

# ClientAlert

March 31, 2010

## “Climate Change”: Litigation- and Regulatory Update

As previously reported in Client Alert, [\*Recent Decisions Permit Claims That Private Companies are Contributing to “Climate Change”\*](#) (Nov. 5, 2009), two federal courts of appeal recently permitted nuisance claims related to damage allegedly resulting from climate change to proceed, while a federal district court dismissed a similar lawsuit. There have been additional developments of interest in each of these cases and we provide an update below.

In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), a three-member panel of the Fifth Circuit revived a lawsuit filed by residents along the Mississippi Gulf coast against several corporations in the energy and fossil fuels industries, alleging they were responsible for property damage caused by Hurricane Katrina. Recently, the defendants’ petitions for rehearing *en banc*, filed on November 27 and November 30, 2009, were granted by the U.S. Court of Appeals for the Fifth Circuit on February 26, 2010 (see No. 07-60756 (5th Cir.)). Accordingly, the entire Fifth Circuit will now review the case. On March 23, 2010, the case was tentatively calendared for *en banc* oral argument for the week of May 24, 2010.

In *Connecticut v. American Elec. Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009), a two-judge panel of the U.S. Court of Appeals for 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.

Defendants’ petition for rehearing *en banc*, filed in the Second Circuit on November 5, 2009, was denied on March 10, 2010 (see No. 05-5119-cv (2d Cir.)). On March 11, 2010, certain defendants filed a motion to stay the Second Circuit’s issuance of the official “mandate” in the case until the defendants file a petition for *certiorari* to the U.S. Supreme Court. In their motion, defendants argued that the Supreme Court is “reasonably likely” to take the case because their petition for *certiorari* will present “substantial constitutional and jurisprudential questions.” In particular, defendants claimed that the Second Circuit panel’s “holdings [ ] regarding standing, displacement of federal common law, and the political question doctrine are, at the very least, in considerable tension with opinions of the Supreme Court . . . Furthermore, the issues addressed in the [Second Circuit’s] decision have been considered and decided by five courts thus far, with four district courts reaching conclusions that are exact opposites of those reached by this Court.” According to defendants, “[s]uch stark disagreement, coupled with the significance of the issues involved, shows that this case presents substantial questions for certiorari.” The Second Circuit granted defendants’ motion on March 16, 2010. Pursuant to the U.S. Supreme Court’s rules, defendants have 90 days in which to file their *certiorari* petition.

And in *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), plaintiff village has now appealed to the U.S. Court of Appeals for the Ninth Circuit from the district court’s order dismissing plaintiff’s lawsuit against oil, energy and utility companies claiming that their greenhouse gas emissions threatened the habitability of the village (see No. 09-17490 (9th Cir. (Nov. 5, 2009))). Briefing on the appeal began in March 2010 and is expected to conclude in April 2010.

On a related front, the Securities and Exchange Commission recently issued “Commission Guidance Regarding Disclosure Related to Climate Change” (the “Guidance”), which includes guidelines on existing SEC disclosure requirements relating to the issue of climate change (see 75 Fed. Reg. 6290, 17 C.F.R. Parts 211, 231 and 241). As previously noted in Client Alert, [SEC Releases Guidance on Climate Change Disclosure](#) (Feb. 19, 2010), the SEC has not established new legal requirements or modified existing disclosure requirements. Rather, the Agency issued the guidelines to assist companies in weighing the impact of climate change laws and regulations when assessing what information to disclose to their shareholders in corporate filings.

### **Chadbourne & Parke LLP**

*While the factual allegations raised by these lawsuits may be relatively untested, the underlying legal theories are not new. Chadbourne & Parke LLP has decades of experience successfully defending complex class actions, tort, and nuisance actions, including actions seeking injunctive relief, involving cutting-edge legal, environmental, and scientific issues, on behalf of a wide variety of clients.*

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