SIMPSON THACHER MEMORANDUM

# Three Federal Courts Issue Back-to-Back Decisions Addressing the Viability of Global Warming Tort Actions

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In September and October 2009, federal courts issued three significant decisions concerning tort-based global warming litigation. By virtue of their decisions, the United States Court of Appeals for the Second and Fifth Circuits have paved the way for governments and even private actors to sue industrial defendants for contributing to global warming and injury ensuing from climate change. Conversely, the United States District Court for the Northern District of California—in a ruling that will presumably be reviewed closely by the Ninth Circuit—expressly disagreed with the Second Circuit's decision issued only nine days prior and dismissed a global warming nuisance claim brought by an Inupiat Eskimo village against oil, energy, and utility companies.

Although the United States District Court for the Northern District of California held that tort-based global warming claims are judicially unmanageable and therefore nonjusticiable, the Second and Fifth Circuits both concluded otherwise, notwithstanding the lack of emission standards for greenhouse gases and the obvious causation hurdle facing plaintiffs relating to the link between defendants' actions and the alleged harm. Accordingly, a new wave of litigation is expected even before the viability of global warming tort complaints is fully tested. Insurance coverage claims and disputes will inevitably follow.

## Connecticut v. American Electric Power Company, Inc.

On September 21, 2009, the United States Court of Appeals for the Second Circuit revived two complaints brought by eight states, the City of New York and three private plaintiffs against electric utility companies to abate the "public nuisance" of global warming. *See* Conn. v. Am. Elec. Power Co., Nos. 05-5104, 05-5119 (2d Cir. Sept. 21, 2009) ("AEP"). In their complaints, plaintiffs sought to compel defendants to cap and reduce their carbon dioxide emissions and claimed that global warming is causing and will continue to cause serious harm to human health and natural resources. *See* slip op. at 3-4.

The district court held that the plaintiffs' claims implicated a political question inappropriate for judicial resolution and thus dismissed the complaints. *See* id. at 4. The Second Circuit disagreed, finding no "textually demonstrable constitutional commitment of the issue to a coordinate political department." Id. at 16, 20-24. Further, the Second Circuit concluded there was no lack of "judicially discoverable and manageable standards for resolving" plaintiffs' claims because "[w]ell-settled principles of tort and public nuisance law" provide guidance to the district court in assessing the plaintiffs' claims, and the federal courts are competent to deal with the issues. Id. at 29-30.

In finding that plaintiffs had standing to bring these claims, the court noted that, "[a]t this point in the litigation, Plaintiffs need not present scientific evidence to prove that they face future injury or increased risk of injury, that Defendants' emissions cause their injuries, or that the remedy they seek will redress those injuries." Id. at 37. In any event, the court found that plaintiffs had alleged not only imminent future injury but also current injury. The Second Circuit read allegations of melting snowpack generously to find claims of property damage, concluding that "[t]he current declining water supplies and the flooding occurring as a result of the snowpack's earlier melting obviously injure property owned by [Plaintiff] State of California." Id. at 51. While the plaintiffs do not expressly seek monetary damages, the complaints and the Second Circuit decision leave open the potential for such claims.

## Native Village of Kivalina v. ExxonMobil Corp.

On September 30, 2009, just nine days after the Second Circuit's issuance of its AEP decision, the United States District Court for the Northern District of California issued a decision in Native Village of Kivalina v. ExxonMobil Corp., Case No. C 08-1138 SBA (N.D. Cal. Sept. 30, 2009) ("Kivalina"). In contrast to the Second Circuit's political question analysis of AEP, the Northern District of California decision held that the federal nuisance-based global warming claim was barred by the political question doctrine and for lack of standing. See slip op. at 12-13, 24.

One of the plaintiffs, Native Village of Kivalina, is the governing body of an Inupiat Eskimo village consisting of residents of the City of Kivalina, the other plaintiff in the action. See id. at 1. Plaintiffs alleged that global warming had diminished the Arctic sea ice that protects the Kivalina coast from winter storms, and that the resulting erosion and destruction would require the relocation of Kivalina's residents. See id. Plaintiffs had named twenty-four oil, energy and utility companies as defendants and sought damages under a federal common law nuisance theory, based on the defendants' alleged contribution to the excessive emission of carbon dioxide and other greenhouse gases, which were allegedly causing global warming. See id.

On the political question issue, the Kivalina court did agree with the Second Circuit that the mere fact that global warming issues may implicate foreign policy and related economic issues did not necessarily place it beyond the reach of the judiciary. See id. at 9. Nonetheless, the court disagreed with the Second Circuit's conclusion that settled tort and public nuisance law principles provide sufficient guidance to the district court in assessing plaintiffs' claims, and also criticized AEP for failing to offer guidance as to precisely what judicially discoverable and manageable standards were to be employed in resolving the claims at issue. See id. at 12-13. The court buttressed its conclusion that plaintiffs' claims implicated a political question with its finding that plaintiffs' federal nuisance claim inherently requires the court to consider both the harm experienced by the plaintiff as well as the utility or value of the defendants' actions, and also requires the court to make a policy decision about who should bear the cost of global warming. See id. at 14.

The Kivalina court likewise disagreed with the Second Circuit on standing, finding that plaintiffs lacked Article III standing because they were unable to trace their injuries to any particular defendant's emissions. See id. at 16-22. In contrast to the Second Circuit decision dismissing the need to address causation at this stage of the litigation, see AEP, slip. op. at 37, the Northern

District of California emphasized that "[t]he tenuousness of Plaintiffs' standing is further exemplified by their theory of causation," which depends on an "attenuated sequence of events" that followed from defendants' alleged excessive discharge of greenhouse gases. Kivalina, slip op. at 22.

### Comer v. Murphy Oil USA

Most recently, on October 16, 2009, the Fifth Circuit found that private plaintiffs had standing to pursue claims for private and public nuisance, trespass, and negligence, and that such claims were justiciable and did not present a political question. See Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. Oct. 16, 2009) ("Comer"). In Comer, plaintiffs—residents and owners of land and property along the Mississippi Gulf coast—alleged that "defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gasses that contributed to global warming, viz., the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs' private property, as well as public property useful to them." Slip op. at 1. The plaintiffs' putative class action was based on Mississippi state common-law actions and did not assert any federal or public law actions or seek injunctive relief. See id. at 1-2.

The Fifth Circuit concluded that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims, and that none of those claims presented nonjusticiable political questions; the court did, however, dismiss the unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims for "prudential standing reasons." Id. at 3.

With respect to standing, the Fifth Circuit found a meaningful distinction between Article III's "fairly traceable" causation requirement and proximate causation: "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. Rather, 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. at 9 (internal citations and quotation marks omitted). Thus, given that plaintiffs had alleged that defendants' emissions caused the plaintiffs' property damage, see id. at 14, and "that injuries may be fairly traceable to actions that contribute to, rather than solely or materially cause, greenhouse gas emissions and global warming," id. at 12 (citing Mass. v. EPA, 549 U.S. 497, 523 (2007)), the Fifth Circuit found plaintiffs had standing to pursue their public and private nuisance, trespass, and negligence claims. However, the court concluded that the plaintiffs' claims for unjust enrichment, civil conspiracy, and fraudulent misrepresentation—which were based on injuries allegedly caused by defendants' public relations campaigns and petrochemical pricing, id. at 7—did not satisfy federal prudential standing requirements because "[s]uch a generalized grievance is better left to the representative branches." Id. at 17.

As for the political question challenge, the Fifth Circuit concluded that the nuisance, trespass and negligence claims did "not present any specific question that is exclusively committed by law to the discretion of the legislative or executive branch." Id. at 17. The court explained that "[c]ommon-law tort claims are rarely thought to present nonjusticiable political questions," id. at 25, and noted that "the defendants begin with an assumption they cannot support, viz., that

the adjudication of plaintiffs' claims will require the district court to fix and impose future emission standards upon defendants and all other emitters." Id. at 34. In reaching its justiciability conclusion, the Fifth Circuit noted that "[a]lthough we arrived at our own decision independently, the Second Circuit's reasoning [in AEP] 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." Id. at 29 n.15.

## POTENTIAL IMPLICATIONS OF THE THREE RECENT DECISIONS

In the face of congressional and regulatory inaction, the back-to-back reversals by the Second and Fifth Circuits of district court dismissals will likely prompt a wave of climate change litigation, not only against energy companies and utilities but potentially against any company that has emitted greenhouse gases or manufactured products that emit such gases. Should the Ninth Circuit follow suit and reverse the district court's decision in Kivalina, such reversal would likely create additional momentum for global warming nuisance suits, particularly by municipalities and private plaintiffs. Further, to the extent policyholders call upon liability insurers to bear the cost of defending and indemnifying them in these lawsuits, a secondary wave of litigation will follow addressing a host of insurance coverage defenses.

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