

ALERT

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GROUND-BREAKING DEVELOPMENTS IN CLIMATE CHANGE NUISANCE LITIGATION

William F. Stewart • 610.832.8356 • wstewart@cozen.com

Danielle A. Willard • 610.941.2380 • dwillard@cozen.com*

After a long lull in judicial activity, the one-month period between September 21 and October 16, 2009, provided a series of surprising and potentially explosive developments in global warming nuisance liability law. Over the last few weeks, three federal court decisions, each from different regions of the country, weighed in on the issue of whether greenhouse gas emission nuisance claims were barred on “political question” and/or “constitutional standing grounds.” In decisions that defied conventional wisdom, two of the three Courts concluded that individual plaintiffs could pursue climate change claims for damages -- so long as those damages are alleged to be “different than those sustained by the public at large.”

THE CASES

On September 21, 2009, the U.S. Court of Appeals for the Second Circuit, in *State of Connecticut v. AEP*¹, held that: (1) public nuisance claims against greenhouse gas (“GHG”) emitters were not barred on political question grounds; and (2) private organizations, upon a showing of injury different (in scope or kind) from the public at large, had standing to pursue that litigation. The decision permits the plaintiffs, eight states, the City of New York and three land trusts, to proceed against six electric power corporations characterized by the plaintiffs as the “largest emitters of carbon dioxide in the United States.” In vacating the federal trial court judgment (a dismissal on political question and standing grounds), the Second Circuit held that the plaintiffs had a right to bring claims under the federal common law of nuisance and that those claims do not present “non-judiciable political questions.” The plaintiffs’ complaints, filed in 2004, seek to enjoin the defendant electrical

power corporations from their ongoing contribution to climate change, and to force those defendants to cap and reduce their carbon emissions. Crucially, there is nothing in the *AEP* Opinion that suggests that the decision is somehow specifically limited to a narrow category of plaintiffs or defendants.

Just nine days later, on September 30, 2009, the Federal Court for the Northern District of California issued an opinion in *Native Village of Kivalina v. ExxonMobil*² that reached a contrary result. The *Kivalina* court dismissed claims against 24 of the largest U.S. power companies for their alleged contributions to global warming -- associated with the emission of greenhouse gases during the combustion of fossil fuels. In that case, the Inuit plaintiffs, from a small village situated on a barrier reef off of the northwest corner of Alaska, had alleged that their homeland is becoming uninhabitable due to erosion resulting from warmer ocean temperatures. The plaintiffs seek to hold each of the power defendants jointly and severally liable under a federal common law claim of nuisance because the greenhouse gas pollutants emitted by the defendants were a substantial factor in causing higher global temperatures. The *Kivalina* court dismissed these claims against the power companies based upon the attenuated nature of the causal link between the claimed injuries and any particular defendants’ conduct, and on the basis that the regulation of greenhouse gas emissions was an issue best left for the elected branches of government.

Two weeks later, the scales tipped again. On October 16, 2009, the U.S. Court of Appeals for the Fifth Circuit, in *Comer v. Murphy Oil*³, held that residents and property owners in the State of Mississippi had standing to assert public and private

* Danielle Willard is a law clerk within Cozen O'Connor's Global Insurance Group.

1. No. 05-5104 (2d Cir. Sept. 21, 2009).

2. No. 08-1138 (N.D. Ca. Sept. 20, 2009).

3. No. 07-60756 (5th Cir. Oct. 16, 2009).

nuisance claims against oil, coal, and chemical company defendants for their contribution to climate change. The Fifth Circuit found that plaintiffs' allegations that defendants, through production of environmentally harmful greenhouse gases, magnified adverse weather events and fostered the strengthening of Hurricane Katrina and the frequency and intensity of other storms in recent years, causing extensive destruction and damage to their property, did not present nonjusticiable political questions.

WHAT THESE DECISIONS MAY MEAN

In the event that individual plaintiffs are permitted to pursue nuisance claims against entities that have allegedly contributed to global warming, the courts will see an influx of litigation that is substantial, wide-ranging, complex and expensive. Lawsuits instituted for either financial or political motive could target power companies, auto manufacturers, heavy industry, dairy farms, or timber companies. In essence, suits could be instituted against any party that either emits GHGs, or engages in land use changes that eliminate "carbon sinks."

While the holdings by the Second and Fifth Circuit Courts of Appeal, that individual plaintiffs have standing to pursue climate nuisance claims, certainly have the potential to open "pandora's box," there are four reasons why these decisions may not lead to an explosion of global warming litigation. First, it is possible that a majority of all judges of the Second and/or Fifth Circuits (in what is called an *en banc* review) may

overturn the three judge panels that recently issued these opinions. Second, the United States Supreme Court is likely to permit an appeal -- and will probably make the ultimate decision on these issues. Third, Congress may pass climate change legislation that preempts nuisance litigation (or at least strengthens the "political question" defense). And fourth, the courts may reject the nuisance claims on the bases of defenses not yet argued -- particularly, the inability of plaintiffs to meet the legal burden of proof standard for causation.

Of these four potential developments with the capacity to preclude substantial climate nuisance litigation, only domestic legislation is on the near-term horizon. A climate bill (Waxman-Markey) passed 219-212 in the House in June, and a similar bill (Boxer-Kerry) may soon be put to a vote in the Senate. Thus, unlike judicial resolutions that are still probably one year away, action by the legislature has the potential to provide immediate relief.

This Alert was written by Bill Stewart and Danielle Willard who can be reached at 610.832.8356. Bill is Co-Chair of the firm's Climate Change/Global Warming practice area, and his work on global warming related topics has been featured by NBC News, The Wall Street Journal, the National Law Journal, Money, Best's Review, Business Insurance, and International Financier. Bill is involved in much of the civil climate change litigation active today, and his book, Climate of Uncertainty, is available for advanced purchase at oceanpublishing.org.