



Climate Change Litigation Begins to Take Shape

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A series of court decisions in recent weeks will have significant ramifications on litigation against the oil and gas industry arising from the purported effects of climate change. These cases involve tort claims brought against oil and gas exploration and development companies for the release of greenhouse gases, and court rulings that plaintiffs have standing to bring lawsuits against these companies based upon alleged harms suffered by plaintiffs arising from climate change and global warming.

Standing to sue in federal court on a tort theory requires that a plaintiff demonstrate: (1) they have suffered an “injury in fact;” (2) the injury is “fairly traceable” to the defendant’s actions; and (3) the injury will “likely be redressed by a favorable decision.” These requirements raise difficult questions in the context of alleged injuries related to climate change, and plaintiffs’ attenuated theory of causation relative to their alleged harm. Three recent court decisions have addressed this issue.

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

In *Connecticut v. AEP*, a group of plaintiffs, including eight states and the City of New York, brought an action to stop what they perceived as the defendants’ contribution to a public nuisance. These eight states claimed that the defendants, a group of electric utilities including the five largest emitters of carbon dioxide in the United States, are substantial contributors to elevated levels of carbon dioxide and global warming. *American Electric Power Co.*, 582 F.3d at 316-18. They conclude that the changes brought on by global warming will have substantial adverse impact on their environments, residents and property, costing these states billions of dollars. *Id.*

The defendants moved to dismiss the case for lack of standing, and the lower court granted the motion. But the Second Circuit Court of Appeals found that there was injury in fact, and that, in the context of climate change related tort claims, standing did not require the plaintiffs to pinpoint which specific harms are caused by particular defendants or show that the defendants' emissions alone were the cause of their injuries. *Id. at 346-47*. The Court further found that the plaintiffs had sufficiently alleged that the defendants' emissions contributed to their injuries, and that some form of relief available through the courts would suffice to address their alleged harms. *Id. at 347*. The Court found that the plaintiffs' proposed remedy need not prevent all potential harm from other greenhouse gas emitting sources. *Id.* Ultimately, the Court ruled that these plaintiffs had standing to bring these claims and remanded the case to proceed on the merits.

Comer v. Murphy Oil, -- F.3d --, 2009 WL 3321493 (5th Cir. 2009)

In *Comer*, a group of residents and land owners along the Mississippi Gulf Coast filed a class action suit against a group of defendants that operated energy-related businesses in Mississippi, including Shell, Chevron, Excel, Entergy, DuPont, Dow Chemical, and others. The plaintiffs claimed that the defendants' operation of energy, fossil fuel, and chemical industries caused the emission of greenhouse gases, leading to global warming, which caused an increase in global surface air and water temperatures, thereby causing a rise in sea levels that added to the ferocity of Hurricane Katrina. *Comer*, 2009 WL 3321493 at 2. They alleged that the combined effects of the defendants' contribution to global warming and Hurricane Katrina destroyed the plaintiffs' private property and public property that was useful to them. *Id.* The lower court ruled that plaintiffs had failed to allege standing sufficient to bring the suit.


In opposing the plaintiffs' standing, the defendants focused on the second prong of the three-part standing test, claiming that plaintiffs' harms were not traceable back to defendants. *Id. at 5*. The Fifth Circuit, however, found that the "fairly traceable" test did not require the plaintiffs show that the defendants were the sole cause of the injury, but that their pollutants caused or contributed to the kinds of injuries alleged by the plaintiffs. *Id. at 7*. The Court further found that the plaintiffs' injuries could be fairly traced to the defendants' green house gas emissions and the effects of global warming and, thus found that plaintiffs had standing to bring the suit.

Village of Kivalina v. Exxon Mobil, -- F.Supp.2d --, 2009 WL 3326113 (N.D.Cal. 2009)

Breaking from the Second and Fifth Circuit decisions in *Connecticut* and *Comer*, the U.S. District Court for the Northern District of California recently dismissed a similar lawsuit, styled *Native Village of Kivalina v. ExxonMobil Corp.*, because plaintiffs' climate change tort claims raised a "political question" and because plaintiffs lacked standing to sue. *Kivalina*, 2009 WL 3326113 at 1. In *Kivalina*, the plaintiffs, a small Eskimo village, sought damages from nineteen large oil and gas companies for their alleged contribution to global warming. *Id.* The plaintiffs claimed that their village, situated on a barrier reef on Alaska's northwest coast, is disappearing due to rising sea levels caused by global warming. *Id.* The Court rejected the recent Second Circuit decision in *Connecticut* and found that the cause of global warming was not sufficiently traceable to the defendants. *Id.* at 14. The case will likely be appealed to the Ninth Circuit, as the *Connecticut* and *Comer* cases were also dismissed at the district court level.

What's next?

The result of these decisions is that there will almost certainly be more tort lawsuits filed against energy companies claiming injuries from alleged effects of climate change and global warming. This new flood of litigation will only be stemmed if the U.S. Supreme Court finds that standing should not have been granted or Congress passes legislation that will limit the court's jurisdiction or limits the possible remedies for these types of cases. Stay tuned.



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