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Climate Change Nuisance Litigation

Emerging Trends and Defense Strategies for Global Warming Claims

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Christina M. Carroll, Partner, **McKenna Long & Aldridge**, Washington, D.C.
Scott D. Deatherage, Partner, **Thompson & Knight,** Dallas
R. Trent Taylor, Partner, **McGuire Woods**, Richmond, Va.

Tuesday, June 22, 2010

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Climate Change Nuisance Litigation: Emerging Trends

Christina M. Carroll

McKenna Long & Aldridge LLP

June 22, 2010

Connecticut v. American Electric Power Co., 582 F.3d 309 (2d Cir. 2009)

PARTIES

- PLAINTIFFS: a coalition of CT, NY, CA, IA, NJ, RI, VT, WI, the City of NY, and three land trusts.
- DEFENDANTS: *American Electric Power Co., Inc., American Electric Power Service Corp., Southern Co., Tennessee Valley Authority (TVA), Xcel Energy, Inc., and Cinergy Corp.* (power/utility companies)

NATURE OF THE LAWSUIT

- In 2004, Plaintiffs commenced a lawsuit against Defendants seeking an order requiring that Defendants abate the public nuisance of global warming. Plaintiffs alleged that Defendants' coal-operated power plants constitute a public nuisance under federal and state common law. Plaintiffs claimed that Defendants are "the five largest emitters of carbon dioxide in the U.S."

Connecticut v. American Electric Power Co.

REMEDIES SOUGHT

- Plaintiffs asked the court to hold each Defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance; and
- To permanently enjoin each Defendant to abate its contribution to global warming by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.

TRIAL COURT DECISION

- Dismissed Plaintiffs' case on grounds that the lawsuit raised "non-justiciable political questions that were better suited to resolution by the political branches and that were beyond the limits of the court's jurisdiction."
- In other words, the district court held that these kinds of cases should be handled by the Executive Branch and Congress, not the Courts.

Connecticut v. American Electric Power Co.

On September 21, 2009, the Second Circuit reversed the district court and concluded:

- Plaintiffs' claims did not present non-justiciable political questions. Seeking to limit emissions from coal-fired power plants is something that could be adjudicated by the courts;
- All plaintiffs have standing to bring their claims;
- Plaintiffs stated a claim under the federal common law of nuisance; and
- Plaintiffs' claims have not been displaced by federal legislation. The Clean Air Act and other legislation on the subject of greenhouse gases have not displaced federal common law public nuisance claims.

Connecticut v. American Electric Power Co.

- En banc review by the Second Circuit was denied.
- **WHAT COULD HAPPEN NEXT?**
  - Further proceedings at the district court level (unless stayed – motion for stay of mandate filed June 2, 2010).
  - Supreme Court review. Petition for writ of certiorari due July 6, 2010.

Thompson & Knight Impact
ATTORNEYS AND COUNSELORS

Comer v. Murphy Oil—Latest Decision Raises More Questions than Answers

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Background on Comer

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- **A lawsuit was filed in federal district court in Mississippi by plaintiffs who claimed that the defendants emissions of greenhouse gases had caused the rising of sea levels and the impact of Hurricane Katrina**
- **Plaintiffs**
  - **Fourteen individuals**
- **Defendants**
  - **Nine oil companies, thirty-one coal companies, and four chemical companies**

District Court Decision

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- **The district court dismissed the plaintiffs' state law nuisance, trespass and negligence claims**
- **Basis for dismissal**
  - **The plaintiffs had not adequately linked defendants' operations to Hurricane Katrina, and**
  - **Liability for damages relating to global warming constituted a nonjusticiable political question best left to Congress and the Executive Branch.**

Fifth Circuit Panel Opinion

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- **Standing**
  - **The plaintiffs alleged a series of scientific links that, if found to be true, fairly traced the damages caused by Hurricane Katrina to greenhouse gas emissions emitted by the defendants**
  - **The court concluded that these allegations were not too attenuated to permit the plaintiffs to have standing**
  - **The court relied in part on the US Supreme Court's conclusion in *Massachusetts v. EPA* that referred to rising sea levels and increased storms as a result of climate change caused by greenhouse gas emissions**
  - **The court allowed the case to go forward even if the plaintiffs could not show the defendants emissions were the material cause of their damages**

After Defendants Sought *En Banc* hearing, Recusals Began

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- ***En banc*** **hearing requested**
- **Seven out of 16 judges recused themselves**
- **After remaining eight judges vote to hear case *en banc* and letter briefs filed, another judge recused herself**
- **At which point five of the remaining judges concluded that the last recusal deprived the court of a quorum**

Order of Dismissal

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- Due to this late recusal, the en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business
- Accordingly, the appeal was dismissed and the lower court decision, which dismissed the action for lack of standing, was reinstated
- Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. May 28, 2010)

Dissent in Dismissal

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- **Judge Dennis dissent:**
  - **". . . federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred…. Just as courts have an absolute duty … to hear and decide cases within their jurisdiction, litigants have a corresponding due process right to have their cases decided when they are properly before the federal courts.**

Unprecedented Decision?

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- **No split between circuits, Fifth and Second, on standing or political question?**
- **Appeal now to the Supreme Court that the Fifth Circuit improperly failed to hear the case?**
- **How many years before this is decided by the Supreme Court?**
- **If sent back to the Fifth Circuit to hear the case, how long will that take?**
- **Regardless of the specific case itself, what are the problems with this approach to mass recusal?**
  - **What does this approach mean for future federal appeals?**
  - **What area the due process issues raised by the Fifth Circuits approach?**

Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp.

Kivalina Summary

- Remote Alaskan village has sued 24 oil, gas, and power companies, alleging that their emissions have contributed to global warming, which has in turn caused Arctic ice to melt, resulting in erosion and threatening the existence of the village.
- District court (N.D. Calif.) dismissed on political question and standing grounds
- On appeal to Ninth Circuit; briefing will not be complete until mid-September 2010

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What makes the *Kivalina* case different from other climate change cases?

- More concretized and specific injury
- Conspiracy
- Most sympathetic plaintiff
- Least attenuated causation

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Kivalina
Complaint – Alleged Injury

- "Rising temperatures caused by global warming have affected the thickness, extent, and duration of sea ice that forms along Kivalina's coast. Loss of sea ice . . . leaves Kivalina's coast more vulnerable to waves, storm surges and erosion. Storms now routinely batter Kivalina and are destroying its property to the point that Kivalina must relocate or face extermination." ¶ 185.

- "The U.S. Army Corps of Engineers, Alaska District, in an April 2006 report on erosion suffered by Alaska Native Villages, concluded that global warming has affected the extent of sea ice adjacent to Kivalina." ¶ 185.

- "The U.S. GAO, in a 12/03 report also addressing erosion in Alaska Native Villages, reached similar conclusions . . : '[I]t is believed that the right combination of storm events could flood the entire village at any time.'" ¶ 185.

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Kivalina
Complaint – Damages

- "The GAO concluded that ***'[r]emaining on the island . . . is no longer a viable option for the community***.'" ¶ 185.

- "The Army Corps of Engineers' report projects that it would cost between $95 and $125 million to relocate Kivalina. The GAO report projects that it would cost between $100 and $400 million to relocate Kivalina." ¶ 186.

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Kivalina
Complaint – Conspiracy

- "The Conspiracy Defendants participated and/or continue to participate in an agreement with each other ***to mislead the public with respect to the science of global warming and to delay public awareness of the issue*** – so that they could continue contributing to, maintaining and/or creating the nuisance without demands from the public that they change their behavior as a condition of further buying their products." ¶ 269.

- "At least as far back as 1970, Defendants Shell and BP began funding scientific research in England to examine the possible future climate changes from emissions of greenhouse gases. During most of this time, while the scientific alarm bells began ringing louder and louder, most of the defendants not only did little or nothing to control their greenhouse gas emissions and other conduct contributing to such emissions, but rather greatly increased their emissions and other conduct contributing to such emissions. Some of the defendants responded to these scientific developments with ***a nefarious campaign of deception and denial intended to manufacture a false sense of public uncertainty regarding the science of global warming***." ¶ 162.

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Conspiracy?

- Article that appeared on front page of April 24, 2009, N.Y. Times, *Industry Ignored Its Scientists of Climate:*
  - For more than a decade the Global Climate Coalition, a group representing industries with profits tied to fossil fuels, led an aggressive lobbying and public relations campaign against the idea that emissions of heat-trapping gases could lead to global warming.
  - ***"But a document filed in a federal lawsuit demonstrates that even as the coalition worked to sway opinion, its own scientific and technical experts were advising that the science backing the role of greenhouse gases in global warming could not be refuted."***
  - "The scientific basis for the Greenhouse Effect and the potential impact of human emissions of greenhouse gases such as CO2 on climate is well established and cannot be denied," the experts wrote in an internal report compiled for the coalition in 1995.

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Significance of Conspiracy count

- The conspiracy count arguably eliminates the need for a jury to determine how much greenhouse-gas production is acceptable. ***"You're not asking the court to evaluate the reasonableness of the conduct," Berman says. "You're asking a court to evaluate if somebody conspired to lie."***
- Monetary damages to Kivalina need not be sourced exclusively to the defendants' emissions; they would derive from bad-faith efforts to prevent the enactment of public measures that might have slowed the warming.

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Kivalina decision – Political Question

- "While a water pollution claim typically involves a discrete, geographically definable waterway, Plaintiffs' global warning claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and ***affecting the entire planet and its atmosphere***." Order at 12- 13.

- "[T]he harm from global warming involves a series of events disconnected from the discharge itself. In a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which ***in turn*** results in the planet retaining heat, which ***in turn*** causes the ice caps to melt and the oceans to rise, which ***in turn*** causes the Arctic sea ice to melt, which ***in turn*** allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms." Order at 13.

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Kivalina decision – Political Question

- "Plaintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs." Order at 13.

- "Plaintiffs also fail to confront the fact that resolution of their nuisance claim requires the judiciary to make a policy decision about who should bear the cost of global warming. Though alleging that Defendants are responsible for a ' substantial portion' of greenhouse gas emissions, ***Plaintiffs also acknowledge that virtually everyone on Earth is responsible on some level for contributing to such emissions.*** Yet, by pressing this lawsuit, Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming." Order at 15.

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Kivalina decision - Standing

- "Plaintiffs concede that they are unable to trace their alleged injuries to any particular Defendant but instead claim that they need not do so. According to Plaintiffs, for purposes of establishing standing, they need only allege that Defendants 'contributed' to their injuries . . . ." Order at 16.

- "The Court disagrees. There is a critical distinction between a statutory water pollution claim versus a common law nuisance claim. Under the Clean Water Act, . . . where the plaintiff shows that a defendant's discharge exceeds . . . federal limits, it is presumed for purposes of standing that there is a substantial likelihood that defendant's conduct caused plaintiffs' harm . . . ." *Id*.

- "In contrast, there are no federal standards limiting the discharge of greenhouse gases. As a result, no presumption arises that there is a substantial likelihood that any defendant's conduct harmed plaintiffs. ***Without that presumption, and especially given the extremely attenuated causation scenario alleged in Plaintiffs' Complaint, it is entirely irrelevant whether any defendant 'contributed' to the harm because a discharge, standing alone, is insufficient to establish injury." Id.***

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Kivalina decision - Standing

- "Plaintiffs have not alleged that the 'seed' of their injury can be traced to any of the Defendants. ***Plaintiffs allege that the genesis of the global warming phenomenon dates back centuries and is a result of the emission of greenhouse gases by a multitude of sources other than the Defendants.*** . . . ***Significantly, the source of the greenhouse gases are undifferentiated and cannot be traced to any particular source, let alone defendant [sic],*** given that they 'rapidly mix in the atmosphere' and 'inevitably merge[] with the accumulation of emissions in CA and the rest of the world.'" Order at 20.

- "In view of the Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the pleadings makes [sic] 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 [sic] at any particular point in time***. . . . Thus, Plaintiffs have not and cannot show that Defendants' conduct is the 'seed of [their] injury.'" *Id*.

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Kivalina decision – Standing

- "Here, the allegations of the Complaint demonstrate that Plaintiffs are not within the zone of discharge. This is not an instance in which Plaintiffs' use of their property is negatively impacted affected [sic] by virtue of their proximity to the discharge, similar to discharges of effluent into waterways. Plaintiffs' only response is that the ***relevant geographical area should be 'the entire world,*** given the inherent nature of global warming.' That reasoning, however, suggests that ***every inhabitant on this Earth is within the zone of discharge***, thereby effectively eliminating the issue of geographic proximity in any case involving harms caused by global warming." Order at 21-22.

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Kivalina decision - Standing

- "The tenuousness of Plaintiffs' standing is further exemplified by their theory of causation. Unlike water pollution cases in which the discharges of effluent in excess of the permitted amount are deemed harmful, Plaintiffs' arguments depend on an attenuated sequence of events that purportedly follow from the Defendants' alleged 'excessive' discharge of greenhouse gases . . . ***[T]he Plaintiffs' claim for damages is dependent on a series of events far removed both in space and time from the Defendants' alleged discharge of greenhouse gases."*** Order at 22.

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Will the specter of *Massachusetts v. EPA*, 549 U.S. 497 (2007), be an issue in the 9th Circuit?

- As noted by 5th Circuit panel in *Comer*, "[i]n [EPA], the Court accepted as plausible the link between man-made greenhouse gas emissions and global warming as well as the nexus of warmer climate and rising ocean temperatures with the strength of hurricanes. ***Thus, the Court accepted a causal chain virtually identical in part to that alleged by plaintiffs [in Comer].***"

- "Defendants' contention that traceability is lacking because their emissions contributed only minimally to plaintiffs' injuries is also similar to another argument rejected by the Supreme Court in [EPA]. . . . [T]he Court concluded that '[a]t a minimum . . . EPA's refusal to regulate [greenhouse gas] emissions contributes to Massachusetts' injuries,' and therefore sufficiently demonstrates traceability so as to support Massachusetts' standing. ***Thus, the Court recognized, in the same context as the instant case, that injuries may be fairly traceable to actions that contribute to, rather than solely or materially cause, greenhouse gas emissions and global warming.***"

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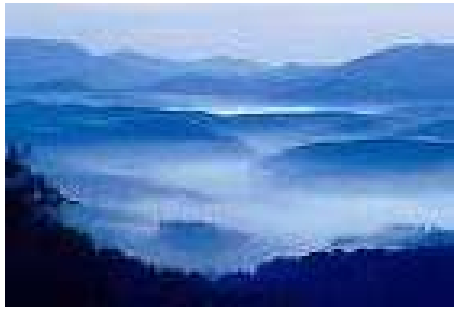
State of North Carolina v. TVA
593 F. Supp.2d 812 (W.D. N.C. 2009)



- Finding that power plant emissions contributed to:
  - significant negative impacts on human health, including premature mortality and increased asthma;
  - Numerous social and economic harms;
  - Harm to the environment;
  - Significant effects on visibility.

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State of NC v. TVA

- Declared air emissions to be a public nuisance despite compliance with all applicable state and federal regulations and ordered TVA to install enhanced pollution controls at a cost of $1 billion
- Held that TVA's power had a high social utility but that it was outweighed by "the vast extent of the harms caused in North Carolina by the secondary pollutants emitted by these plants . . . ."

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Key Threshold Issues in Climate Change Nuisance Litigation

- Standing
- Political Question Doctrine
- Causation/Showing of Injury
- Damages
- Preemption/Displacement
- The future

Standing – Overview

- Federal court jurisdiction is limited to "cases" or "controversies" under Article III of the Constitution.

- Basic Three-Part Test for Article III Standing:
  - Injury-in-fact
    - "invasion of a legally protectable interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'"
  - Causation
    - "there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly trace[able] to the challenged action of the defendant…'"
  - Redressability
    - "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

Standing – Different Test for State Plaintiffs?

- *Parens Patriae* Doctrine
  - State has a right to sue on behalf of its citizens to protect its quasi-sovereign interests—such as "the health and comfort of its inhabitants" and "earth and air in its domain." *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).
- *Massachusetts v. EPA,* 549 U.S. 497 (2007)
  - States and environmental groups sought review of EPA order that Clean Air Act did not authorize regulation of GHG emissions from new cars.
  - EPA argued plaintiffs lacked standing.
  - Court held MA entitled to "special solicitude" in standing analysis because of its quasi-sovereign interests.
  - But did special considerations actually impact the Court's *Lujan* three-part standing analysis?
    - Court did not indicate where relaxed standard was needed.
    - Court relied on MA's ownership interest in coastal property – not a quasi-sovereign interest for purposes of *parens patriae.*
    - GHGs cause global warming, EPA's refusal to regulate contributes to MA's injury.
- Impact of the "special solicitude" analysis on climate change nuisance cases?

Standing vs. Merits Analysis

- Factual allegations accepted as true.
- Reasonable inferences drawn in plaintiffs' favor.
- "At the pleadings stage, the 'fairly traceable' standard is not equivalent to a requirement of tort causation."
  - *Connecticut v. AEP*, 582 F.3d 309, 333 (2d Cir. 2009).
- "At this point in litigation, Plaintiffs need not present scientific evidence to prove that they face future injury or increased risk of injury, that Defendants' emissions cause their injuries, or that the remedy they seek will redress those injuries."
  - *Id.* at 333.

Standing - *Connecticut v. AEP*

- *Parens patriae* standing
  - States articulated an interest apart from interests of particular citizens (more than a nominal party); expressed quasi-sovereign interests in public health and welfare; and injury affects significant population segment (carbon dioxide will affect all citizens)
  - and in any event, states satisfy *Lujan* Article III test for standing / state suing in capacity as landowner → proprietary interest

Standing - *Connecticut v. AEP*

- Proprietary Article III standing
  - Injury in fact
    - Current injury – e.g., coastal erosion, loss of snowpack
    - Future injury – e.g., sea level rise, flooding, associated impacts on infrastructure, habitat destruction, crop risk
    - No strict temporal requirement; certainty of injury is the requirement
    - Refers to *Massachusetts v. EPA* holding that incremental injury suffices
  - Causation
    - Ps alleged that Ds are the 5 largest emitters of CO2 in the US and that Ds directly contribute to their injuries.
    - Particularly at the pleadings stage, the "fairly traceable" requirement is not equivalent to tort causation.
    - Plaintiffs "are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries." *Id.* at 347.
  - Redressability
    - Capping Defendants' emissions and reducing them by a certain percentage would redress Ps' alleged injuries.
    - Court rejected Ds' arguments that there is no redressability because Ds account for 2.5% of man-made emissions and global warming will continue even if Ds reduced emissions. Injuries could be less if Ds reduced emissions.

Standing - *Kivalina v. ExxonMobil Corp.*

- Standing dispute centered on the causation requirement, i.e. injury must be fairly traceable to Defendants.
- Court held that Plaintiffs lack standing to bring federal common law nuisance claims because there is no "fairly traceable connection" between the erosion of the Kivalina coastline and any of Defendants' GHG emissions.
- It is not enough to show that Defendants <u>contributed</u> to global warming.
  - Different view on contribution than the Second Circuit.

Standing - *Kivalina v. ExxonMobil Corp.*

- Court rejected Plaintiffs' standing analysis based on Third Circuit CWA cases.
  - Contribution – held only violation of federal limits would allow for contribution argument
  - "Seed" of Injury – multitude of alternative culprits
  - Zone of Discharge – Ps' claim far removed both in space and time from Ds' alleged discharge of GHGs
- Court also held that Eskimo village and city not entitled to "special solitude" in standing analysis.
- Case on appeal to Ninth Circuit.

Standing - *Comer v. Murphy Oil USA*

- Holding of the Now Vacated Fifth Circuit Opinion
  - Heart of standing debate is causation prong.
  - Defendants argued that Ps' theory tracing their injuries to Ds' action was too attenuated.
  - Court held that Plaintiffs had standing to bring their nuisance, trespass, and negligence claims.
  - Plaintiffs' complaint, relying on scientific reports, alleges a chain of causation between Defendants' substantial emissions and Plaintiffs' injuries.
    - Emissions and Hurricane Katrina and sea level rise
    - Allegations sufficient for this stage in the litigation
  - Relied on *MA v. EPA* analysis even though no state plaintiffs
  - Contribution to injury enough
  - No longer a valid opinion but might serve as a road map in other cases
- Reinstated trial court decision
  - No standing

McKenna Long & Aldridge LLP
Attorneys at Law

Climate Change Nuisance Litigation & Standing

Connecticut v. AEP

- Standing for nuisance claims –
- Current and future injuries (harm to the environment, harm to the states' economies, and harm to public health) are sufficiently traceable to Defendants.
- Contribution is enough to satisfy fairly traceable element.
- Plaintiffs also showed that the relief they requested -- limit on Defendants' emissions -- would redress their injuries.

Comer v. Murphy Oil USA (now vacated opinion)

- Standing for nuisance, trespass, and negligence claims -- injury is "fairly traceable" to Defendants, Defendants all emitted GHGs contributing to global warming; per *Mass. v. EPA*, Defendants need not be exclusive cause but only contributors.
- Plaintiffs do not have standing to bring unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims because such claims are generalized grievances and should be handled by Congress or the Executive.

Comer v. Murphy Oil USA (trial court – governing decision)

- No standing

Kivalina v. ExxonMobil Corp.

- No standing for nuisance claim-- cannot fairly trace injury to any particular defendant; contribution to global warming does not satisfy "fairly traceable" standard in this case.

Political Question Doctrine - Overview

- The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186 (1962).

- "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, (1986) (citatons omitted).

- Commonly litigated areas
  - constitutional issues
  - foreign affairs

Political Question Doctrine - Overview

- 6 *Baker* v. Carr Factors:
  - (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
  - (2) a lack of judicially discoverable and manageable standards for resolving it;
  - (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
  - (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
  - (5) an unusual need for unquestioning adherence to a political decision already made; or
  - (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Political Question Doctrine – *Connecticut v. AEP*

- Plaintiffs' claims did not present non-justiciable political questions.
- Factor 1 –
  - A decision by a single federal court regarding whether the emissions of six coal-fired power plants constitutes a public nuisance does not set a national or international emissions strategy.
  - No textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance.
- Factor 2 - Well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims and the federal courts are competent to deal with these issues.
- Factor 3 - "Ordinary tort suit" - there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.

Political Question Doctrine – *Kivalina v. ExxonMobil Corp.*

- Court dismissed federal common law nuisance claim on the ground that it constituted a "non-justiciable political question."
  - Issue not constitutionally or statutorily committed to Congress or Executive branch, but
  - There are no workable standards for a jury to decide whether Defendants' emissions caused more harm (erosion to the coastline) than good (providing power, utilities and oil to industry and homes), and
  - EPA or Congress should decide whether Defendants' emitted too many GHGs.

Political Question Doctrine – *Comer v. Murphy Oil, USA*

- Trial Court 2007 –
  - Dismissed the claims against Defendants on the ground that the claims represented "non-justiciable political questions" better left to the legislative and executive branches, *i.e.,* EPA and Congress.
- Fifth Circuit Oct. 16, 2009 (now vacated) –
  - Plaintiffs' nuisance, trespass, and negligence claims are justiciable and do not present non-justiciable political questions.
  - No constitutional provision or federal law committing issues in case to a political branch, and therefore, automatically not a political question.
  - Tort law provides manageable and workable standards for decision.
- 2007 Trial Court decision stands – for now.

McKenna Long & Aldridge LLP
Attorneys at Law

Climate Change Nuisance Litigation & PQD

Connecticut v. AEP

- Plaintiffs' nuisance claims do not present non-justiciable political questions. Seeking to limit emissions from specific coal-fired electricity plants is something that can be decided by the courts.

Comer v. Murphy Oil USA (vacated opinion)

- Nuisance, trespass and negligence claims represent justiciable questions
  - Not limited by federal law to decision by Congress or Executive
  - Tort law provides manageable and workable standards

Comer v. Murphy Oil USA (trial court – governing decision)

- Case presents non-justiciable political questions.

Kivalina v. ExxonMobil Corp.

- Nuisance claim represents a non-justiciable political question
  - Not limited by federal law to decision by Congress or Executive, but
  - There are no workable standards for a jury to decide whether Defendants' emissions caused more harm than good.
  - EPA or Congress should decide whether Defendants' emitted too many GHGs.

Meeting Certain Elements of a Climate Change Tort

Thompson & Knight Impact
ATTORNEYS AND COUNSELORS

- **Restatement (Second) of Torts**
  - **The word "duty" is used . . . to denote the fact that *the actor is required to conduct himself in a particular manner* at the risk that if he does not do so he becomes subject to liability to another to who the duty is owed *for any injury sustained* by such other, *of which that actor's conduct is a legal cause*.**
- **Duty**
- **Causation**
- **Injury**
- **Damages**

Duty of Care and Breach

Thompson & Knight Impact
ATTORNEYS AND COUNSELORS

- What may not have been discussed are issues surrounding duty of care and breach
- Prosser and Keeton define duty as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another”
- What is the duty of care of an emitter of greenhouse gases?
- How, if at all, has that changed as one moves forward in time, and as one looks back in time, particularly emissions occurring decades ago?
- As the scientific academies become more convinced of human causations role in climate change, does the duty change? Is there a threshold that must be crossed before a duty arises? What is that threshold? Who makes the determination? Is there a “Supreme Court” for science?

Causation

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- The challenge of linking greenhouse gas emissions by a particular defendant to an injury clearly of plaintiffs is one of the main challenges to a plaintiff, counsel, and experts
- Supreme Court: "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming." *Mass. v. EPA*, at 523.
  - Greenhouse gases cause climate change (EPA reached conclusion in Endangerment Finding, but being litigated now, National Academy of Science)
    - Does this still need to be proven in climate tort cases? Is so, how will this be resolved? How do the conclusions of the national academies of science, IPCC, etc. apply to the analysis? Are the courts a realistic place to address scientific issues this broad? Relates back to political question issues
  - Incremental causation
    - Can a small emitter from a global perspective be held liable? Is there a threshold of emissions under which a defendant would not be liable? Relates back to standing and political question issues

Causation

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- **How does one move from science that drives regulatory and policy changes at the legislative and executive branch to science in the judicial branch to hold a particular defendant or groups of defendants liable for climate change?**
  - **For the former, risk may drive "risk hedging" to require reductions in greenhouse gas emissions**
  - **For the latter, one may have to prove a particular defendant should pay damages for an injury to a particular plaintiff**
  - **The threshold of proof and the basis for analysis may be quite different in each context.**
- **So how does *Mass v. EPA*, a statutory case to drive executive branch action relate to a tort suit?**

Causation

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- **General Phenomena**
  - **Rising Sea Levels**
  - **Storms**
  - **Storm Intensity**
- **Cause of localized event and damage to a particular defendant**
  - **Sea level causes injury to a single landowner**
  - **A storm strikes a particular area and injures a particular home, kills a person**
  - **The storm intensity for a particular storm at a particular place**

Injury

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- **"The harms associated with climate change are serious and well recognized" and could include**
  - **Sea level rise,**
  - **an increase in spread of disease, and**
  - **possibly an increase in the ferocity of storms due to a rise in ocean temperatures.**
  - ***Mass. v. EPA*, at 521-22**

Damages

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- What are the damages to the plaintiff?
- Is liability for these damages several or joint and several?
- If several, how do you apportion liability?
- How much of the damage is attributable to nature vs. nature affected by defendants?
- How are damages allocated to
  - A localized event?
  - A specific individual or business?
  - Nature vs. nature affected by defendants?

Consider the Potential Issues for the District Court in Comer to Adjudicate

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- **In the *Comer* case, the federal district court might be forced to deal with the following causal chain:**
  - **Did the defendants actions cause or contribute to global warming?**
  - **If so, did global warming generally (or the portion caused by the defendants—a tricky question) cause or contribute to the Gulf of Mexico waters becoming warmer than they otherwise would have been?**
  - **If so, did the warming of the Gulf of Mexico waters (caused by greenhouse gas emissions generally or by the defendants) cause or contribute to the intensity of Hurricane Katrina?**
  - **If so, did the increased intensity of Hurricane Katrina (caused by greenhouse gas emissions or those of the defendants) cause or contribute to a particular plaintiff's injury?**
  - **If so, what damages should each defendant be required to pay?**

Practical Problems

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- Do federal district courts really want to try climate change tort cases?
- How is a federal district court going to actually work through duty, causation, injury, and damages?
- How long will this take?
- Will these cases, if successful and filed in numerous venues overwhelm the judicial system?
- Will there need to be a multi-district litigation approach if numerous cases are actually filed?
- Can courts actually perform the function being requested of them?
- If not where, where will plaintiffs turn? Congress? The executive branch?
- Will numerous lawsuits force defendants to turn to Congress and the executive branch for alternatives to court adjudication?
- Will a “BP” or “9/11” type process be created?

Displacement
What is it?

- "[T]he concept of 'displacement' refers to a situation in which 'federal statutory law governs a question previously the subject of federal common law." AEP decision at 102.

- "Because 'federal common law is subject to the paramount authority of Congress,' federal courts may resort to it only 'in absence of an applicable Act of Congress.'" AEP decision at 102.

- "[T]he question [of] whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." AEP decision at 103.

- The test is "whether the federal statute [speaks] directly [to] the question otherwise answered by federal common law." AEP decision at 103.

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Displacement in *AEP* decision

- Declined to find that Clean Air Act has displaced federal common law in the area of air pollution
- Held that while it is clear that EPA has statutory authority to regulate GHGs as a pollutant under the CAA, it can do so only after an endangerment finding has become final.
- Court notes that endangerment finding at time of decision was only proposed and only related to mobile sources. "Until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'speak[] directly' to the 'particular issue' raised here by Plaintiffs, which is otherwise governed by federal common law."
- Court held that a broader endangerment finding also relating to stationary sources would need to become final before displacement could be considered.

Displacement in *AEP* decision

- "We also note that the regulatory scheme set up by the CAA bears more similarity to the Federal Water Pollution Control Act in place at the time of *Milwaukee I* than to the amended FWPCA addressed in *Milwaukee II*."
- "In sum, at least until EPA makes the requisite findings, for the purposes of our displacement analysis, the CAA does not (1) regulate GHG emissions or (2) regulate such emissions from stationary sources. Accordingly, the problem of which Plaintiffs complain certainly has not 'been thoroughly addressed' by the CAA. We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law."
- Court also rejected argument that five other federal statutes "address global climate change and carbon dioxide emissions."

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Displacement – Aftermath of *AEP*

- Judge Peter Hall, the author of the 2nd Circuit's opinion in a recent speech at Georgetown Law School stated that the courts would happily get out of the business of hearing nuisance suits about climate change ***if the EPA does its job in restricting these emissions — or better yet, if Congress passes a comprehensive climate bill***.
- Judge Hall added that judges have the responsibility to take seriously nuisance lawsuits brought by property owners facing strengthening hurricanes and rising sea levels. These lawsuits, he said, probably provide a backstop and "some small impetus" to stonewalling lawmakers.

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Displacement – The Future

- Current endangerment finding
- Climate change bill

Preemption of cases relying on state law

- Is a state law public nuisance case based on air emissions (such as in *State of NC v. TVA*) preempted by the Clean Air Act?
- No express preemption of source-state common law due to Clean Air Act savings clause: "Nothing in this Act shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."
- Where "Congress has been very careful to pre-empt expressly only certain areas of state law, . . . the remainder [is preserved] for state regulation." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005).

Preemption of cases relying on state law

- Possible conflict preemption if state law suit "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough Co. Florida v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985).
- Fourth Circuit panel may very well decide that conflict preemption exists in *State of NC v. TVA*

The Future of Climate Change Litigation – Top Five Issues to Watch

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#1 – Crystal Ball for Comer, AEP, & Kivalina?

#2 – Only the first wave?

- That factor, along with the very deep pockets of Big Oil, is likely to keep the lawsuits coming, testing different theories and different arguments. ***"It's sort of like when infantry used to charge the machine guns,"*** says Joseph Wayne Smith, an Australian lawyer and the author of *Climate Change Litigation*. ***"A lot of them would get mowed down, but eventually a wave would get through and take out the pillbox."***
- The first tobacco suits were filed in the 1950s, but it wasn't until 1988 that lawyers were able to find chinks in the industry's armor. The first lawsuit to succeed was also the first to accuse the industry of conspiracy.
- "It's a process of learning by doing." said Pawa. ***"Just by bringing these cases over and over again, the judiciary [and] the public get used to the idea of liability."***

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2 (cont.)
Potential for big money?

- According to a forthcoming United Nations study, the world's 3,000 biggest public companies could be on the hook for $2.2 trillion – more than 30% of their profits – if they were made to pay for the fallout of their carbon emissions.

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2 (cont.) Verdicts/Settlements in recent nuisance cases

- **$206 billion** over 25 years – settlement agreement with States in tobacco litigation
- **$926 million** – jury verdict award to class of 13,000 property owners against Dow Chemical and Rockwell Int'l Corp. for plutonium contamination
- **$752 million** – settlement amount in MDL MTBE against various corporate defendants alleging exposure to MTBE
- **$700 million** – settlement amount in a suit by a class of Alabama residents against Monsanto Co. alleging exposure to PCBs
- **$120 million** – jury verdict award to class of residents against oil refinery due to contamination by heavy metal emissions
- **$108 million** – jury verdict award in AL case against defendants including Halliburton Energy Services for contaminating property with mercury
- **$75 million** – settlement amount in FL case against City of Jacksonville alleging exposure to lead, mercury, and ash
- **$45 million** – settlement amount in MD suit alleging groundwater contamination due to disposal of coal ash
- **$35 million** – settlement amount in TX case against Zeneca, Occidental Chemical, and GB Biosciences for contaminating property with pesticides

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#3 – Next battlefield = international?

- Micronesia's challenge to Prunerov power station in Czech Republic
- In 1/10, Micronesia lodged a formal objection to recertification of Prunerov power station in Czech, long known as one of Europe's dirtiest power plants.
- In March, the government decided to allow the plant to proceed – but the decision was very controversial.

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4 – New Science

- Article that appeared in The Guardian on December 8, 2009, *Science paves way for climate lawsuits*:
- Myles Allen, a physicist at Oxford University, said a breakthrough that allows scientists to judge the role man-made climate change climate played in extreme weather events could see a rush to the courts over the next decade.
- He said: **"We are starting to get to the point that when an adverse weather event occurs we can quantify how much more likely it was made by human activity. And people adversely affected by climate change today are in a position to document and quantify their losses. This is going to be hugely important.“**
- "We can work out whether climate change has loaded the dice and made extreme weather more likely. And once the risk is doubled, then lawyers get interested," he said.

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5
Courts accepting less tangible harms and extremely attenuated causation links in nuisance suits ?

- ***Gates v. Rohm and Haas Co***. (E.D. Pa.) – ruled that the presence of vinyl chloride in the air, even if below backgrounds levels, constitutes a physical injury to property under nuisance law.
- ***Meyer v. Fluor Corp***. (Mo.) – in nuisance class suit against lead smelter to recover prospective medical monitoring due to harmful emissions, MO S. Ct. certified the class and held that recovery for medical monitoring is not contingent upon the existence of a present physical injury
- ***State of NC v. TVA*** – (1) numerous social and economic harms to North Carolinians, including lost school and work days, increased pressure on the health industry due to extra doctor visits, and the general loss of well-being that results from chronic health problems; (2) harm to the environment including killing local vegetation, removing nutrients necessary for healthy forest growth, and degrading water quality; and (3) significant effects on visibility due to creating haze in many pristine areas of wilderness in NC
- ***Cook et al. v. Rockwell and Dow*** – jury verdict of almost $1 billion based solely on decline in property values for 13,000 plaintiffs

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5 (cont.)

- Causation in *State of NC v. TVA*:
  - pollutants at issue were secondary pollutants. These secondary pollutants were not emitted by the TVA but were formed when the primary pollutants underwent chemical changes.
  - These secondary pollutants in turn then allegedly contributed to acid deposition,
  - Which in turn made the soil more acidic,
  - Which in turn made naturally-occurring toxic aluminum more prevalent in the environment,
  - Which in turn damaged local vegetation.
- Causation in *Comer v. Murphy Oil USA Inc.*:
  - Defendants emitted greenhouse gases
  - Contributed to global warming
  - Made waters in Golf of Mexico warmer
  - Which made Hurricane Katrina more intense
  - Which caused property damage to pltfs

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#5 (cont.)

- Distance
  - Public nuisance has traditionally been measured distance-wise in yards; TVA in *State of NC* case was held liable for emissions 100 miles away
  - Defendants in *CT v. AEP* are being sued for emissions much further away than that.
- Contribution
  - TVA in *State of NC* was held liable for a very small percentage of total amount of pollutants in state
  - Defendants in *CT v. AEP* are only responsible for 2.5% of global GHG emissions at most

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