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ClientAlert

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"Climate Change" Litigation Update -- Fifth Circuit Dismisses En Banc Appeal On Procedural Grounds, So District Court Decision Dismissing Claims Related To Climate Change Stands As Good Law

In an unusual procedural development, the Fifth Circuit has dismissed defendants' appeal in *Comer v. Murphy Oil USA*. Due to recusals in this case of eight of the sixteen judges on the Fifth Circuit, the court lost its quorum. Thus, it found, it could no longer entertain the appeal. The district court's opinion -- dismissing plaintiffs' lawsuit on the basis that it presented a non-justiciable "political question"-- thus remains good law.

As previously reported (*see* Client Alert, "*Climate Change*": *Litigation- And Regulatory Update* (Mar. 31, 2010)), in *Comer*, Mississippi property owners allege that the greenhouse gas emissions of defendants -- several oil, coal, and chemical companies -- contributed to climate change and amplified the property damage caused by Hurricane Katrina.[1] The district court had dismissed the lawsuit on political question and standing grounds, but a three-member panel of the Fifth Circuit reversed. *See Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). On February 26, 2010, nine judges (with seven judges having recused themselves) granted defendants' petition for rehearing *en banc*. The grant of rehearing *en banc* automatically "vacate[d] the panel opinion and judgment of" the Fifth Circuit. 5th Cir. R. 41.3.

Oral argument was scheduled to occur on May 24, 2010. However, on April 30, 2010, the Office of the Clerk of the Fifth Circuit announced the cancellation of *en banc* oral argument due to another judge's recusal, leaving only eight judges able to participate in the case. The Fifth Circuit then directed the parties to submit supplemental letter briefs as to what could and should be done where there was no longer a majority of the court available to hear the *en banc* appeal.

Following the parties' supplemental briefing, on May 28, 2010, a five-member majority of the eight remaining non-recused judges, issued an order dismissing the appeal. The majority reasoned that because they lacked a quorum, they could do nothing more than dismiss the appeal, and could not reinstate the Fifth Circuit's panel opinion. *See Comer v. Murphy Oil USA*, No. 07-60756, 2010 WL 2136658, at *4 (5th Cir. May 28, 2010). The court expressly rejected five other potential options: (1) asking the Chief Justice to appoint a judge from another Circuit to sit; (2) declaring that a quorum existed by defining "quorum" as constituting a majority of non-recused judges of the court; (3) adopting the Rule of Necessity, which allows disqualified judges to sit under certain circumstances; (4) "dis-enbancing" the

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[1] Also, in *Native Village of Kivalina v. Exxon Mobil Corp.*, No. 09-17490 (9th Cir.), a federal district court dismissed the lawsuit of a village against oil, energy and utility companies claiming that their greenhouse gas emissions threatened the habitability of the village. Plaintiff village's appeal is currently pending before the Ninth Circuit.

case and ordering the panel opinion reinstated; and (5) holding the case in abeyance until the composition of the court changed. *Id*. at *3-*4.

The Order, which directed the court Clerk to dismiss the appeal, noted that the *Comer* plaintiffs could petition for review by the U.S. Supreme Court. *Id*. at *4. In dissenting opinions, the three Fifth Circuit judges who had authored the original *Comer* decision argued that the court could and should hear the case.

The Potential Impact Of The Fifth Circuit's Decision

To the extent the Fifth Circuit's dismissal in *Comer* and the reinstatement of the district court's dismissal of plaintiffs' lawsuit constitute a substantive decision, it has created a conflict between the Fifth and Second Circuits on the political question doctrine and standing in climate change cases. In *Connecticut v. American Elec. Power Co. Inc*., 582 F.3d 309 (2d Cir. 2009) ("*AEP*"), the Second Circuit held that state governments and advocacy groups could seek injunctive relief against greenhouse gas-emitters based on federal common law nuisance and trespass theories. But unlike the Fifth Circuit in *Comer*, the Second Circuit denied defendants' petition for rehearing *en banc*. The defendants in *AEP* are scheduled to file their *certiorari* petitions to the U.S. Supreme Court on July 6, 2010. Assuming the *Comer* plaintiffs file similar petitions[2] and those petitions are granted, one could expect an interesting issue presented to the highest court. If the U.S. Supreme Court were inclined to view *Comer* (despite its peculiar procedural posture, lacking any ruling on the merits by the Fifth Circuit) as representing a split with *AEP*, the Supreme Court would have only the district court's opinion to work with -- which would essentially be tantamount to a direct review of the lower court's ruling.

Interestingly, in addition to the recusals of members of the Fifth Circuit in *Comer*, recusals could become an issue for the U.S. Supreme Court as well. For instance, Justice Sotomayor would likely recuse herself due to her participation in *AEP* when she was on the Second Circuit.[3] It is possible that she may also have to recuse herself in *Comer* (assuming a *certiorari* petition is filed and granted) since the issues presented there are so similar and related to those in *AEP*.

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Chadbourne & Parke LLP has extensive experience successfully defending complex class actions, tort, and nuisance actions, and can advise clients on issues regarding climate change and related legal issues.

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2 According to the Rules of the Supreme Court, plaintiffs have 90 days from May 28, 2010, the date of the Fifth Circuit's order, to do so.

3 For example, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 130 S.Ct. 1758 (2010), Justice Sotomayor did not take part in the consideration or decision, having decided an earlier issue in the case while sitting on the Second Circuit.

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