, caused the sea level to rise and added to the strength of Hurricane Katrina. Such actions had led, in turn, according to the plaintiffs, to the destruction of plaintiffs’ property, as well as plaintiffs’ loss of the use of certain public property near their homes. Plaintiffs sought compensatory and punitive damages.

The court concluded that plaintiffs have standing to assert public and private nuisance claims, as well as trespass and negligence claims. (The court dismissed various other claims, including claims of fraudulent misrepresentation, unjust enrichment and civil conspiracy.)

The court rejected defendants’ argument that the matter lay beyond the purview of the judiciary, finding that the lawsuit did not involve issues that were “constitutionally committed to the exclusive authority of a political branch of government” or in which the judiciary lacked “discoverable or manageable standards with which to decide [the] case;” and that the case did not involve issues that were “impossible [to decide] without an ‘initial policy determination’ having been made by the elected branches.” The court explicitly joined ranks with the court in the *AEP* case regarding the “political question” doctrine, noting that “[a]lthough we arrived at our own decision independently, the Second Circuit’s reasoning [in *AEP*] is fully consistent with ours, particularly in its careful analysis of whether the case requires the court to address any specific issue that is constitutionally committed to another branch of government.”

The court gave short shrift to what defendants had characterized as the “attenuated” purported causal connection between the defendants’ claimed conduct and plaintiffs’ injuries. In the defendants’ view, the plaintiffs had not sufficiently alleged that the hurricane damage to their properties was traceable to the companies’ actions.

However, the court invoked the US Supreme Court’s decision in *Massachusetts v. EPA*, which it said seemed to

accept “as plausible the link between man-made greenhouse gas emissions and global warming [and that] rising ocean temperatures may contribute to the ferocity of hurricanes.” The court said “the [Supreme] Court accepted a causal chain virtually identical in part to that alleged by the plaintiffs” when it ruled in *Massachusetts v. EPA* that to satisfy the causal standard, the states merely had to show a contributing cause, not the main cause of their injuries. In addition, in a footnote, the court characterized the US Supreme Court in *Massachusetts v. EPA* as having “also recognized that the impact of Hurricane Katrina is arguably a result of this causation link.”

Kivalina

A very different result was reached by a federal district court in *Native Village of Kivalina v. Exxon Mobil Corporation*, No. C 08-1138 SBA (N.D. Cal. September 30, 2009). There, the court dismissed a lawsuit brought by the Alaskan village of Kivalina against two dozen energy and utility companies alleging that global climate change traceable to the defendants had led to the loss of the Arctic sea ice protecting the village from winter storms, and that the resulting erosion had threatened the habitability of the village. The plaintiffs did not seek injunctive relief, but instead sought damages for the cost of relocating the village.

The court found that it lacked subject matter jurisdiction pursuant to the “political question” doctrine. The court found that the “allocation of fault — and cost — of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.” The court observed that the plaintiffs’ claim of nuisance

requires the judiciary to make a policy decision about *who* should bear the cost of global warming. Though alleging that Defendants are responsible for a ‘substantial portion’ of greenhouse emissions, [] Plaintiffs also acknowledge that virtually everyone on Earth is responsible on some level for contributing to such emissions. Yet, by pressing this lawsuit, Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants . . . should be the only ones to bear the cost of contributing to global warming.

The court further found that the plaintiffs lacked standing, in light of the tenuous causal connection they alleged between the defendants’ conduct and plaintiffs’ claimed injuries:

Plaintiffs’ ... pleadings make[] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions

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by any specific person, entity, group at any particular point in time . . . it is not plausible to state which emissions – emitted by whom and at what time in the last several centuries and at what place in the world – ‘caused’ Plaintiffs’ alleged global warming related injuries.

Potential Impact

The plaintiffs’ bar, ever alert to new areas of potential corporate liability, is undoubtedly embracing *AEP* and *Comer* as representing a significant new litigation arena. Given the magnitude and importance of the issues presented, one might expect the appeals courts to revisit *AEP* and *Comer en banc*. However, if those decisions stand, they may well lead to an upsurge of public nuisance claims by private individuals, as well as by states and municipalities, alleging that companies’ carbon emissions have led to climate change that has, in turn, caused property damage. *Comer*, particularly, should give companies pause for, there, private property owners are pursuing not injunctive relief, but compensatory and punitive damages.

Yet there remain significant legal hurdles for a plaintiff bringing such a lawsuit. Denial of class certification may operate as a major deterrent to the plaintiff from proceeding with a suit and reduce significantly any potential recovery. To the extent that a climate change lawsuit is pursued as a class action, as in *Comer*, there remains an important question (not yet addressed in that case) whether class certification would be legally appropriate. There are a variety of reasons why these actions might be deemed unsuitable for class treatment. Material variations among class members, for example, may defeat the “typicality” of plaintiffs and “commonality” of issues required for class treatment. In addition, to the extent that plaintiffs claim that defendants’ conduct somehow affected them differently than it did others, a threshold investigation might be required before full membership of the putative class is defined — which may lead the court to find that class membership is not properly “ascertainable.”

Moreover, as the court emphasized in *Kivalina*, the requirement of proving causation in both fact and law will undoubtedly pose a significant hurdle for plaintiffs. Plaintiffs will presumably have to prove that the specific carbon emissions by the particular company or industry being sued are measurable and sufficient, in and of themselves, to alter the climate and precipitate the damage claimed by the particular plaintiff — and that those emissions in fact did so. Depending on the theories of liability pursued, issues of the scientific state of the art, including establishing what was scientifically known, when and by whom about the effects of

carbon emissions, will likely be part of the matters to be proved. Other critical questions may include whether a particular company or industry had a legal duty to take actions other than it did and, if so, how and when, as well as whether the plaintiffs themselves engaged in conduct that contributed to the damage for which they seek recovery.

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