

Climate Change and Clean Technology Blog

Posted at 10:43 AM on December 8, 2009 by Sheppard Mullin

Federal Courts Take Divergent Views of Common Law Claims on Climate Change

Comer v. Murphy Oil USA, ___ F.3d ___, No. 07-60756 (5th Cir. 2009); *Native Village of Kivalina v. ExxonMobil Corporation*, No. 08-1138 (N.D. Cal. Sept. 30, 2009)

by [James F. Rusk](#)

In two sharply diverging opinions, the Fifth Circuit Court of Appeals and a northern California district court recently considered the validity of common law tort claims against large emitters of greenhouse gases. The Fifth Circuit, in *Comer v. Murphy Oil USA*, held that plaintiffs had standing and that their claims did not present a nonjusticiable political question. The district court, in *Native Village of Kivalina v. ExxonMobil Corporation*, found that plaintiffs lacked standing because their injuries were not traceable to defendants' actions, and that their claims were barred by the political question doctrine.

Comer is generally consistent with the Second Circuit's recent opinion in *Connecticut v. American Electric Power Company Inc.*, ___ F.3d ___, No. 05-5104 (2nd Cir. 2009), although the Fifth Circuit did not rely on that case. *Kivalina*, on the other hand, explicitly criticized the reasoning of *American Electric*, setting the stage for a potential circuit split if the Ninth Circuit upholds the district court's decision.

Comer v. Murphy Oil USA

In *Comer*, private property owners along the Mississippi Gulf Coast filed a putative class action against energy, chemical, and fossil fuel companies headquartered outside the state but doing business in Mississippi. Plaintiffs alleged that defendants' emissions of greenhouse gases contributed to global warming, which led to a rise in sea levels and increased the severity of Hurricane Katrina, thereby damaging plaintiffs' property. Invoking federal diversity jurisdiction, plaintiffs asserted claims under Mississippi's common law, including public and private nuisance, trespass and negligence. Plaintiffs did not assert any federal law claims and sought

only damages, not injunctive relief.

Defendants contended that plaintiffs lacked standing because their injuries were not "fairly traceable" to defendants' actions, in that the causal connection between plaintiffs' injuries and defendants' actions was too attenuated. They also argued that plaintiffs' claims presented a nonjusticiable political question. The district court agreed and dismissed the claims in a bench ruling. The Court of Appeals, however, reversed and remanded.

On the issue of standing, the Fifth Circuit rejected defendants' attack on causation, finding that it "essentially calls upon us to evaluate the merits of plaintiffs' causes of action" and was therefore "misplaced at this threshold . . . stage of the litigation." Slip op. at 9. At the pleading stage, it was sufficient that plaintiffs' complaint alleged a causal chain linking defendants' emissions and plaintiffs' injuries. The court also found it significant that the Supreme Court, in *Massachusetts v. EPA*, had "accepted a causal chain virtually identical in part to that alleged by plaintiffs." Slip op. at 11.

The court also relied upon *Massachusetts* for the proposition that "injuries may be fairly traceable to actions that *contribute to*, rather than solely or materially cause . . . global warming." Slip op. at 12 (emphasis added). Thus, the court rejected defendants' contention that traceability was lacking because defendants' emissions had contributed only minimally to plaintiffs' injuries.

As to justiciability, both *American Electric* and *Kivalina* addressed this issue by analyzing the criteria found in *Baker v. Carr*, 369 U.S. 186 (1962), the seminal case dealing with the political question doctrine. *American Electric* and *Kivalina* focused primarily on two of the *Baker* factors: whether there was a "lack of judicially discoverable and manageable standards for resolving" the plaintiffs' claims, and whether resolution of the claims would be impossible "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The Fifth Circuit, however, relied on *Nixon v. United States*, 506 U.S. 224 (1993).

Under *Nixon*, the court found it unnecessary even to apply the criteria found in *Baker*, because the question whether defendants were liable to plaintiffs under Mississippi common law clearly had not been textually committed to a political branch of government by the Constitution or by federal law. The court also noted that common law tort claims are "rarely thought to present nonjusticiable political questions," and that claims for damages are "considerably less likely" to be nonjusticiable than claims for injunctive relief, in part because a claim for damages would not require the court to set standards for greenhouse gas emissions. Slip op. at 25.

Native Village of Kivalina v. ExxonMobil Corporation

In *Kivalina*, the governing bodies of a small Alaskan coastal village, located seventy miles north of the Arctic Circle, sued twenty-four oil, energy and utility companies under the federal common law of nuisance. Plaintiffs alleged that the defendants' emissions of greenhouse gases contributed to global warming, which in turn reduced the sea ice that protected the village against storms, leading to erosion that was making the village uninhabitable. The plaintiffs sought unspecified damages, alleging that the village would have to be relocated at a cost of

\$95 million to \$400 million.

As in *Comer* and *American Electric*, the defendants argued that plaintiffs lacked standing and that their claims were nonjusticiable. In *Kivalina*, however, the court agreed. The court found that the plaintiffs lacked standing because their alleged injuries were not fairly traceable to defendants' conduct, given that global warming results from the cumulative effects of emissions from a multitude of sources over many decades. Although defendants' emissions may have *contributed* to global warming, this alone did not establish a substantial likelihood that defendants' conduct, and not that of other parties responsible for similar emissions, actually harmed plaintiffs. According to the court, prior water pollution cases embracing a "contribution" theory were distinguishable because they involved discharges in excess of statutory limits, where the plaintiff also was within the "zone of discharge." Those factors gave rise to a presumption of causation not applicable in the present case, given that no statutory limits exist for greenhouse gas emissions and that the zone of discharge for such emissions would be the entire planet. Slip op. at 19.

Applying the *Baker* factors discussed above, the court also found that the case presented a nonjusticiable political question. As the court explained, a public nuisance is defined as an "unreasonable interference with a right common to the general public." Determining whether the interference is unreasonable requires the court to weigh the "gravity of the harm against the utility of the [defendant's] conduct." Slip op. at 10 (quoting the Restatement (Second) of Torts). Therefore, resolution of plaintiffs' claims would require the fact finder to weigh the harms associated with current energy-production methods against the potential benefits and risks associated with alternative energy sources, taking into account such factors as reliability, safety and economic impacts. The court could identify no standards that would produce a decision that would be "principled, rational, and based upon reasoned distinctions." Slip op. at 11.

Likewise, resolution of plaintiffs' claims for damages necessarily would require the courts to decide who, among the many contributors to greenhouse gas emissions, should bear the costs of global warming—a policy decision best left to the political branches. Plaintiffs' claims were therefore unfit for judicial resolution and dismissed for lack of jurisdiction.

Conclusion

On the standing issue, *Kivalina* reached a different conclusion from *Comer* and *American Electric* in large part because the *Kivalina* court rejected the "contribution" theory of causation accepted by the Fifth and Second Circuits. According to the *Kivalina* court, the undifferentiated nature of greenhouse gas emissions means that, as a matter of law, plaintiffs cannot establish causation sufficient to support a claim against any particular defendant. This may reflect the court's reading of the relevant case law, but it also appears to reflect underlying justiceability concerns—i.e., that the courts should not be responsible for deciding who among the innumerable contributors to global warming should be held responsible for the harm that it causes. That is not surprising, given the enormous scope of the problem and the unprecedented magnitude of the damages that could be at issue.

The same concerns about justiceability and fairness that drove the *Kivalina* decision will provide

continued pressure for a resolution of this emerging conflict among the federal courts. As long as the Second and Fifth Circuits, and possibly others, continue to allow these suits, large emitters of greenhouse gases will be subject to uncertainty and nearly unlimited potential liability. It would not be surprising to see the Supreme Court address this issue, unless Congress enacts comprehensive climate change legislation that preempts common law claims.

For more information, please contact [James F. Rusk](#). James Rusk is an associate in the Real Estate, Land Use and Environmental Practice Group in the firm's San Francisco office.