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Emissions of Greenhouse Gases & Global Warming – Regulation through Litigation?

Who is Liable for Damages Arising from Global Warming?

I. Introduction

Two recent United States Court of Appeals decisions may herald a new wave of litigation for damages arising from greenhouse gas emissions. Plaintiffs, relying on the federal and state common law of public and private nuisance, as well as other common law tort theories, and encouraged by the prospect of potentially substantial compensatory and punitive damage awards, may sue public sector and private industry defendants, contending that their emissions of greenhouse gases have caused or contributed to global warming, in turn, harming the plaintiffs.[1] In the course of resolving those lawsuits, courts are likely to be called upon to make judgments that practitioners might expect would be made, at least in the first instance, by Congress or by regulatory agencies.

On September 21, 2009, in what is certain to be a landmark decision, a panel of the United States Court of Appeals for the Second Circuit decided two consolidated cases of great potential significance to climate change, global warming and related subjects, including the political question doctrine:[2] *State of Connecticut v. American Elec. Power Co., Inc.* and *Open Space Inst., Inc. v. American Elec. Power Co., Inc.*, Nos. 05-5104-CV and 05-5119-CV, 2009 WL 2996729 (2d Cir. Sept. 21, 2009) (*Connecticut*). For the first time, the federal common law of public nuisance was found to apply to claims to abate global warming.

Less than a month later, on October 16, a panel of the Fifth Circuit similarly held that plaintiffs asserting claims for damages incurred as the result of Hurricane Katrina had "standing to assert their public and private nuisance, trespass, and negligence claims [for global warming] and that none of these claims present[s] nonjusticiable political questions …"[3]. *Comer v. Murphy Oil USA*, No. 07-60756, 2009 WL 3321493, at *2 (5th Cir. Oct. 16, 2009) (*Comer*).

[1] Some commentators have suggested that this new wave of litigation could rival the asbestos litigation in scope and complexity.

[2] The consolidated cases were argued in June 2006 before a panel that included then Circuit Judge Sonia Sotomayor. After the oral argument, but before the case was decided, Judge Sotomayor was elevated to the Supreme Court. The remaining panel members, Circuit Judges Peter W. Hall (author of the opinion) and Joseph M. McLaughlin, "who are in agreement, have determined the matter." [citations omitted] Presumably, if the cases were to reach the Supreme Court, as seems a reasonable possibility, Justice Sotomayor, who participated in the oral argument of the cases in the Court of Appeals, may recuse herself. As a possible swing vote, her recusal could potentially affect the outcome of the appeal and any other appeals that might be consolidated with the appeal.

[3] The court affirmed dismissal of plaintiffs' unjust enrichment, fraudulent misrepresentation and civil conspiracy claims for prudential standing reasons.

Meanwhile, on September 30, 2009, after *Connecticut*, but before *Comer*, the United States District Court for the Northern District of California dismissed similar claims asserted by an Alaska village, on the ground that they presented non-justiciable political questions, explicitly rejecting the reasoning of the Second Circuit in *Connecticut*. *Native Village of Kivalina & City of Kivalina v. ExxonMobil Corp. et al.*, No. C08-1138, 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009) (*Kivalina*). In light of *Connecticut* and *Comer*, *Kivalina* can be expected to be appealed to the Ninth Circuit.

II. Connecticut

In *Connecticut*, eight states, the City of New York and three private land trusts sued five electric power companies that own and operate fossil-fuel power plants in twenty states, as well as the Tennessee Valley Authority (TVA), seeking injunctive relief, to "abate[] Defendants' ongoing contributions to the public nuisance of global warming." Defendants moved to dismiss the complaints, arguing that the cases presented non-justiciable political questions, that the plaintiffs lacked standing to sue, that the plaintiffs had failed to state claims for private and public nuisance upon which relief could be granted under the federal common law, and that the plaintiffs' claims had been "displaced" by federal legislation. TVA also argued that the discretionary function exception provided it with immunity from suit.

The district court dismissed the plaintiffs' complaints, holding that plaintiffs' claims presented a non-justiciable political question. *State of Connecticut v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). As a result, the district court did not reach the remaining contentions made by the defendants, including questions related to the standing of the plaintiffs and the merits of their nuisance claims.

In a lengthy opinion, the Second Circuit panel held that the plaintiffs' complaints did not present a non-justiciable political question, but instead stated a claim for common law nuisance similar to tort claims the federal courts have been adjudicating for years. The panel analyzed six factors, or "formulations," that the Supreme Court identified in *Baker v. Carr*, 369 U.S. 86 (1962) (*Baker*), as attributes of non-justiciable political questions, observing that *Baker* "set a high bar for nonjusticiability." *Connecticut*, 2009 WL 2996729, at *6. The court concluded that the plaintiffs' claims did not represent a domestic controversy implicating constitutional issues (because an analysis of "the Constitution to determine whether adjudication of a dispute is 'textually committed' to the Executive or Legislative branches" yielded no such commitment) or the conduct of foreign relations. After examining the six *Baker* "formulations" for the identification of non-justiciable political questions, the panel held "that the district court erred when it dismissed the complaints on the ground that they presented non-justiciable political questions." *Id.* at *16.

Having found that the complaints did not present non-justiciable political questions, the panel, in the interests of judicial economy, went on to resolve the remaining issues raised by the defendants in their motions to dismiss that had not been decided by the district court. The court held that "[t]he States have *parens patriae* and Article III standing, in their quasi-sovereign and proprietary capacities, respectively, and New York City and the Trusts have Article III standing," that "[a]ll parties have stated a claim under the federal common law of nuisance" grounded in the definition of "public nuisance" found in Section 821B of the Restatement (Second) of Torts and that "[f]ederal statutes have not displaced Plaintiffs' federal common law of nuisance claim."[4] *Id.* at *73. The court vacated the judgment of the district court and remanded the case for further proceedings.

III. *Comer*

In *Comer*, plaintiffs, residents and owners of property along the Mississippi Gulf coast filed a putative class action against a number of oil and energy companies, alleging that the operations of the defendants emitted greenhouse gases that contributed to global warming, causing a rise in sea levels and adding to the ferocity of Hurricane

[4] As the *Connecticut* court explained, "displacement" refers to a situation in which a federal statute governs a question which had previously been the subject of federal common law; whereas, "pre-emption" generally refers to a situation in which a federal statute supersedes state law, although the terms are frequently used interchangeably. *Connecticut*, 2009 WL 2996729, at *44.

Katrina. The hurricane had allegedly destroyed plaintiffs' private property and public property useful to them. The *Comer* complaint invoked the diversity jurisdiction of the district court, and alleged a number of claims based on state common law theories including public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy. Unlike the plaintiffs in *Connecticut*, the *Comer* plaintiffs sought monetary damages and not injunctive relief and asserted no claims under federal law. However, just like the district court in *Connecticut*, the district court in *Comer* dismissed plaintiffs' complaint on the ground that their claims presented non-justiciable political questions. Plaintiffs timely appealed to the United States Court of Appeals for the Fifth Circuit.

In its opinion, the Fifth Circuit panel turned first to the issue of whether plaintiffs had standing to bring their claims against defendants, and held that "[p]laintiffs' claims easily satisf[ied] Mississippi's 'liberal standing requirements.'" *Comer*, 2009 WL 3321493, at *3. (citation omitted). Turning to the "more rigorous" Article III federal standing inquiry,[5] the court held, and the defendants conceded, that the plaintiffs "sustained actual, concrete injury in fact to their particular lands and property, [which] can be redressed by the compensatory and punitive damages [plaintiffs] seek for those injuries." That said, defendants and the court focused on the requirement that the harms alleged must be "fairly traceable" to the conduct of the defendants. *Id.* at *5. In deciding that the plaintiffs had also met this standing requirement, the Fifth Circuit panel observed that "for issues of causation, the Article III traceability requirement 'need not be as close as the proximate causation needed to succeed on the merits of a tort claim';…[r]ather, an indirect causal relationship will suffice, so long as there is a 'fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant.'" *Id.* The court then went on to find that the alleged indirect connection between the defendants' alleged conduct and the injuries plaintiffs claimed they suffered was "fairly traceable." The Fifth Circuit panel, however, held that only plaintiffs' public and private nuisance, trespass, and negligence claims satisfied Article III standing requirements. By contrast, the court held that plaintiffs' claims based on theories of unjust enrichment, fraudulent misrepresentation and civil conspiracy did not satisfy federal prudential standing requirements, which embody "'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Comer*, 2009 WL 3321493, at *8, *quoting Allen v. Wright*, 468 U.S. 737, 751 (1984). Those claims, the court found, presented a "generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American Public." *Id.* In doing so, the Fifth Circuit panel distinguished plaintiffs' nuisance, trespass and negligence claims as presenting more particularized injuries as the plaintiffs alleged that they had been directly impacted by Hurricane Katrina.

After finding that plaintiffs had Article III standing to assert their nuisance, trespass and negligence claims, the Fifth Circuit panel went on to conclude that plaintiffs' claims alleging damages from defendants' greenhouse gas emissions were not non-justiciable political questions.

While both *Connecticut* and *Comer* concluded that plaintiffs' tort claims presented justiciable issues, their analysis was somewhat different. In *Connecticut*, the Second Circuit carefully applied the analytical framework enunciated in *Baker*. In *Comer*, while the Fifth Circuit referred to the *Baker* analysis, it concluded that an application of that analysis was unnecessary as defendants had "failed to articulate how any material issue is exclusively committed by the Constitution or federal laws to the federal political branches." *Comer*, 2009 WL 3321493, at *16.[6] Recognizing that it was too early in the proceedings to determine if plaintiffs could actually prove all the elements of a claim under

[5] The court observed that "[a]rticle III standing is an 'irreducible constitutional minimum'" requiring plaintiffs to demonstrate that they have suffered "injury in fact" that is "fairly traceable" to the defendants' acts or omissions and that the injury can be redressed by a favorable decision. *Comer,* 2009 WL 3321493, at *4.

[6] The Fifth Circuit acknowledged the Second Circuit decision in *Connecticut*, and concluded that "[a]lthough we arrived at our own decision independently, the Second Circuit's reasoning 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." *Comer,* 2009 WL 3321493, at *17 n.15.

Mississippi tort law, the Fifth Circuit concluded that plaintiffs' first set of claims were justiciable and that plaintiffs had pleaded sufficient facts to satisfy applicable standing requirements. *Id.* at *20. Accordingly, the case was remanded to the district court for further proceedings.

IV. Kivalina

In *Kivalina*, a native Inupiat Eskimo village and the City of Kivalina, Alaska, brought an action in federal court against 24 oil, energy and utility companies, alleging that as a result of defendants' contribution to excessive emissions of greenhouse gases, global temperatures have risen, causing the arctic sea ice that protects the coastline to diminish, exposing their shoreline communities to enhanced winter storms and the resultant erosion and destruction. Ultimately, plaintiffs alleged, global warming will require relocation of the residents. The *Kivalina* plaintiffs asserted claims for damages for the costs of relocating their residents based on state and federal tort theories, including a federal common law claim of public nuisance, state common law claims of public and private nuisance, civil conspiracy and concert of action.

The district court dismissed plaintiffs' complaint for lack of subject matter jurisdiction, on the ground that the plaintiffs' claims presented non-justiciable political questions. In performing its analysis, the court applied a "distilled approach" to the *Baker* "formulations," grouping the six "formulations" into three issues: "(i) Does the issue involve a resolution of questions committed by the text of the Constitution to a coordinate branch of Government ?, (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? [and] (iii) Do prudential considerations counsel against judicial intervention?" As to the first question, the defendants argued that the complaint implicated foreign policy issues committed to the Executive, but the court concluded that "[t]he indisputably international dimension of this particular environmental problem does not render the instant controversy a non-justiciable one." *Kivalina*, 2009 WL 3326113, at *6.

As to the second distilled "formulation," the court concluded that plaintiffs had "fail[ed] to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." *Id*. (citation omitted). The court noted that adjudication of a public nuisance claim would require a comparison of the social utility of the defendants' activities against the gravity of the harm, something a court is not equipped to do. *Id*. at 7. In reaching that conclusion, the court explicitly rejected the reasoning of the Second Circuit in *Connecticut*. According to the district court, *Connecticut* and the cases upon which it relied "involved a discrete number of 'polluters' that were identified as causing a specific injury to a specific area." *Id*. at 8. By contrast, as the *Kivalina* plaintiffs apparently conceded, a global warming claim is "entirely different" in that it is "based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere*." *Id.* (emphasis in original). The court first concluded that there were no judicially discoverable and manageable standards to apply to plaintiffs' federal common law global warming claims. The court recognized that, unlike tort claims based upon air and water pollution, tort claims based upon the emission of greenhouse gases would involve innumerable sources located throughout the world. *Kivalina*, 2009 WL 3326113, at *8.

The court also found that adjudication of plaintiffs' claims would require the court to make initial policy determinations that are beyond the competence of the judiciary, such as "balancing the social utility of Defendants' conduct with the harm it inflicts," and determining "who should bear the cost of global warming," since plaintiffs acknowledged "that virtually everyone on Earth is responsible on some level for contributing to such emissions." *Id.* at 10. These, the court concluded, are non-justiciable political questions. *Id.*

Finally, the court found that plaintiffs lacked Article III standing because their injuries were not "fairly traceable" to defendants' conduct. Since the court lacked subject matter jurisdiction over plaintiffs' federal claim, the court declined to exercise supplemental jurisdiction over plaintiffs' remaining state law claims. *Id.* at *15.

V. Future of the Litigation

As a result of these recent decisions, two cases have been remanded to district courts for further proceedings (although either or both may be the subject of petitions for *en banc* review by the full Second and Fifth Circuit Courts of Appeals, or of petitions to the Supreme Court for writs of certiorari) and one case would appear to be on its way to the Ninth Circuit Court of Appeals. These untested waters may yield some dramatic results. First, the defendants in both cases now pending in the district courts are likely to diffuse their own potential liability by impleading, or attempting to implead, scores, if not hundreds or thousands of other emitters of greenhouse gases. Second, both Circuit Courts of Appeals acknowledged that the scrutiny of plaintiffs' claims will be far more rigorous on the merits than it was for purposes of the initial motions to dismiss, *see Connecticut*, 2009 WL 2996729, at *30; *Comer*, 2009 WL 3321493, at *20, so further motion practice, and potentially important rulings, can be anticipated as the cases march through pretrial discovery and are prepared for trial. Third, at the end of the day, the district courts will have to confront the underlying dilemma of how global warming is to be addressed. Resolution of that dilemma will require the district courts to decide many thorny issues, such as: (a) what quantum of proof will be needed to establish that releases of greenhouse gases proximately caused the harm alleged by plaintiffs, (b) whether that harm is indivisible such that defendants will be jointly and severally liable, or whether there is a reasonable basis upon which the harm, even if it is a single harm, can be apportioned among those responsible, *see Burlington No. & Santa Fe R. Co. v. United States*, 129 S. Ct. 1870 (2009), (c) what role will Section 433A of the Restatement (Second) of Torts play in resolving plaintiffs' claims, (d) should these cases proceed as class actions, (e) can the plaintiffs recover their attorney fees and costs, and (f) can plaintiffs recover punitive damages; must they prove malice or recklessness? Will this litigation come to resemble the asbestos cases, with huge multi-party, multi-jurisdictional proceedings? Finally, the plaintiffs' bar will be watching with great anticipation for the development of another wave of costly and time consuming, but potentially lucrative, litigation, possibly following in the tracks of asbestos. Potential defendants and their counsel will be wise to watch whether Congress intervenes to prevent these cases from becoming the next iteration of asbestos. They will also be wise to consider whether they may have insurance coverage to protect them against what could be a coming onslaught.