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Federal Courts Conflicted on Climate Change Litigation

Three recent federal court decisions sharply divide on whether large carbon emitters may be sued under common law theories of nuisance and negligence.

Connecticut v. American Electric Power Company

In the first case, the Second Circuit ruled that eight states, a city and three land trusts may proceed with their claims against six electric power corporations for contributing to the “public nuisance” of global warming. *State of Connecticut v. American Electric Power Company, Inc. (AEP)*, 582 F.3d 309 (2d. Cir., Sept. 21, 2009). According to the lawsuit, these power corporations own and operate fossil-fuel-fired power plants in 20 states and are among the largest carbon emitters in the world. Seeking to abate the defendants’ contributions to global warming, the plaintiffs sued the defendants under both federal and state nuisance law. Concluding that plaintiffs stated a claim under federal nuisance law, the court rejected arguments that the plaintiffs lacked standing, that plaintiffs’ claims were barred by the political question doctrine, and that federal legislation had displaced plaintiffs’ claims.

In so doing, the court dismissed the power corporations’ arguments that the causal link involving climate change was too tenuous. Instead, for purposes of Article III standing, the court held that the defendants’ emissions need only to “contribute” to plaintiffs’ injuries. Lauding “the federal courts’ masterful handling of complex public nuisance issues” in the past, the court thus concluded that the federal courts were similarly well equipped to handle cases involving climate change litigation. *Id.* at 327. The court also noted that the Environmental Protection Agency had not completed its rulemaking process to regulate greenhouse gas under the Clean Air Act, and that the corporations could not show that any federal legislation had otherwise displaced plaintiffs’ claims. The defendants filed a motion for reconsideration before the full circuit court on November 5, 2009.

Native Village of Kivalina v. ExxonMobil

In the second case, a federal district court in California sided with the defendants, 24 oil, energy and utility companies, against the Village of Kivalina, a small, self-governing tribe of Inupiat people who reside north of the Arctic Circle. *Native Village of Kivalina v. ExxonMobil Corp.*, 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009). The residents of Kivalina had sued the defendants for damages under federal nuisance law, based on the defendants’ contributions to global warming. The villagers argued that, as a result of global warming, “the sea ice now attaches to the Kivalina coast later in the year and breaks up earlier and is thinner and less extensive than before, thus subjecting Kivalina to coastal storm waves and surges.” *Id.* at *1.

In dismissing the plaintiffs’ claims, the *Kivalina* court strongly disagreed with the Second Circuit’s decision in *AEP*—a decision issued less than two weeks before its own. Notably, the *Kivalina* court was “not so sanguine” as the *AEP* court regarding the federal courts’ competency in dealing with the complexities inherent in climate change litigation. The *Kivalina* court also noted that “Plaintiffs’ global warming claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere.” *Id.* at *8 (emphasis in original).

Applying the political question doctrine to bar plaintiffs’ claims, the *Kivalina* court concluded that neither the plaintiffs nor the *AEP* court “offer[] any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue.” *Id.* The court also dismissed the *AEP* court’s standing analysis, reasoning that “no federal standards limit[] the discharge of greenhouse gases.” *Id.* at *12. In light of this fact, and

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the plaintiffs’ “attenuated causation scenario,” the *Kivalina* court held that defendants’ contributions to global warming were “irrelevant” since “a discharge, standing alone, is insufficient to establish injury.” *Id.*

Comer v. Murphy Oil USA

In the third case—decided less than one month after *AEP* and *Kivalina*—the Fifth Circuit sided with the plaintiffs, property owners along the Mississippi Gulf Coast, against the defendants, various oil, energy, and chemical companies doing business in Mississippi and elsewhere in the United States. *Comer v. Murphy Oil USA*, 2009 WL 3321493 (5th Cir. Oct. 16, 2009). Here, the plaintiffs alleged that these companies’ greenhouse gas emissions had “contributed to global warming, viz., the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs’ private property” and other injuries. *Id.* at *2.

Reversing the lower court’s grant of summary judgment to the defendants, the *Comer* court held that the plaintiffs had standing to pursue their state-law claims of nuisance, trespass and negligence. In so doing, the *Comer* court relied, as the *AEP* court had done, on the U.S. Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In the *Massachusetts* decision, the Supreme Court concluded that Massachusetts and other petitioners had standing to sue the EPA for failing to regulate greenhouse gases. The *Comer* court noted that “the defendants’ main contentions are similar to those rejected by the Supreme Court in *Massachusetts v. EPA*.” Thus, the *Comer* court found that “the causal link between emissions, sea level rise, and Hurricane Katrina” was not too attenuated, and that plaintiffs’ injuries were fairly traceable, even though the “defendants’ actions are only one of many contributions to greenhouse gas emissions.” *Id.* at *5-6. The *Comer* court also found the political question doctrine to be inapplicable, noting that “the only ‘issues’ are those inherent in the adjudication of plaintiffs’ Mississippi common law tort claims for damages” and that common law tort rules provided the “judicially discoverable and manageable standards with which to decide this case.” *Id.* at *16.

But the *Comer* court did conclude that the plaintiffs did not have standing to bring their unjust enrichment, fraudulent misrepresentation and civil conspiracy claims. The *Comer* court considered these claims to “alleg[e] a massive fraud on the political system resulting in the failure of environmental regulators to impose proper costs on the defendants.” *Id.* at *9. As such, this “generalized grievance is better left to the representative branches.” *Id.* It is expected that the defendants will file a petition for reconsideration in this matter before the entire Circuit.

Conclusion

While these cases are still in their infancy, *AEP* and *Comer*, on one hand, and *Kivalina*, on the other, show that federal courts are sharply divided over climate change litigation. Nonetheless, plaintiffs and their attorneys will take great comfort from their initial successes in *AEP* and *Comer*. Absent federal legislation or rulemaking, large carbon emitters—including energy companies, oil and gas companies, and utilities—may increasingly find themselves mired in litigation over complex and controversial climate change issues.



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