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Fifth Circuit Holds That Private Parties Have Standing to Assert Tort Claims for Injuries Allegedly Arising From Climate Change

Several weeks after the U.S. Court of Appeals for the Second Circuit ruled in *Connecticut v. American Electric Power Company, et al.*, that, in the absence of comprehensive legislation regulating greenhouse gas (GHG) emissions, states, municipalities and certain private organizations have standing to bring federal common law nuisance claims seeking to impose company-specific GHG emission caps and mandatory reductions, the Fifth Circuit in *Comer v. Murphy Oil USA, et al.*, held that private parties have standing to bring tort claims seeking both compensatory and punitive damages for property damages allegedly stemming from climate change-driven events. The *AEP* and *Comer* decisions may provide the catalyst for additional climate change tort suits seeking both money damages and GHG emissions reductions.

In *Comer*, plaintiffs (Mississippi Gulf Coast residents and property owners) filed a putative class action against a wide range of energy, fossil fuel and chemical companies. Plaintiffs alleged that defendants' GHG emissions contributed to global warming that had raised sea levels and increased the ferocity of Hurricane Katrina, which combined to destroy plaintiffs' private and public property. Plaintiffs asserted claims for compensatory and punitive damages under various Mississippi common law theories, including, public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy. The district court had dismissed the complaint without written opinion on nonjusticiable, political question grounds. The Fifth Circuit reversed, finding that the plaintiffs had satisfied both Mississippi and federal standing requirements (as necessary for a diversity case) with respect to their nuisance, trespass and negligence claims and that the political question doctrine did not bar these claims.

With respect to standing, the court held that the plaintiffs had satisfied Mississippi's minimal requirements. The court ruled that plaintiffs had established standing with their allegations that the adverse effects of defendants' GHG emissions had damaged their property interests. Like the Second Circuit in *AEP*, the Fifth Circuit found that the *Comer* plaintiffs had met the federal three-part test for standing under Article III of the U.S. Constitution. The court found there was no dispute that plaintiffs had satisfied the "injury-in-fact" and the redressability prongs — plaintiffs had alleged concrete injuries to their particular property, and a monetary award would redress those injuries. The heart of the dispute was the "fairly traceable" causation factor.

The Fifth Circuit ruled that at the pleading stage of the litigation, plaintiffs need only allege a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant." This standard is not equivalent to the tort causation requirement of "proximate cause." Relying on scientific reports, plaintiffs had alleged a chain of causation between defendants' emissions and plaintiffs' injuries. The Fifth Circuit noted that this alleged causation chain was similar to the contentions in *Massachusetts v. EPA*, where the Supreme Court held that Massachusetts had standing to challenge EPA's decision not to regulate the emission of GHGs from motor vehicles. Moreover, as in *Massachusetts v. EPA* and in *AEP*, the Fifth Circuit rejected

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the argument that because defendants' emissions contributed only minimally to plaintiffs' injuries, traceability was lacking. The *Comer* court stated that the "'fairly traceable' test is not an inquiry into whether a defendant's pollutants are the sole cause of an injury but rather whether 'the pollutant causes or *contributes* to the kinds of injuries alleged by the plaintiffs.'" Accordingly, the Fifth Circuit concluded that plaintiffs had standing to bring their state public and private nuisance, negligence and trespass claims.

The Fifth Circuit went on to find that the political question doctrine did not bar plaintiffs' claims. The court held that the fundamental issue was whether damages resulting from climate change had been "constitutionally entrusted exclusively to either or both the executive or the legislative branch . . ." The most that the *Comer* defendants were able to point to is that Congress may in the future enact laws, or federal agencies may adopt regulations, that comprehensively govern GHGs. The court characterized the political question doctrine as a limited exception to the court's exercise of jurisdiction and that federal courts are not free to abstain from deciding politically charged cases or cases with complex questions if a question is not committed to the legislative or executive branches. Moreover, the court noted that the common law tort claims are rarely thought to present nonjusticiable political questions.

In contrast to the Appellate Court decisions in *Comer* and *AEP*, the Northern District of California recently issued a conflicting decision. In *Kivalina v Exxon-Mobil*, an Alaskan village filed a federal nuisance action against two dozen oil, energy and utility companies seeking up to $400 million in damages for the costs of relocating the village. Plaintiffs allege that moving the village is necessary because global warming has caused the loss of sea ice and, without the protective ice, erosion resulting from winter storms is rendering the village uninhabitable. The judge dismissed the claims on political question and standing grounds rejected by the *AEP* and *Comer* courts.

The *AEP* and *Comer* decisions are likely to prompt an increase in similar damage- and injunction-based tort claims against significant emitters of GHGs. This list of potential defendants could potentially be quite extensive. Under these decisions, there is no obvious lower limit in the decisions that would serve as a safe harbor for defendants accused of contributing to global warming.

If there proves to be a flood of new cases, it is possible that the defendants will consider the formation of a multidistrict litigation (MDL) proceeding as a means of keeping some control over these cases. This is particularly true if the defendants believe that the pending climate change legislation might provide an alternative to continued litigation. A judge in charge of an MDL proceeding, who is faced with managing and coordinating a large number of cases, is more likely to be interested in the type of global resolution that legislation could provide, and thus may be more willing to structure a process that allows for the legislative process to play out some before engaging in extensive judicial proceedings.

If comprehensive GHG legislation does not pass, EPA will likely proceed with its efforts to cobble together a GHG regulatory program under the federal Clean Air Act (CAA). The use of the CAA (such as new source review permit requirements for new and modified plants), however, might not displace common law-based suits seeking the imposition of GHG emission caps and reductions if the CAA-based GHG regulatory framework does not address completely the issues in the case — regulating and capping GHG emissions from existing plants. Consequently, until comprehensive federal GHG legislation is enacted, companies face the unpleasant prospect of a patchwork combination of EPA regulation under the CAA and court imposed injunctions.

Moreover, even if comprehensive GHG legislation or a CAA-based regulatory framework is established, damage-based claims, like those in *Comer*, are a different animal entirely. It is far from clear whether a court would find that legislation or regulations displace damage-based tort claims. It may well be the case that state common law claims such as those set out in *Comer* will continue to be asserted by claimants. Although cases based on such damage-based tort claims are more challenging from the plaintiffs' perspective, they are also far more lucrative, and are likely to lead to a far broader range of cases, including additional purported class actions seeking punitive damages.

As companies evaluate their potential exposure to federal GHG tort actions and/or prepare defenses to any such actions in which they may become involved, we believe that companies should consider strategies and defenses that encompass both the ever changing and complex federal legislative and regulatory regimes relating to GHG emissions and the myriad procedural and substantive pre-trial defenses and actions available to defendants in high-stakes tort cases.