

Second and Fifth Circuits Open the Door to Climate Change Public Nuisance Lawsuits

Catching many by surprise, in the last several weeks two federal appellate courts have ruled that public nuisance tort lawsuits may go forward on theories related to climate change. Both the Second¹ and Fifth² Circuits overturned lower court decisions that had rejected this kind of litigation as falling within the “political question” domain that the Constitution directs courts not to decide. There are big hurdles between allowing these lawsuits and reaching a litigated judgment that holds companies that emit greenhouse gases liable for monetary damages allegedly resulting from global warming. However, there is no question that these decisions have the potential to usher in a wave of nuisance suits for damages against virtually any emitter of greenhouse gases.

Of the two decisions, the Fifth Circuit decision in *Comer v. Murphy Oil* is the more sweeping. While the Second Circuit case seeks injunctive relief on behalf of several states and land trusts, the Fifth Circuit litigation was brought by private class action plaintiffs suing under state law for compensatory and punitive damages. The case involves claims by homeowners in Mississippi who argue their property damage from Hurricane Katrina was due to stronger hurricane intensity caused by greenhouse gas emissions from oil, gas, and coal companies, including a number of major oil companies. In allowing the lawsuit to go forward, the Fifth Circuit concluded that the plaintiffs’ theory was not materially different from that relied upon by the Supreme Court in *Massachusetts v. EPA*,³ the landmark decision that required the Environmental Protection Agency to consider whether carbon dioxide is a pollutant under the Clean Air Act: “Thus, the [Supreme] Court accepted a causal chain virtually identical in part to that alleged by plaintiffs, *viz.*, that defendants’ greenhouse gas emissions contributed to warming of the environment, including the ocean’s temperature, which damaged plaintiffs’ coastal Mississippi property via sea level rise and the increased intensity of Hurricane Katrina.”⁴

It is one thing to meet the threshold for establishing standing to maintain a lawsuit, and another thing entirely to win on the merits. As a first step, it is likely that defendants will seek rehearing, in an effort to subject these decisions to consideration by the full set of Second and Fifth Circuit judges; this will test whether those full Courts of Appeals agree with opinions issued by, respectively, two- and three-judge panels.⁵ Beyond that, a major legal battle lies ahead for the plaintiffs in trying to prove their property losses were caused by the carbon dioxide emissions generated by the defendants, and distinguishing the responsibility those companies may bear for global warming from what is due to emissions contributed by so many other sources. Even if defendants prevail in the end, however, the transaction costs of defending these lawsuits are bound to be significant. And in the meanwhile, there is no analytical distinction between the defendants named in these two recent cases and any other carbon dioxide emitters that the next group of plaintiffs may choose to target. The implications for U.S. businesses are substantial.

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Endnotes

- 1 *Connecticut v. American Electric Power Co.*, No. 05-5104, 2009 U.S. App. LEXIS 20873 (2d Cir., Sept. 21, 2009).
- 2 *Comer v. Murphy Oil Co.*, No. 07-60756, 2009 U.S. App. LEXIS 22774 (5th Cir., Oct. 16, 2009).
- 3 *Massachusetts v. EPA*, 549 U.S. 497 (2007). EPA is proceeding to develop a series of greenhouse gas regulatory requirements based on the Supreme Court's mandate.
- 4 *Comer v. Murphy Oil Co.*, slip op. at 23.
- 5 Among other issues, defendants will surely point out that the Supreme Court's 5-4 decision in *Massachusetts v. EPA* depended heavily on the fact that the plaintiffs in that case were states and had unique standing to raise climate change concerns. While this may make the Second Circuit's decision in *Connecticut v. American Electric Power Co.*, more likely to be sustained on rehearing, (or on review by the Supreme Court), since *Connecticut* also involves state plaintiffs, it offers much less comfort to the Fifth Circuit's application of this reasoning to accord standing to private plaintiffs in personal injury tort actions for compensatory and punitive damages.

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