

Climate Alert

Significant Climate Change-Related News and Updates from the LLB&L Climate Change Practice Team

Please click here to learn more about the LLB&L Climate Change Practice Team.

Authors

M. Benjamin Cowan

713-226-1339

bcowan@lockelord.com

Joseph N. Froehlich

212-812-8345

jfroehlich@lockelord.com

www.lockelord.com

This *Client Alert* is provided solely for educational and informational purposes. It is not intended to constitute legal advice or to create an attorney-client relationship. Readers should obtain legal advice specific to their enterprise and circumstances in connection with each of the topics addressed.

If you would like to be removed from our mailing list, please contact us at either unsubscribe@lockelord.com or Locke Lord Bissell & Liddell LLP, 111 South Wacker Drive, Chicago, Illinois 60606, Attention: Marketing. If we are not so advised, you will continue to receive *Client Alerts*.

Attorney Advertising

© 2009 Locke Lord Bissell & Liddell LLP

The Action Heats Up in Global Warming Nuisance Litigation

Fifth Circuit Follows Second in Allowing Claims to Proceed in Comer, While Northern District of California Dismisses Kivalina

In September 2009, the Second Circuit Court of Appeals became the first court to allow a public nuisance claim based on alleged contributions to global warming to proceed beyond a motion to dismiss in *Connecticut v. American Electric Power Co.* –F.3d–, 2009 WL 2996729 (2d Cir. Sept. 21, 2009) (See our [Climate Alert](#) on that case). Now, the Fifth Circuit has followed the Second Circuit's lead and reversed the dismissal of a global warming public nuisance claim in *Comer v. Murphy Oil USA*. However, just before the *Comer* decision was issued, District Court Judge Sandra Brown Armstrong of the Northern District of California granted a motion to dismiss a global warming public nuisance claim in the highly publicized case of *Native Village of Kivalina v. ExxonMobil Corporation*.

These contrasting decisions not only highlight the different findings on the political question doctrine and standing issues, but create the distinct possibility of forum shopping by future plaintiffs who attempt to bring such global warming-based claims. This *Alert* will take a look at both the *Comer* and *Kivalina* decisions.

Comer v. Murphy Oil USA

Background

In 2005, Plaintiffs brought a putative class action suit in the Southern District of Mississippi for damage they suffered from Hurricane Katrina. Plaintiffs claimed that the Defendants' energy, fossil fuel and chemical operations caused the emission of greenhouse gases that contributed to global warming, which in turn caused a rise in sea level and added to the intensity of Hurricane Katrina. Plaintiffs sought compensatory and punitive damages under Mississippi common law based on claims of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy. The district court dismissed the action on the basis that these claims presented nonjusticiable political questions. The plaintiffs appealed to the Fifth Circuit Court of Appeals.

Fifth Circuit Holds that Plaintiffs Have Standing and Global Warming Claims Are Not Precluded by the Political Question Doctrine. The Fifth Circuit first addressed the issue of whether the plaintiffs had standing to bring their claims. Since plaintiffs' claims were Mississippi common law claims, the court applied both the Mississippi and federal standing analyses. The court very quickly found that the plaintiffs had met the

more permissive Mississippi standard. The court then turned to the federal standard as set forth in the case of *Lujan v. Defenders of Wildlife*. Plaintiffs must demonstrate that "they have suffered an 'injury in fact'; the injury is 'fairly traceable' to the defendant's actions; and the injury will 'likely . . . be redressed by a favorable decision.'" In analyzing the nuisance, trespass and negligence claims, the court stated that the only element that was in question was the "fairly traceable" prong. The court rejected the defendants' assertion that the harms were not fairly traceable, stating that such an argument calls upon the court to determine the merits of plaintiffs' cause of action at the pleading stage. The court also noted that the "fairly traceable" requirement "need not be as close as the proximate causation" required in a tort claim. The court then stated that the Supreme Court's decision in *Massachusetts v. EPA* expressly approved the causal "link between man-made greenhouse gas emissions and global warming . . . , as well as the nexus of warmer climate and rising ocean temperatures with the strength of hurricanes." The *Comer* court then noted that it deemed the plaintiffs' claim to be "fairly traceable" if it was alleged that the defendants' actions contributed to global warming – the actions did not have to be the sole or material cause of global warming.¹

The Fifth Circuit, likewise, rejected the argument that plaintiffs' claims were barred by the political question doctrine. While the court gave a history of the political question doctrine, it found that the political question doctrine did not apply because the plaintiffs' "claims do not present any specific question that is exclusively committed by law to the discretion of the legislative or executive branch." The *Comer* court held that if this first statement is not met, then the factors set forth in the seminal case of *Baker v. Carr* do not even apply. The *Comer* court took a very restrictive view of the political question doctrine, concluding that "the federal courts are not free to invoke the political question doctrine to abstain from deciding politically charged cases like this one, but must exercise their jurisdiction as defined by Congress whenever a question is not exclusively committed to another branch of the federal government." The *Comer* court also criticized earlier district court opinions that had applied the political question doctrine to global warming claims, stating that those courts "could [not] demonstrate (rather than assume as a false premise) that a specific issue . . . had been exclusively committed to a political branch by a federal or constitutional or statutory provision."

In light of its holdings on the standing and political question issues, the Fifth Circuit remanded the case back to the district court for further proceedings.

Native Village of Kivalina v. ExxonMobil Corporation

Background

Plaintiffs, the governing body of Kivalina (an Inupiat Eskimo village of about 400 people on an island above the Arctic Circle), brought suit against 24 oil, energy and utility companies. The plaintiffs claimed that global warming had reduced the Arctic sea ice that protects Kivalina, resulting in erosion that will force the relocation of Kivalina's residents. It is estimated that the cost to move Kivalina would be between \$95 million and \$400 million. Plaintiffs brought claims for public nuisance under federal common law, public and private nuisance under state common law, civil conspiracy and concert of action. The defendants filed motions to dismiss based on standing and the political question doctrine.

District Court Holds That Federal Public Nuisance Global Warming Claim is Barred By the Political Question Doctrine and That Plaintiffs Lack Standing to Bring Such a Claim.

The District Court first addressed the political question doctrine, seeking initially to determine whether "the issue involve[s] resolution of questions committed by the text of the Constitution to a coordinate branch of Government." While the defendants argued that rulings on greenhouse gas emissions would intrude on foreign policy, the court rejected this argument. The court found that there was a difference between an item that "touches foreign relations" and those that implicate foreign policy to the point of making it non-justiciable. The court held that there was no provision of the Constitution that exclusively committed the political branches to make "the final determination regarding air pollution or global warming." On this element of the doctrine, the *Kivalina* court's finding is similar to that of the Fifth Circuit in *Comer*.

The court then turned to the question of whether there were "judicially discoverable and manageable standards." While the plaintiffs argued that the standards are the same as in all nuisance cases, the court disagreed. The court held that for a nuisance claim, "the factfinder must also balance the utility and benefit of the alleged nuisance against the harm caused." This will cause the factfinder

to have to weigh, among other things, "the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and businesses at every level." The court found that the plaintiffs did not articulate any particular judicially discoverable and manageable standard that would guide a factfinder in making these decisions. The court rejected the argument that the standards of other air and water pollution cases would be a guide. In so doing, the district court expressly rejected and criticized the Second Circuit's decision in *Connecticut v. American Electric Power*. The court held that while the pollution cases involved a discrete number of polluters that were identified as causing a specific injury to a specific area, global warming claims were "entirely different" because they are "based on the emission of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere . . . [that] cannot be similarly geographically circumscribed." The court focused on the fact that "global warming involves a series of events disconnected from the discharge itself" and that such global warming claims "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs."

In the final prong of its analysis of the political question issue, the court turned to the question of whether it would be impossible for the judiciary to decide the case without an initial policy determination of a kind clearly left for nonjudicial discretion. The court again focused on the concept that a nuisance claim requires the factfinder to weigh the harm against the utility or value of the defendant's actions. Such a determination necessarily requires a finding of the acceptable level of greenhouse gases emitted by defendants – a determination the court felt ill-equipped to make. The court also noted that such a lawsuit was asking the court to make the policy determination of "who should bear the cost of global warming." The court recognized that "virtually everyone on Earth is responsible on some level for contributing to such emissions", but by pursuing this case the plaintiffs were asking the court to make the political judgment that these two dozen companies "should be the only ones to bear the cost of contributing to global warming." Ultimately,

the court held that "the allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." Accordingly, the court relied on the political question doctrine in dismissing the plaintiffs' claims.

The court also held that the plaintiffs lacked standing to bring a global warming nuisance claim. Like in *Comer*, the court recognized that the important issue was whether the alleged injury was "fairly traceable" to the actions of the defendant. Unlike in *Comer*, the district court found that the "fairly traceable" requirement was not met. The court rejected the argument that plaintiffs only needed to show that the defendants "contributed" to the injury – holding that such a "contribution" standard came from cases under the Clean Water Act, which cases were distinguishable because the effluent in those cases was strictly regulated. The court noted that, in contrast, there are no federal standards for greenhouse gas emissions.

The court also held that the *Kivalina* plaintiffs failed to have standing because they could not show that the "seed" of their injury can be traced to any of the defendants. "[T]he pleadings make[] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." The court concluded its analysis by stating "it is not plausible to state which emissions – emitted by whom and at what time in the last several centuries and at what place in the world – 'caused' Plaintiffs' alleged global warming related injuries."

After dismissing the plaintiffs federal common law public nuisance claim on political question and standing grounds, the court dismissed the remaining state law claims without prejudice for lack of jurisdiction, refusing to invoke supplemental jurisdiction.

Commentary – An Invitation to Forum Shop?

The varied rulings by the *Comer* and *Kivalina* courts are an interesting development in global warming public nuisance claims. Following the decision in *Connecticut v. AEP* to reinstate plaintiffs' claims, *Comer* will likely serve as a further precedent to embolden plaintiffs to pursue large emitters of greenhouse gases. *Comer*

Offices

Atlanta

Austin

Chicago

Dallas

Houston

London

Los Angeles

New Orleans

New York

Sacramento

San Francisco

Washington DC

The Action Heats Up in Global Warming Nuisance Litigation

Fifth Circuit Follows Second in Allowing Claims to Proceed in Comer, While Northern District of California Dismisses Kivalina (cont'd.)

would seem even more appealing to plaintiffs because it specifically allowed a global warming claim that sought damages, as opposed to the injunctive relief sought in the *Connecticut v. AEP* case.

Since *Comer* and *Connecticut v. AEP* were decided by the Federal Court of Appeals for the Fifth and Second Circuits respectively, they will be binding precedent for the federal district courts in those circuits – an area that includes Texas, Louisiana, Mississippi, New York, Vermont, and Connecticut. These decisions are not binding for the district courts in other states; thus, the possibility remains that district courts in other states will issue decisions such as the one by the *Kivalina* court. It also remains to be seen whether the *Kivalina* plaintiffs will appeal the district court's decision, and if so, whether the traditionally more liberal Ninth Circuit will follow the Second and Fifth Circuits as might be expected in this case. Accordingly, it would seem likely that future plaintiffs may seek to bring their claims in the district courts of the Second and Fifth Circuits in order to avoid a potential dismissal for lack of standing or on the basis of the political question doctrine. This would also be convenient for prospective plaintiffs given the concentration of energy companies and other large emitters of greenhouse gases in those circuits, particularly the Fifth Circuit. Further, by sticking to the fertile ground of the Second and Fifth Circuits, prospective plaintiffs can reduce the opportunity for conflicting decisions in other circuits that might otherwise lead to a split in the circuits and eventual Supreme Court review.

Of course, while the Second and Fifth Circuits have held that the political question doctrine does not apply to global warming-based nuisance claims, climate change is very much a politically charged issue, and one that Congress is actively debating. It is very possible that Congress will enact some form of climate change legislation before a decision on the merits is reached in *Connecticut*, *Comer*, or any other global warming case. It remains to be seen whether such legislation will expressly preclude or permit these types of claims, or remain silent on the issue and leave it to the courts to determine the appropriate resolution of these claims.

For further insight into these developments or for assistance with any questions you may have on these issues, feel free to contact the authors or any member of LLBL's Climate Change Practice Team.

Endnotes

- 1 The *Comer* court dismissed plaintiffs' claims for unjust enrichment, fraudulent misrepresentation, and civil conspiracy due to a lack of prudential standing. These claims allege that the defendants artificially inflated prices of petrochemicals and hid or lied about the effects of global warming from the government and regulators. The court found that standing was lacking for these claims because they did nothing more than present generalized grievances that could be brought by any citizen.

About the Authors

M. Benjamin Cowan is a partner in the Environmental Section of LLB&L. Mr. Cowan is the leader of the firm's Climate Change Practice Team, with an emphasis on carbon trading programs and the development of emissions credits and offset projects. He has extensive experience in the permitting and development of wind energy projects. His traditional environmental law practice covers regulatory compliance and permitting issues, civil and criminal enforcement defense, and real estate, corporate and energy transactional matters.

Joseph N. Froehlich is a partner in the litigation department at LLB&L. He is a member of the firm's Climate Change Practice Team with a focus on global warming litigation involving both regulatory and common law claims. He has experience in representing clients in complex commercial and business litigation, both in New York and throughout the country. Mr. Froehlich has extensive experience representing financial institutions, educational institutions and insurance companies in every step of the litigation process: pre-suit investigation, pre-trial proceedings, trials, appeals and post-judgment proceedings.