

## Companies in Hot Seat as Courts Advance Climate-Change Claims

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Three important court rulings have been handed down in recent weeks regarding claims for harm alleged to have resulted from “climate change” caused by private companies’ carbon emissions. Two of those decisions, by federal courts of appeal, found that such actions may proceed, while the third, by a lower federal court, ordered such a lawsuit dismissed.



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While the rulings thus reach very different results, and may each be subject to further review, they nonetheless raise potentially troubling issues for, and may signal what may prove to be a new era of litigation against, generators of carbon emissions. However, the fact that “climate change” claims have survived dismissal at this juncture does not establish that they will prevail over time. Even if the recent court of appeals decisions stand, the underlying claims in those cases present significant hurdles that may be exceedingly difficult for a



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plaintiff to overcome — including whether any of the cases may be properly certified as a class action and pursued on an aggregate basis, 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.

### [Connecticut v. American Electric Power Company Inc., Nos. 05-5104-cv, 05-5119-cv \(2nd Cir. Sept. 21, 2009\)](#)

In *AEP*, a two-judge panel of the 2nd U.S. Circuit Court of Appeals revived two lawsuits, originally brought in 2004 by eight states, the city of New York 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 permanently to enjoin 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 2nd Circuit 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 2nd Circuit 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. *AEP*, slip op. at 105 (emphasis in original; citation omitted). 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).” *AEP*, slip op. at 22-23 (emphasis in original). 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.’” *Id.* at 70 (citation omitted).

The court rejected the argument that the plaintiffs lacked standing, finding that plaintiffs had sufficiently alleged injury-in-fact (asserting not only current injuries (e.g., reduced snowpack in California and coastal erosion in Massachusetts) but also future injuries (e.g., risk of severe flooding due to rising sea levels)) alleged to be “fairly traceable” to the actions of the defendants, which injuries were “redressable” by the injunctive relief sought. *AEP*, slip op. at 36-64.

#### **[Comer v. Murphy Oil USA, No. 07-60756 \(5th Cir. Oct. 16, 2009\)](#)**

In *Comer*, a three-judge panel of 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 their lawsuit against 147 oil, chemical and electric generation company defendants. 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 in the vicinity of their dwellings. Plaintiffs sought compensatory and punitive damages.

The 5th Circuit in *Comer* concluded that plaintiffs did have standing to assert public and private nuisance claims, as well as trespass and negligence claims. (The panel 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;” nor that the case involved issues that were “impossible [to decide] without an ‘initial policy determination’ having been made by the elected branches,” that required “adherence to a political decision already made.” *Comer*, slip op. at 21, 26, 28, 30 (citations omitted). The *Comer* court explicitly joined ranks with the 2nd Circuit regarding the “political question” doctrine, noting that “[a]lthough we arrived at our own decision independently, the 2nd 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.” *Id.* at 29 n.15.

The court gave short shrift to what defendants had characterized as the “attenuated” purported causal connection between defendants’ claimed conduct and plaintiffs’ injuries. *Comer*, slip op. at 9. In defendants’ view, plaintiffs had not sufficiently alleged that the hurricane damage to their properties was traceable to the companies’ actions. The court, however, invoked the U.S. 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.” *Id.* at 10-11 (citing 549 U.S. 497, 521-23 (2007)). The 5th Circuit stated that “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. *Comer*, slip op. at 11-12. In addition, in a footnote, the court characterized the U.S. Supreme Court in *Massachusetts v. EPA* as having “also recognized that the impact of Hurricane Katrina is arguably a result of this causation link.” *Id.* at 11 n.4 (citing 549 U.S. at 522 n.18).

***Native Village of Kivalina v. Exxon Mobil Corporation, No. C 08-1138 SBA (N.D. Cal. Sept. 30, 2009)***

A very different result was reached by a federal district court in *Kivalina*. 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. 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.” *Kivalina*, slip op. at 15. 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.” *Id.* at 14-15 (emphasis in original).

The court further found that 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 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.” *Kivalina*, slip op. at 20.

Plaintiffs in *Kivalina* filed a notice of appeal to the 9th Circuit on Nov. 5, 2009. Briefing on the

appeal will begin in February of 2010 and conclude in April of 2010.

### **The Potential Impact of These Decisions**

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 2nd and 5th circuits to revisit *AEP* and *Comer* en banc. Defendants’ petition for rehearing en banc in *AEP*, filed on Nov. 5, 2009, remains pending. Defendants’ petitions for rehearing en banc, filed in *Comer* on Nov. 27 and Nov. 30, 2009, also remain pending. If those decisions stand, however, 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 in these actions. Denial of class certification may operate as a major deterrent to the plaintiff from proceeding with a lawsuit, 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 impacted 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-fact and legal causation 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 upon 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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