

Fifth Circuit Reinstates State Class Action Lawsuit Seeking Global Climate Change Damages

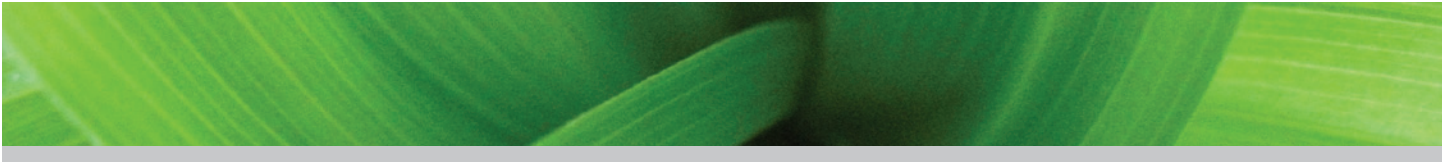
INTRODUCTION

A panel of the federal court of appeals for the Fifth Circuit has reinstated a class action tort suit against major energy, fuel and chemical companies seeking damages for property losses caused by Hurricane Katrina. *Comer et al., v. Murphy Oil USA et al.*, No. 07-60756 (5th Cir. October 16, 2009). The complaint was filed in the federal district court for Mississippi, and is based solely on Mississippi law. The plaintiffs allege that defendants' emissions of greenhouse gases (GHGs) contributed to global climate change, which in turn intensified the strength of Hurricane Katrina, and resulted in destruction of their property.

The district court had dismissed the suit on the grounds that the plaintiffs lacked standing to invoke the federal court's jurisdiction over suits based on diversity of citizenship, and that the claims presented non-justiciable political questions. The Fifth Circuit's rulings on these issues are consistent with the Second Circuit's recent decision in *Connecticut v American Electric Power Corp et al.*, Nos. 05-5104-cv, 05-5119-cv (September 21, 2009), which allowed a suit for injunctive relief to go forward under a federal common law theory that emissions contributing to global warming are a public nuisance (see September 24, 2009 Issue Alert titled, "Second Circuit Reinstates Lawsuit Claiming GHG Emissions from Six Utilities Constitute Nuisance Under Federal Common Law"). Both opinions hold that (1) climate change issues are not exclusively political questions, but may be addressed by federal courts; and (2) states, local governments and private litigants have standing to seek judicial remedies for injuries attributable to global climate change caused by GHG emissions. One judge on the Fifth Circuit panel, however, while concurring with the standing and political question holdings, noted that he would have dismissed the complaint for failure to allege facts showing that the losses alleged were "proximately caused" by the defendants' emissions.

BACKGROUND OF THE CASE

Plaintiffs are residents and owners of land and property along the Mississippi Gulf Coast. They allege "that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of [GHGs] 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." Their class action complaint asserts claims for compensatory (*i.e.*, property and other economic) damages and punitive damages based on Mississippi common law of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy.



The district court granted defendants' motion to dismiss the case on the grounds that plaintiffs lack standing to assert their claims, and that the claims present non-justiciable political questions. The district court characterized the suit as a debate about global climate change, which had no place in a federal court until Congress enacts legislation setting standards by which the court can measure conduct, and by which juries can adjudicate the facts. In considering the claims alleged, the district court said it would have had to make policy decisions committed to the Legislative and Executive branches.

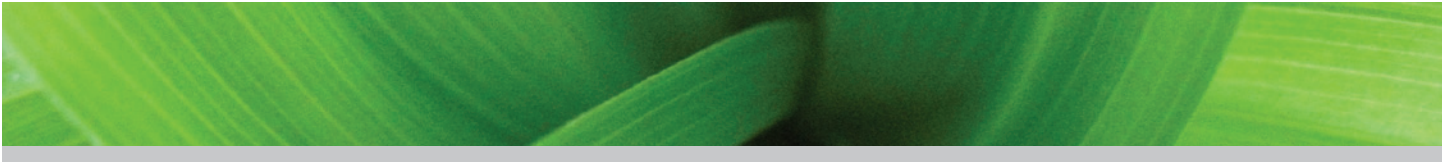
THE FIFTH CIRCUIT'S OPINION

The Fifth Circuit panel concluded that the plaintiffs have standing under Article III of the Constitution to assert their public and private nuisance, trespass, and negligence claims under Mississippi law, and that these state law tort claims do not present non-justiciable political questions. The court, however, dismissed for lack of prudential standing other claims brought by the plaintiffs – specifically the claims that the defendant companies had been unjustly enriched, had made fraudulent misrepresentations about the nature of global warming, and had engaged in a civil conspiracy to mislead the public and governments about the dangers of GHGs. The Court remanded the case to the district court to decide whether plaintiffs had alleged sufficient facts to state a cause of action under Mississippi tort law by showing that their losses were proximately caused by the defendants' emissions.

1. Standing. The court first noted that in a diversity case based on state common law, the plaintiffs must satisfy both state and federal standing requirements. Because the judicial power under the Mississippi Constitution is not limited to cases or controversies, the court held that plaintiffs adequately established standing to assert all of their claims under Mississippi law. In ruling on the federal standing requirements, however, the court separated the claims into two categories.

Nuisance, Trespass and Negligence. The court held that the constitutional minimum for federal standing under Article III of the United States Constitution requires plaintiffs to demonstrate that: (1) they have suffered an injury in fact; (2) the injury is “fairly traceable” to the defendants' actions; and (3) the injury is capable of being redressed by a favorable judicial decision. The court determined that the plaintiffs clearly met the first and third of these requirements. Turning then to the second element, traceability, the court distinguished the traceability requirement for standing from the proximate causation that must be established in order for the plaintiffs to succeed on the merits of a tort claim. For federal standing purposes, it held, “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.” It expressly relied on the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which “accepted a causal chain virtually identical in part to that alleged by plaintiffs.” Consequently, the court found that plaintiffs met the traceability requirement necessary for standing.

Unjust Enrichment, Fraudulent Misrepresentation, and Civil Conspiracy. The court held, however, that plaintiffs' claims of unjust enrichment, fraudulent misrepresentation, and civil conspiracy did not satisfy federal prudential standing requirements. It explained that because the source of these claims was the alleged failure of the government to properly regulate and enforce environmental laws that would have prevented defendants' emissions of GHGs, each of these claims “presents a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public.”



2. *Political Question*. The court held that because defendants could not identify any constitutional provision or federal law that commits Mississippi's common law torts of nuisance, trespass, and negligence exclusively to the legislative and/or executive branches of the federal government, no political question is involved. It noted that future laws or regulations might preempt state common law torts, but "[u]ntil Congress, the president or a federal agency so acts...the Mississippi common law tort rules questions posed by the present case are justiciable, not political..." The Court also noted that its conclusion was consistent with the Second Circuit's recent opinion in *Connecticut*, which rejected a political question defense under the six part test in *Baker v. Carr*, 369 U.S. 186 (1962).

IMPLICATIONS

Comer and *Connecticut* are quite different cases, but each potentially opens the court-house door to more suits based on climate change impacts of GHG emissions. *Comer* involves only class action damages. *Connecticut* involves only injunctive relief. *Comer* is based only on state tort law. *Connecticut* is based only on federal common law. Both *Comer* and *Connecticut*, however, clearly hold that global change issues may be considered in suits against major emitters of GHGs in private litigation. Under those decisions (unless reversed), such suits will continue to be available so long as there are no federal statutes or regulations that preempt state law tort claims like those in *Comer*, or displace federal common law claims like those in *Connecticut*. Both cases will, moreover, influence the disposition of other pending tort cases premised on climate change-related harms.

One such case is *Native Village of Kivalina v. ExxonMobil Corp. et al.*, USDC ND Calif. No. C 08-1138 SBA (September 30, 2009). In that suit, a village on the Northwest coast of Alaska sued 24 energy, oil, and utility companies for unspecified damages under federal common law. The complaint alleges that coastal erosion threatens to force the 400 inhabitants to relocate. This crisis is asserted to be attributable to global climate change linked to GHG emissions from the defendants' facilities. The district court dismissed the complaint on the ground that it raises non-justiciable political questions, and that plaintiffs lack constitutional standing. Given the opinions in *Connecticut* and *Comer*, plaintiffs in *Kivalina* may appeal to the Ninth Circuit in the hope that it will view the issues in the same light as Second and Fifth Circuits.

The defendants in *Comer* may petition the full Fifth Circuit for rehearing or petition the Supreme Court to consider the case. In the meantime, *Comer* adds to the potential for additional federal and state common law suits against a variety of GHG sources by public and private parties alleging injuries from climate change. In addition, it adds to the debate over climate change in Congress and the Executive branch. The prospect of potentially significant tort liability and a proliferation of litigation over climate change may provide additional impetus for Congress to move forward with a comprehensive scheme for the control of GHGs.

FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors congressional and executive branch developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information, please contact Kyle Danish, Stephen Fotis, Doug Smith, or any member of the firm's Climate Change practice at (202) 298-1800.

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