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

continued page 7

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]

continued page 5

INSIDE

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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Continued from cover

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

claims under state law on May 27, 2011 in the Southern District of Mississippi,[9] seeking to maintain their suit after the earlier disposition of their case and the outcome of *AEP*.

Kivalina (California)

The Ninth Circuit is home to a third major global warming suit. In 2008, the Alaskan Native Village of Kivalina sued ExxonMobil Corp[10] and dozens of other energy companies in the Northern District of California, seeking hundreds of millions of dollars in damages due to the erosion of the village's land, which was allegedly precipitated by global warming. Similar to *Comer I*, the district court found the case nonjusticiable, and the plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit put the case on hold while *AEP* was considered by the Supreme Court, and after that decision, lifted its stay. Supplemental briefing was filed on the effect of *AEP*, and a panel heard argument in *Kivalina* on November 28, 2011. The panel will consider the Supreme Court's guidance about whether cases seeking to assign responsibility for and limit global warming are properly maintained in federal court.

The Recent Dismissal of *Comer II* Confirms *AEP* Is a Serious Obstacle

Though the unanimous decision in *AEP* was seen by many as a repudiation of global warming nuisance litigation, it has not ended pending lawsuits. To the contrary, litigation continues over *AEP*'s meaning and effect. So far, only one of the lower courts has had occasion to apply the *AEP* decision.

In 2011, the *Comer* plaintiffs returned to court with a very similar state law class action against an even larger pool of more than ninety named defendants (*Comer II*). Filed prior to the *AEP* opinion, the plaintiffs attempted to avoid the difficult question whether federal common law provides a cause of action for nuisance in the global warming context. This time the plaintiffs focused on state law causes of action, barely mentioning their original federal common law claims, and they substantially toned down their language about political inaction on global warming. The complaint also added claims based on strict liability and conspiracy.[11] Finally, the complaint embraced an issue explicitly left unaddressed by the *AEP* Court, by seeking a declaratory judgment that federal law does not preempt the state law claims.

The district court in March 2012 found that the litigation was barred by the court's prior decision in *Comer I* under the doctrines of res judicata and collateral estoppel and that the new issues did not save the case.[12] However, "out of an abundance of caution," the district court once again explored the various claims and provided additional rationales as to why the case fails. In doing so, the district court was mindful to address the discussions in *AEP* regarding standing, political question, and preemption.

On the question of standing, the district court reiterated its original conclusion that Article III's requirements were not satisfied. Though half of the evenly divided *AEP* Court would have found that the states had standing in that case, here the district court relied on the Supreme Court's statement that it "had not yet determined whether private citizens . . . could file lawsuits seeking to abate out-of-state pollution" and held that, as private citizens, the plaintiffs did not have standing.

With respect to the political question doctrine, the district court relied on *AEP*'s logic to hold that the case was barred. Though the Supreme Court did not find the suit in *AEP* barred, it made plain its discomfort with the enterprise the plaintiffs sought to foist upon the courts. The Supreme Court found it "altogether fitting that Congress designated an expert agency, here, EPA," to regulate greenhouse gases. Unlike the agency, "[j]udges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located." The *Comer II* district court further took to heart the Supreme Court's observations, concluding that "if the . . . plaintiffs [are] dissatisfied with the outcome of the EPA's rulemaking, they should seek review from the Court of Appeals"[13] on direct review of agency action, and not judicial intervention in the first instance.

Further, while recognizing that *AEP* did not address federal preemption of state law claims, the district court relied on the logic of *AEP*'s federal displacement holding to support its reasoning that the plaintiffs' "entire lawsuit [was] displaced by the Clean Air Act," in the same manner as the CAA displaces federal nuisance claims.

The district court provided additional reasons why the case fails, thus making it difficult for the plaintiffs to prevail before another panel of the Fifth Circuit. The court applied the Mississippi statute of limitations to conclude that the litigation in *Comer I* did not toll the statute of limitations. The court rejected the plaintiffs' theory that defendants' contributions to global warming constitute a continuing tort that vitiates the statute of limitations bar due to the alleged ongoing effects of their property damage such as increased insurance rates. Finally, the court explained that the plaintiffs cannot establish that

there is proximate cause to support their theory, so they fail to state a claim. Fifth Circuit Judge W. Eugene Davis explored this issue in his special concurrence to the vacated panel opinion, in which he stated that he would affirm the district court's opinion as "plaintiffs failed to allege facts that could establish that the defendant's actions were a proximate cause of the plaintiffs' alleged injuries."[14] The district court's development of this multiplicity of legal issues constitutes strong headwinds against the plaintiffs' appeal, which was docketed April 17, 2012.[15]

Looking Ahead, Several Questions Remain Unanswered

Courts Must Apply AEP *'s Guidance on Displacement*

Kivalina had been fully briefed in the Ninth Circuit and was on hold pending the decision in *AEP*. In supplemental briefs, the parties contest the scope and meaning of the decision. Among other things, the plaintiffs argue that *AEP* does not compel displacement of their damages claims because "the substance of a public nuisance claim for damages fundamentally differs from the substance of a public nuisance claim for injunctive relief."[16] The plaintiffs assert that *AEP* turned on the fact that "'[t]he [CAA] itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law.'"[17] From this vantage point, they argue "[t]hat is not the situation here: the CAA has no parallel remedy of damages for economic injury, nor would pollution victims' ability to sue for damages disrupt EPA's ability to set emissions caps."[18] In plaintiffs' view, *AEP* does not displace their suit.

The defendants take the opposite view, arguing that "[j]ust as in *AEP*, plaintiffs' claims would require a court to 'determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable'—an exercise in 'complex balancing' that would require consideration of the 'particular greenhouse gas-producing sector' at issue (e.g., the oil, coal, electric, or other industries), and an 'informed assessment of competing interests,' including 'our Nation's energy needs and the possibility of economic disruption.'"[19] As such, damages claims are just as much displaced as injunction claims based on the same activities. At oral argument late last year, the panel inquired about the meaning of the *AEP* decision, and pressed counsel about its impact.

AEP will also figure prominently in the appeal docketed in *Comer II*. Just as the plaintiffs in *Kivalina*, the *Comer* plaintiffs will have to convince the Fifth Circuit that *AEP* does not bar their class action suit seeking damages. They also have to navigate the lower court's adverse decisions on a variety of issues. In addition to the justiciability issues addressed below, plaintiffs will have to overcome the district court's application of res judicata, as well its more robust statements about the lack of proximate cause, which in the previous appeal was compelling to at least one member of the panel. Further complicating the plaintiffs' path at the Fifth Circuit is the issue of recusals, which is what made the en banc proceedings so unusual in the first place.

Core Justiciability Questions Remain Unresolved.

Comer II and *Kivalina* will also turn on core questions of standing and the political question doctrine, which the Supreme Court avoided in *AEP*. Given the continued push by the plaintiffs and advocates to have global warming nuisance claims adjudicated notwithstanding *AEP*, these questions remain ripe for resolution. The Supreme Court's standing analysis in *Massachusetts v. EPA* arguably was unique to the statutory scheme of administrative review relied on by the plaintiffs. In *AEP* the Court did not reach the issue, noting that the Justices were split 4-4 on the standing issue and the meaning of *Massachussets v. EPA*. The four Justices who would have found standing also were unpersuaded by other threshold issues like prudential standing.

The district courts in *Kivalina* and *Comer II* readily concluded that the plaintiffs lacked standing and presented political questions, so the courts of appeal will likely grapple with justiciability. An earlier panel of the Fifth Circuit concluded that the plaintiffs' first nuisance claims survived these threshold justiciability hurdles, but that was before the Supreme Court's guidance in *AEP*, in which four Justices quite clearly expressed the view that threshold issues are fatal to such claims. The courts of appeals will have to make sense of that 4-4 split and what it might mean for the pending cases.

Courts Will Grapple with Preemption of State Nuisance Claims.

Also up for judicial consideration is preemption of state nuisance claims for global warming, which were included in the *Comer II* and *Kivalina* complaints. The Supreme Court clearly stated in *AEP* that "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand."[20] The *Kivalina* plaintiffs argue that their "state common law nuisance claims are not before [the Ninth Circuit] because the district court dismissed them without prejudice to re-filing in state court."[21] Only the district

court in *Comer II* directly confronted state nuisance claims and concluded that federal law displaced those claims. This was bolstered by the court's application of the Fifth Circuit's "transactional test" for res judicata, under which the court found that the plaintiffs' attempt to invoke different state causes of action could not avoid the court's prior decision based on federal law.

Conclusion

Creative global warming nuisance suits have been pressed in federal courts for almost a decade, heeding the call for "heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories."[22] These cases have been brought in venues as different as Mississippi and Manhattan, framed as class actions and on behalf of individual States. They have relied on federal and state common law theories, and have alternatively sought damages and injunctive relief. But regardless of the form, theory and venue, one thing has been consistent: every trial court to confront such a suit has found it to be beyond the court's institutional competence and constitutional capacity.

Nonetheless, litigation continues because numerous doctrinal questions—from the demands of Article III standing to the meaning of the Supreme Court's displacement analysis in *AEP*—remain unresolved. These suits offer plaintiffs the possibility of enormous monetary recoveries, punishing discovery, and the opportunity to continue to pressure an industry in political debates over greenhouse gas regulation. As a result, litigation will continue, and the Supreme Court is likely to be called upon again to address the proper role, if any, of federal courts in addressing global warming.

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Endnotes

1 Complaint ¶ 5, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. July 21, 2004), *quoted in* Am. Elec. Power v. Connecticut, 582 F.3d 309, 317 (2d Cir. 2009).

2 Third Amended Complaint at ¶ 18 n.13, Comer v. Murphy Oil Co., No. 1:05-cv-00436 (S.D. Miss. Apr. 19, 2006). These allegations are not in the more recent complaint filed in 2011.

3 131 S. Ct. 2527 (2011).

4 Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

5 Complaint ¶ 186, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. July 21, 2004).

6 369 U.S. 186 (1962).

7 *AEP,* 131 S. Ct. 2527, 2540 (2011).

8 Comer v. Murphy Oil USA, Inc., No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated on grant of reh'g en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

9 Comer v. Murphy Oil USA, Inc., No. 1:11-cv-00220 (S.D. Miss. May 27, 2011).

10 Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. 2010).

11 Complaint at ¶¶ 36, 41, Comer v. Murphy Oil USA Inc., No. 1:11-cv-00220 (S.D. Miss. May 27, 2011).

12 Comer v. Murphy Oil USA, Inc., 2012 WL 933670 (S.D. Miss. Mar. 20, 2012).

13 *Id.* at 26.

14 Comer v. Murphy Oil USA, 585 F.3d 855, 880 (5th Cir. 2009).

15 Comer v. Murphy Oil USA Inc., No. 12-60291 (5th Cir. 2012).

16 Kivalina Supp. Br. at 4 (Dkt. 158, filed Nov. 4, 2011).

17 Kivalina Supp. Br. at 7 (Dkt. 158, filed Nov. 4, 2011) (quoting *AEP*, 131 S. Ct. at 2538).

18 Appellants' Supp. Br. at 7, *Kivalina* (Dkt. 158, filed Nov. 4, 2011).

19 Appellees' Supp. Br. at 4, *Kivalina* (Dkt. 157, filed Nov. 4, 2011).

20 *AEP*, 131 S. Ct. at 2540.

21 Appellant's Supp. Br. at 1 n.2, *Kivalina* (citing *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, 882-83 (N.D. Cal. 2009), and arguing that there can be no res judicata effect against those claims).

22 Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591, 626-27 (2008).