

ENVIRONMENTAL, ENERGY AND MARITIME LAW

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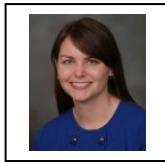
R. Bruce Barze, Jr. and Alexia B. Borden provide an update on climate change litigation, highlighting three cases in California, Connecticut, and Mississippi in which plaintiffs are trying to use nuisance theories to create liability for defendants.

Update on Climate Change Litigation

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ABOUT THE COMMITTEE

The Environmental, Energy and Maritime Law Committee assists all members whose practice relates to environmental issues and the energy and admiralty fields by publishing newsletters, presenting educational seminars, and providing an opportunity to network with fellow practitioners in those fields to enhance practice opportunities across the country and internationally.

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In the summer of 2008, we reported on a number of “global warming” lawsuits. (The article entitled “*Global Warming Litigation: Just a Bunch of Hot Air?*” can be found on the Publications section of the IADC Web site by members logged in.) Last fall, three significant climate change case opinions were released. While the incentive for these lawsuits differs (money damages vs. reductions in emissions), the premise of the suits is the same—defendants emit carbon dioxide, which is a nuisance that causes global warming. The Second and Fifth Circuits found that the plaintiffs had standing to bring such claims, while a federal trial court in California found just the opposite. However, on February 26, 2010, the Fifth Circuit granted a petition for rehearing *en banc* and will give the defendants another bite at the apple with respect to these claims. We discuss these cases in more detail below.¹

***Comer v. Murphy Oil*, Case No. 07-60756 (5th Cir. 2009)**

On August 30, 2007, the U.S. District Court for the Southern District of Mississippi determined that the plaintiffs lacked standing to sue because they could not show how any of defendants’ actions had caused damage to any plaintiff. The district court also held that the plaintiffs’ claims raised “political questions” that the Court lacked jurisdiction to hear.²

Last October, the United States Court of Appeals for the Fifth Circuit disagreed and

reversed this decision (in part), remanding the case to the district court. The Fifth Circuit opinion holds that the Plaintiffs have standing to assert their nuisance, trespass and negligence claims and that none of the claims present nonjusticiable political questions. *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009).

The case was originally filed in 2005 following Hurricane Katrina on behalf of all Mississippians suffering injury and damage as a result of that devastating storm. The suit was brought against oil, coal, utility, and chemical company defendants. Specifically, the plaintiffs claim that: (1) the defendants burn or supply coal that releases or emits CO₂; (2) the CO₂ has contributed to global warming; (3) global warming caused Hurricane Katrina to form and intensify; and (4) Hurricane Katrina caused damage to the plaintiffs’ lives and properties.

The defendants filed a petition for rehearing *en banc*, seeking rehearing based on the panel’s application of *Baker v. Carr*, 369 U.S. 186 (1962), the landmark political question case, and based on the panel’s ruling on standing. On February 26, 2010 the Fifth Circuit granted the petition for rehearing *en banc*. 2010 WL 685796 (5th Cir. Feb. 26, 2010). A supplemental order requires supplemental briefs from appellants on March 31 and from appellees on April 30. The court has set oral argument during the week of May 24, 2010.

***Connecticut v. AEP*, Case No. 05-5104 (2d. Cir 2009)**

On September 21, 2009, the United States Court of Appeals for the Second Circuit Court reversed a district court decision and upheld the right of several states (Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, as well as the

¹ Attorneys in the Environmental Litigation Practice Group at Balch and Bingham LLP are engaged in the defense of some of these cases, actively monitor developments in “climate change” cases, and advise clients accordingly. As an aside, the firm’s Gulfport, Mississippi office sustained extensive damage during Hurricane Katrina.

² The district court did not issue a written opinion in this case but rather offered its ruling from the bench.

City of New York) and two land trust groups to bring nuisance claims against AEP, TVA, XCel Energy, Cinergy and Southern Company under federal common law. 582 F.3d 309 (2nd Cir. 2009). Specifically, the plaintiffs allege that global warming is a public nuisance, which in turn harms their property. The U.S. District Court for the Southern District of New York had dismissed the case in 2005, holding that the question of global warming is a nonjusticiable political question that should be addressed by legislation. The Second Circuit vacated the judgment of that court and remanded the case for further proceedings.

Specifically, the Second Circuit held that the political question doctrine is “only rarely” applied by the Supreme Court to bar adjudication of an issue. 582 F.3d at 321. The court examined the six factors laid out in *Baker v. Carr* to determine whether a political question is involved and concluded that they did not apply to the federal common law nuisance claims. Importantly, the court stated that a decision by a single federal court concerning a common law nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy (assuming that emissions caps are even put into place). The court also held the plaintiffs had standing to bring claims. *Id.* at 349.

On November 5, 2009, the defendants filed a petition for rehearing *en banc* arguing that the decision contravenes the political question doctrine, the constitutional standing doctrine, and settled principles on the limits of federal common law. This petition remains pending.

***Native Village of Kivalina v. ExxonMobil*,
Case No. 08-1138 (N.D. Cal. 2009)**

On October 15, 2009, the United States District Court for the Northern District of California dismissed a lawsuit filed against two dozen oil, power and coal companies on behalf of the Native Village of Kivalina, Alaska. 663 F. Supp. 2d 863 (N.D. Cal. 2009). The Court disagreed with the Second Circuit in *Connecticut v. AEP* and dismissed the lawsuit on the ground that the case involved a political question more properly decided by the legislative and executive branches. In addition, the Court held that the plaintiffs lacked standing, holding that “[i]n view of the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the 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, group at any particular point in time.” *Id.* at 880.

This lawsuit was originally filed in 2008 and claimed that the defendants’ emission of greenhouse gases, mainly carbon dioxide, is responsible for global warming. These increased temperatures have allegedly melted the sea ice adjacent to the village, leaving the village more vulnerable to Arctic winter storms. As a result, plaintiffs claim, the village has suffered a “massive erosion problem” that is destroying the village and requires it to be relocated, at a cost estimated between \$95 and \$400 million. Plaintiffs derived this estimate based on reports by the U.S. Army Corps of Engineers and the U.S. Government Accountability Office. Plaintiffs assert four causes of action: (1) public nuisance (based on federal common law and state common and statutory law); (2) private nuisance (state common and statutory law); (3) civil conspiracy; and (4) concert of action.

On November 6, 2009, the Ninth Circuit Court of Appeals docketed the appeal filed by

the plaintiffs. The plaintiffs' principal brief is due on March 11, the defendants' briefs are due on April 12, and the plaintiffs have the option to file a reply.

Given the attention paid to this issue by politicians, military leaders, and the media, as well as the recent meeting in Copenhagen of the UN Climate Change Conference, climate

change will continue to dominate headlines. The debate continues to rage in light of the recent disclosure of damaging emails sent by several scientists who are prominent climate change advocates. It is unclear where the public will end up on these issues, but it is evident, based on these recent court decisions, that this litigation is only in its early stages and likely will take years to sort out.

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Bruce Barze and Thomas L. Casey, III

MARCH 2007

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R. Bruce Barze, Jr. and Alexia B. Borden

JANUARY 2007

Maine People's Alliance & Natural Resource Defense Council v. Mallinckrodt, Inc., No. 05-2331 (1st Cir. Dec. 22, 2006)
By R. Bruce Barze, Jr. and Thomas L. Casey, III

OCTOBER 2006

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R. Bruce Barze, Jr. & Jeffrey H. Wood