Climate Change and Clean Technology Blog

Posted at 10:45 AM on June 11, 2010 by Sheppard Mullin

The Supreme Court or Congress: Which Will Decide Whether Large Emitters of Greenhouse Gasses May be Held Liable for the Effects of Global Warming?

By Robyn Christo and Scott Vignos

As climate change litigation proceeds throughout the country, three cases, *Comer v. Murphy Oil*, *Connecticut v. American Electric Power* and *Native Village of Kivalina v. ExxonMobil*, provide indications of the Supreme Court's potential role in shaping the legal landscape of climate change. The Fifth Circuit's May 28, 2010 order dismissing the *en banc* appeal in *Comer* has provided renewed interest in this issue.

In *Comer*, property owners along the Gulf Coast brought a putative class action alleging the activities of energy, chemical and fossil fuel companies had contributed to global warming. The class claimed that greenhouse gas (GHG) emissions from the defendants' operations contributed to rising sea levels and severe hurricanes resulting, ultimately, in property damage. The district court granted defendants' motion to dismiss, finding plaintiffs' claims presented non-justiciable political questions. A Fifth Circuit panel disagreed and the case was remanded for arguments on the merits. Defendants immediately moved for a rehearing *en banc*.

The Fifth Circuit, left with a bare quorum due to the recusal of seven justices, voted to hear the *Comer* appeal *en banc*, automatically vacating the panel's earlier decision. Prior to oral arguments, an eighth judge recused herself, prompting the loss of the quorum necessary to hear the appeal. Although the Court did not provide an explanation in its order, the recusals are speculated to be due to conflicts raised by stock-ownership issues.

Following arguments of both parties and *amici*, the Court dismissed the *Comer* appeal entirely, finding, "There is no rule that gives this court authority to reinstate the panel opinion which has been vacated." The order restored the district court's original ruling, leaving plaintiffs with a final alternative – a writ of certiorari to the Supreme Court. The order may signal a temporary victory for industry defendants, but the lasting impact of *Comer* is much more nuanced.

The *Comer* decision has generated interest in a potential Supreme Court ruling on the liability of large GHG emitters. Because the dismissal of *Comer* allowed the district court's opinion to stand, it prevented, for the time being, a split in the circuits on climate change liability. The Second Circuit in *American Electric Power*, recently denied defendants' motion for *en banc* consideration. The ruling allows a panel decision to stand, giving plaintiffs – eight states, New York City, and three land trusts – a green light to proceed with tort claims against GHG emitters in district court.

A circuit split may yet arise, however. *Native Village of Kivalina* is currently before the Ninth Circuit Court of Appeals. The district court in *Kivalina*, criticizing the Second Circuit's rationale employed in *American Electric Power*, found the tort claims of a village in the Arctic were precluded by a lack of standing and the political question doctrine.

Several issues may bear on the Supreme Court's decision to grant (or deny) certiorari in *Comer* or *American Electric Power*. First, without a substantive ruling from the Fifth Circuit, the Second Circuit's decision alone may not present the necessary impetus that is generally provided by a circuit split. Further, the Ninth Circuit may reverse the district court in *Kivalina* and side with the Second Circuit's decision in *American Electric Power*, leaving the circuits in agreement.

Second, should the Supreme Court grant certiorari, it is possible the Court would face recusal issues similar to those faced by the *Comer* court. Certainly Justice Sonia Sotomayor, who participated in *American Electric Power* while a justice on the Second Circuit, would recuse herself. Moreover, both Justices Anthony Kennedy and Samuel Alito own stock in large oil companies. Without the participation of these three Justices, the Court would be left with its bare quorum of six.

Finally, legislation pending on the Hill may militate against granting certiorari. Senators John Kerry and Joe Lieberman recently released their discussion draft of the long-awaited Kerry-Lieberman "American Power Act." Among other provisions, the bill contains measures to coalesce GHG emission standards under one federal rule, potentially affecting liability exposure for the energy, fossil fuel and chemical industries. To avoid venturing into delicate political territory, the Supreme Court may allow Congress an opportunity to enact comprehensive climate change legislation first.

While it is clear that the Fifth Circuit's decision to "punt" on the issue of climate change has left some frustrated with the Court's reticence on an important and timely issue, litigation may proceed in *American Electric Power*. And, while the *Comer* plaintiffs consider their next move, the attention of environmentalists and industry will shift to the Second Circuit where the defendants in *American Electric Power* have until June 19 to seek their own writ to the Supreme Court.

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