

Mississippi Federal Court Sacks Climate Change Lawsuit for a Second Time

Toxic Tort and Environmental Law Update

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The U.S. District Court for the Southern District of Mississippi once again dismissed claims that the oil and coal industries are liable for property damaged by Hurricane Katrina, finding both that the plaintiffs failed to allege injuries that are "fairly traceable" to the defendants' conduct and that the lawsuit raised non-justiciable political questions.

In *Ned Comer, et al. v. Murphy Oil USA, Inc., et al.*, No. 1:11CV220-LG-RHW (S.D. Miss. Mar. 20, 2012), a group of Coastal Mississippi property owners alleged that the oil and coal industries released greenhouse gases that led to the development and increase of global warming, producing the conditions that formed Hurricane Katrina, which damaged their property. This was the second time these plaintiffs raised these claims against the same defendants in this District Court. In the original lawsuit, the District Court dismissed the plaintiffs' claims because it found that the plaintiffs lacked standing and that their claims were non-justiciable pursuant to the political question doctrine. *Comer v. Murphy Oil USA*, No. 05-436 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), vacated on grant of reh'g en banc, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), mandamus denied, No. 10-294 (U.S. Jan. 10, 2011). Subsequent to a long and complicated procedural history, resulting in the District Court's original dismissal being left firmly in place, the plaintiffs refiled their claims, relying on a Mississippi statute that purportedly permitted refiling.

The District Court did not agree, ruling that because there was a final judgment on the merits of their claims against their favor found with prejudice, the plaintiffs' present claims were barred because the doctrines of *res judicata* and *collateral estoppel* applied. Moreover, the

court ruled that the plaintiffs still lacked Article III standing. The court held that it was insufficient for the plaintiffs to merely allege that the defendants' emissions *contributed* to the kinds of injuries that they suffered. The plaintiffs must allege that the defendants' particular emissions led to their property damage and this they could not do. "At most," the court held, "the plaintiffs can argue that the types of emissions released by the defendants, when combined with similar emissions released over an extended period of time by innumerable manmade and naturally occurring sources encompassing the entire planet, may have contributed to global warming, which caused sea temperatures to rise, which in turn caused glaciers and icebergs to melt, which caused sea levels to rise, which may have strengthened Hurricane Katrina, which damaged the plaintiffs' property." The court also found that the plaintiffs' claims were non-justiciable political questions, because the plaintiffs were essentially asking the court to determine what levels of greenhouse gas emissions were unreasonable and these types of determinations have been entrusted to the EPA by Congress.

Comer is one of a trio of cases presenting common law tort claims for alleged contributions to global warming. A second suit is *American Electric Power, et al. v. Connecticut, et al.*, 131 S. Ct. 2527 (2011), where several states and land trusts sued six energy companies alleging that the defendants' greenhouse gas emissions constituted a public nuisance under federal common law. The third case is *Native Village of Kivalina v. Exxon-Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), in which an Inupiat Eskimo village sued oil, energy, and utility companies, alleging that their greenhouse gas emissions have contributed to global warming, thereby causing Arctic sea ice to diminish. As in *Comer*, the trial courts in *AEP* and *Kivalina* dismissed those respective actions on the grounds that the plaintiffs lacked standing and/or the claims were barred by the political question doctrine. In *AEP*, the plaintiffs appealed, the Second Circuit Court of Appeals vacated the lower court's dismissal, the defendants appealed, and the U.S. Supreme Court dismissed the plaintiffs' federal common-law claims, basically gutting the plaintiffs' case, and remanded to the Second Circuit, where the plaintiffs ultimately



dismissed voluntarily. In *Kivalina*, the plaintiffs appealed and the *Ninth* Circuit Court of Appeals has yet to render a decision.

The path of current and future litigation seeking to hold industry liable for the alleged effects of greenhouse gases on climate change remains somewhat uncertain, but the Mississippi federal court's decision in *Comer* is a strong indication that these issues are ill-suited for tort litigation and are inherently political and must therefore be dealt with by Congress and the executive branch.

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