Class Action Watch

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Global Warming Nuisance Suits Given a Cool Reception in Court

by Megan L. Brown & Roger H. Miksad

For the better part of a decade, courts have confronted several global warming nuisance suits that seek to persuade judges and juries to play a role in assigning responsibility and remedies for alleged harms flowing from climate change. From New York to California, these creative lawsuits have uniformly been rebuffed by trial courts, but they have spawned protracted litigation up and down the federal judiciary over the proper role of courts in setting environmental standards.

At their core, these nuisance cases seek to change the way energy is produced and regulated in this country by requiring private companies to internalize the impacts of activities that produce greenhouse gases, through imposition of compensatory and punitive damages and mandatory judicial emissions caps. Plaintiffs want courts to spur "practical" options such as "changing fuels" and "increasing generation from . . . wind, solar," and other sources that plaintiffs predict will "reduc[e] carbon dioxide emissions without significantly increasing the cost of electricity."[1] To many of them, "Article III resolution is the only viable choice here as the branches of government authorized by Articles I and II of the U.S. Constitution have refused to act."[2]

Although the Supreme Court in *AEP v. Connecticut*[3] closed the courts to certain global warming nuisance suits, key cases remain pending. A class action, *Comer v. Murphy Oil*, was dismissed in 2007 by a court in Mississippi but was refiled and has been dismissed again after *AEP*. It is currently on appeal to the Fifth Circuit. Another case, *Kivalina v. ExxonMobil*, is pending at the Ninth Circuit. These disputes show that there remains continuing uncertainty over key legal questions and that the Supreme Court has not yet had the last word on global warming nuisance suits.

Water Under the Bridge: A Recap of Three Different Cases

American Electric Power (New York)

In *American Electric Power Co. v. Connecticut* ("*AEP*"),[4] several states and land trusts alleged that named energy companies' greenhouse gas emissions constitute a public nuisance under federal common law. Beyond the novel nuisance theory, the case was unusual

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Touching on the Merits When Deciding Class Certification Motions: Ohio's Experience

by Richard A. Samp

The Supreme Court's *Wal-Mart* decision[1] put to rest persistent arguments that federal courts, when deciding whether to certify a class, should accept (without further proof) some or all of the allegations in the plaintiffs' complaint. The Court made clear that "Rule 23 does not set forth a mere pleading standard" and that a plaintiff seeking class certification "must be prepared to prove" that he has met the Rule 23 prerequisites, regardless whether such proof ends up duplicating questions of fact or law that he will need to demonstrate in order to prevail on the merits.[2]

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20 *See* Lumen v. Anderson, No. 08-0514-CV-W-HFS, 2012 WL 444019, at *9 & n.8 (W.D. Mo. Feb. 10, 2012) (citing *Zurn* in support of decision to deny *Daubert* motion before briefing on it was complete). It is also worth remembering that *Wal-Mart* only binds federal courts, and to the extent removal to federal court under the Class Action Fairness Act is not possible, pre-*Wal-Mart* standards may apply in state-court certification proceedings. *See, e.g.,* Howe v. Microsoft Corp., 656 N.W.2d 285, 295-96 (S.D. 2003) ("As long as the basis of the expert's opinion is not so blatantly flawed that, on its face, it would be inadmissible as a matter of law, the court may consider the expert's evidence in determining whether to certify the class action.").

21 No. C 08–00722 EDL, 2011 WL 7710257 (N.D. Cal. Aug. 30, 2011), *reconsideration denied*, 2011 WL 5573466 (Nov. 15, 2011), *pet. for leave to appeal denied*, No. 11-80287 (9th Cir. Feb. 17, 2012).

22 2011 WL 7710257, at *18-*20.

23 2011 WL 5573466 at *11.

24 No. CV 10–05944 MMM (JCx), 2012 WL 1066755, at *4-*5 (C.D. Cal. Mar. 28, 2012).

25 *Id.* at *13-*15.

26 *See* West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).

Touching on the Merits When Deciding Class Certification Motions: Ohio's Experience

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Of course, state courts do not necessarily follow the U.S. Supreme Court's lead on certification issues, and some have been reluctant to permit defendants to seek to defeat class certification by contesting questions of fact or law that relate directly to the merits of the plaintiff's claims. Ohio is one such state; but an interesting case—in which a petition for review has been filed in the Ohio Supreme Court—provides an opportunity for Ohio to decide whether to bring its class certification rules into conformance with federal rules.

The case involves a claim by an auto insurance policy holder, Michael Cullen, that his insurer should have paid to replace his car windshield rather than to repair it. In general, insurers give their policy holders the right to insist upon replacement of a damaged windshield. However, many insurers (including the defendant, State Farm Mutual Automobile Insurance Co.) attempt to persuade their insureds to agree to repair windshields that have experienced very minor damage, such as small cracks caused by a stone. State Farm persuaded Cullen to opt for windshield repair instead of replacement, by assuring him that repair was as effective as replacement for very small cracks and by agreeing to pay for the repair in full (i.e., it waived the $250 deductible on Cullen's policy). Cullen never complained about the quality of the repair and continued to drive the same car with the same windshield for many years thereafter.

Cullen later sued State Farm, claiming breach of contract, bad faith, and breach of fiduciary duty. He contended that his insurance contract gave him the option to demand a cash payment equal to the cost of replacing his windshield (less his deductible) and then decide for himself whether to repair or replace his windshield or simply to retain the payment. He further contended that State Farm inappropriately failed to inform him of this "cash out" option, and that he would have chosen that option if it had been offered to him. Because replacement of a windshield costs more than repair, he contends that he would have derived a financial benefit (even taking into account his $250 policy deductible) if he had exercised the "cash out" option and paid for the repairs himself.

In September 2010, the trial court granted Cullen's motion to certify a plaintiff class under both Ohio Rule of Civil Procedure 23(B)(2) and Rule 23(B)(3). The 100,000-member certified class comprises all Ohio policy holders insured by State Farm who, at any time after January 1, 1991, submitted a "glass-only" damage claim (i.e., no damage to the car other than to the windshield) that was resolved by payment of the cost of repairing the windshield. In determining that the prerequisites for certification had been met, the trial court relied in several respects on the allegations of the complaint without requiring additional proof from the plaintiff. The Ohio Court of Appeals affirmed the certification order in December 2011.[3] State Farm petitioned for Supreme Court review on March 30, 2012.

The wording of Ohio Rule 23 is substantially identical to the Federal Rule 23. Indeed, the Ohio Supreme Court has repeatedly counseled Ohio courts to look to federal authority for guidance in understanding and applying the Ohio rule.[4] Ohio courts nonetheless have often declined to permit defendants to oppose class certification by introducing evidence that goes to the merits of the plaintiffs' claims, even when the evidence is relevant to whether the prerequisites of Ohio Rule 23 have been met.[5] The appeals court expressed similar reluctance in its opinion affirming class certification.[6] State Farm's petition for review asks the Ohio Supreme Court to reconsider that position in light of the *Wal-Mart* decision.

The trial court declined to require the plaintiff to present evidence on several issues relevant to whether common questions of fact and law predominate over individual issues. For example, State Farm presented evidence indicating that it would be impossible to determine in advance of trial who was a member of the plaintiff class. That difficulty arises because the class definition is limited to policy holders who suffered a loss under the plaintiff's theory of the case (i.e., policy holders who could have pocketed cash had they asked to be paid the cash value of a replacement windshield). Policy holders whose deductible exceeded the cash value of a replacement windshield are, accordingly, not included within the class. State Farm presented evidence that the cash value of a replacement windshield varies significantly from class member to class member, based on such factors as car make and model, geographic location, and market conditions at the time of replacement. But the trial and appeals courts simply accepted the plaintiff's allegation (without supporting evidence) that "a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible can be accomplished without trying the issues of the case and can be done in a straight forward, mechanical manner."[7] The courts similarly concluded, based on the plaintiff's allegations, that "computerized algorithms and State Farm's databases" would be sufficient to allow damages of each class member to be calculated accurately."[8] The only evidence submitted to the trial court regarding damage calculations came from State Farm, whose evidence tended to show that its databases did not include sufficient information from which to calculate the damages of individual class members.

State Farm also argues that the appeals court erred in failing to address the legal issue at the heart of the dispute: whether State Farm policies really do offer policy holders a "cash out" option. The plaintiff asserts a contractual right to a cash payment of several hundred dollars (the cost of replacing his windshield less his deductible) to pay the $25 to $50 necessary to have the scratch on his windshield repaired, and then to pocket the difference. State Farm argues that the plain meaning of its policies is that it is only required to pay the amount necessary to return the car to its pre-loss condition (in this case, the cost of windshield repair). The appeals court held that the contractual interpretation issue was a merits-based issue of law that should only be determined at trial or in connection with a motion for summary judgment.[9] State Farm contends that the issue should be determined in connection with class certification because if State Farm policies are not deemed to include a "cash out" option, then the class will not meet the prerequisites of Ohio Rule 23(B)(3); under those circumstances, common questions of fact and law would not predominate over individual questions.

The Ohio appeals court does not stand alone in concluding that merits-based contractual interpretation issues should not be decided in connection with class certification motions even when relevant to Rule 23(B)(3) issues. Indeed, a number of federal appeals courts have reached similar conclusions. Both the Ninth and Seventh Circuits have reasoned—in the context of securities fraud claims seeking class certification based on a fraud-on-the-market theory—that a ruling on a merits-based issue should always be deferred to trial if the issue is capable of being decided on a class-wide basis, regardless whether the issue is relevant to Rule 23(b)(3) "predominance."[10] Those decisions conflict with decisions from several other federal appeals courts, and the Ninth Circuit decision is the subject of a pending certiorari petition.[11]

The Ohio appeals court's decision to defer until trial a ruling on the meaning of State Farm's standard insurance contract is at least arguably in conflict with the principles of *Wal-Mart*. Its decision not to look behind other allegations of the complaint at the class certification stage indisputably conflicts with the principles of *Wal-Mart*. State Farm's petition thus presents an opportunity for the Ohio Supreme Court to determine whether Ohio Rule 23 is more than a mere pleading standard and requires plaintiffs seeking class certification to introduce evidence affirmatively demonstrating that they satisfy each of the Rule 23 requirements. In light of the dangers of inappropriate class certification—including the pressure that defendants face to settle even the most insubstantial of class actions—some observers say that review by the Ohio Supreme Court is fully warranted.

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Endnotes

1 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

2 *Id.* at 2551.

3 Cullen v. State Farm Mut. Auto. Ins. Co., 2011 WL 6780177 (Ohio App. 8 Dist.), 2011-Ohio-6621.

4 Marks v. C.P. Chemical Co., 31 Ohio St.3d 200, 201 (1987).

5 *See, e.g.,* Ojalvo v. Bd. of Trustees, 12 Ohio St. 230, 233 (1984).

6 *Cullen* at ¶ 55 (A finding that "goes to the heart of the merits of the case" is "inappropriate" in connection with a ruling on a class certification motion.).

7 *Id.* at ¶ 34.

8 *Id.* at ¶ 36.

9 *Id.* at ¶ 55.

10 Conn. Ret. Plans & Trust Funds v. Amgen, Inc., 660 F.3d 1170 (9th Cir. 2011); Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010).

11 U.S. Sup. Ct. No. 11-1085.

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because of the remedy sought. In lieu of damages, the plaintiffs asked a federal judge to order a handful of energy companies operating in twenty states to "abate" their alleged "contribution[s]" to global warming "by requiring [them] to cap [their] carbon dioxide emissions and then reduce them by a specific percentage each year for at least a decade."[5] The Southern District of New York concluded that the request presented a non-justiciable political question under *Baker v. Carr*[6] because, among other things, determining what level of emissions is "reasonable" would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests."

On appeal, the Second Circuit reversed on the political question doctrine and found that the case could proceed without running afoul of constitutional or prudential standing doctrines. It also concluded that federal common law provided a cause of action for nuisance and that such a claim had not been displaced by the Clean Air Act or EPA action.

After rehearing was denied, the energy companies petitioned the Supreme Court to reverse the Second Circuit, presenting a variety of bases to dispose of the lawsuit. The Obama Administration participated in the case on behalf of a defendant, the Tennessee Valley Authority, but avoided the justiciability questions by urging the Court to remand to the Second Circuit for reconsideration of the displacement arguments based on EPA action undertaken since the appellate panel's opinion.

The Supreme Court granted certiorari and, in a unanimous opinion written by Justice Ginsburg, held that the plaintiffs' claims could not proceed. The Court reasoned that Congress, in the Clean Air Act, had displaced any federal common law nuisance claim that might exist related to greenhouse gas emissions. The Court explained that "[t]he judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted."[7] As to the other arguments presented by the energy companies and their amici, the court remained split 4-4 (as a result of Justice Sotomayor's recusal) as to whether plaintiffs had Article III standing in the first place. The Court also noted that it had nothing to say about whether the plaintiffs' state law claims were preempted by the Clean Air Act as the issue had not been briefed.

Comer I (Mississippi)

A second major global warming suit has been litigated within the Fifth Circuit. In 2007, a class of Mississippi residents filed a lawsuit in the Southern District of Mississippi against more than thirty energy companies seeking damages from Hurricane Katrina, which plaintiffs alleged was intensified by global warming (*Comer I*).[8] The *Comer I* plaintiffs argued that energy companies' emissions over many decades contributed to global warming and constituted a nuisance that worsened the hurricane's ferocity, causing severe damage for which the energy companies should be held responsible. The district court in Mississippi concluded that the case was nonjusticiable due to a lack of standing, and the class appealed.

A three-judge panel of the Fifth Circuit reversed the district court and issued an opinion that would have permitted the case to proceed. Unusual appellate proceedings followed. Despite a number of recusals, the Fifth Circuit agreed to rehearing en banc and vacated the panel opinion. But in the middle of en banc briefing, the Fifth Circuit dismissed the appeal for lack of quorum after an additional recusal. The court concluded that it lacked jurisdiction to take action on the appeal but that the vacatur was valid because the court had a quorum at the time of the decision to hear the case en banc. The plaintiffs chose not to seek certiorari and instead sought mandamus from the Supreme Court, which denied the petition, leaving the dismissal in place. Thus, the district court's opinion that the case was nonjusticiable remained controlling. As described below, the plaintiffs refiled their