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Energy and Sustainability Litigation ADVISORY

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Bombshells in Climate Change Litigation: Two Major New Cases Expose Greenhouse Gas Emitters to Potential Liability

Liability for Damages? Fifth Circuit Revives "Katrina Tort" Case Against Major GHG Emitters

On October 16, 2009, the Fifth Circuit Court of Appeals reversed a federal district court decision that barred claims against energy, fossil fuel, and chemical industry defendants for damages allegedly associated with the intensification of Hurricane Katrina as a result of global climate change. *See Comer v. Murphy Oil USA, et al*. No. 07-60756 (October 16, 2009). The District Court had found the plaintiffs lacked standing to sue and that the case involved "political questions" that the federal courts are incapable of addressing.

In a 36-page opinion, the Fifth Circuit rejected the District Court's view and held that state law claims for public and private nuisance, trespass, and negligence would be allowed to proceed. The plaintiffs filed a putative class action seeking compensatory and punitive damages for damages associated with Hurricane Katrina along the Mississippi gulf coast. The Fifth Circuit decision has the potential to dramatically increase the liability exposure of virtually every greenhouse gas (GHG) emitter.

The court found that standing exists for the nuisance, trespass, and negligence claims because the plaintiffs alleged specific injuries "that can be traced to the defendants' contributions" to global warming. The court disallowed unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims on prudential standing grounds.

As to the "political question" issue, the court found that nothing in the Constitution or in federal statutes commits the underlying issues to the political branches, and further found that the defendants failed to show that a court would be unable to develop manageable standards to apply to the issues. The court in particular noted that accepting the defendants' arguments would in effect amount to a *de facto* preemption of state law, where no preemption exists in any federal statute.

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Judicially Mandated GHG Controls? Second Circuit Recognizes Viability of Federal Common Law Nuisance Claims Seeking GHG Injunctive Relief

The *Comer* decision comes closely on the heels of a dramatic September 21, 2009 decision by a two-judge panel of the Second Circuit Court of Appeals that exposes GHG emitters to injunctive claims under federal common law.

In *Connecticut v. American Electric Power Co.*, Nos. 05-5104-cv, 05-5119-cv (2d Cir. Sept. 21, 2009), the court held that states, municipalities, and private entities uniquely vulnerable to climate change may bring public nuisance claims in federal court. The decision allows a claim to proceed that seeks a judicially crafted cap on, and subsequent reductions of, GHG emissions from the defendants' coal burning electric generating facilities. The court reached this result even while acknowledging that the GHG emissions at issue constitute a minor percentage of global GHG emissions.

Like the Fifth Circuit, the Second Circuit emphatically rejected the principal argument against allowing federal common law nuisance litigation as to GHG emissions—that such litigation is barred because it involves inherently "political questions" that must be initially determined by the elected branches of government, not the judiciary. Concluding that GHG emissions can in fact be addressed by the judiciary under nuisance law, the court tacitly endorsed the federal courts' ability to establish emissions limitations on an *ad hoc*, case-by-case basis, rather than through unified regulation enacted or promulgated by the elected branches of government.

In overturning the District Court, the Second Circuit found that the plaintiffs could avail themselves of the federal common law of nuisance *precisely because* the elected branches had failed or refused to regulate GHG emissions. This conclusion rests on the panel's simply stated theory of (1) the role played by federal common law—"if regulatory gaps exist, common law fills those interstices"; and (2) the role played by the federal courts in adjudicating such disputes—plaintiffs need not "wait for the political branches to craft a 'comprehensive' global solution to global warming. Rather, Plaintiffs here may seek their remedies under the federal common law."

Further, the decision lowers the bar for the required showing by a plaintiff to demonstrate that it has standing to maintain a climate-change driven nuisance suit. The court applied a relaxed standard for a plaintiff to show that harms from GHG emissions are "imminent," and the court held that the judiciary is able to address such harms by limiting the defendants' GHG emissions, even if those emissions constitute a minor percentage of global emissions.

Finally, by holding that a private party may maintain a federal common law nuisance claim, the decision potentially expands the universe of litigants from state and local governments to virtually any private party or group that can demonstrate a sufficient individual harm not suffered by the general public.

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