

ENVIRONMENTAL ALERT

COMMON LAW CLAIMS FOR GREENHOUSE GAS EMISSIONS ALLOWED TO PROCEED

Two recent circuit court cases have begun to open the door for plaintiffs to bring common law nuisance claims for alleged global warming related damages against facilities that emit greenhouse gases. Where previously the courts had dismissed such claims in large part based on the holding that global warming and its causes are political questions, two U.S. Courts of Appeals have now allowed global warming nuisance suits to proceed. Companies with significant greenhouse gas emissions should be aware of these developments and their impact on the likelihood of being named a defendant in such a suit, on the potential liability exposure from such suits, and their impact on financial risk and disclosure obligations for public companies.

The new cases, detailed below, involved nuisance claims, which are basically a claim that the actions of one party have unreasonably interfered with another party's use and enjoyment of their property. Given that potential GHG claimants include persons with coastal property or property affected by significant weather events, be it hurricanes, flooding or drought, the pool of potential claimants is vast and deep. Moreover, given the global reach of GHG and climate change issues, a claimant need not necessarily be located anywhere near the site of the alleged harm.

It is also reasonable to expect that the scope of companies facing GHG nuisance claims could well expand significantly as a result of these decisions. While most cases to date have been filed against the most obvious targets – power and utility companies, automobile manufacturers – other GHG emitters should not be surprised to see themselves in the crosshairs. To some potential plaintiffs, expanding the scope of targeted industries both provides a more comprehensive spreading of responsibility and allows access to even more deep pocket defendants. In little more than a year the first reports under the U.S. Environmental Protection Agency's recent mandatory greenhouse gas reporting rule will be filed – a side effect of which may be identification of additional targets for GHG suits.

It is worth noting that some entities may have significant GHG emissions, even if their reportable GHG emissions are relatively small. The GHG rule is a counting tool that focuses on direct emissions, and primarily stationary source emissions (i.e factories, not vehicles). Activities that have significant indirect emissions, such as high electricity usage, or significant mobile vehicle emissions, such as car, truck, airplane, etc. emissions associated with a transportation related business or even a large fleet of vehicles utilized by a corporate or governmental entity, could all fall within the cross-hairs of GHG nuisance litigation.

To the extent that the battles in the litigation go beyond broad-brush questions such as the science of global warming and climate change, or the impact of rising sea levels, etc. on a particular plaintiff, the focus could turn to the reasonableness or utility of a particular company's conduct, as compared to the alleged harm to the plaintiff. As such, site-specific issues regarding the operation of facility, the cause and extent of GHG emissions, efforts to limit GHG emissions, etc. could all become relevant. It is on this basis that a company could find itself differently situated than its competitors, and thus bear a greater risk of suit or of liability than others in the same industry.

Issues of concern for potentially targeted companies include:

- * What are my reportable GHG emissions
- * What are my indirect or downstream GHG emissions
- * How do my GHG emissions compare with those of my competitors
- * What has been done to reduce GHG emissions
- * What are my financial obligations, re liability reserves and reporting of potential liability risks

Recent Significant Case Law

The new decisions are the Second Circuit's opinion in *Connecticut v. American Electric Power Company*, (2d Cir. Sept. 21, 2009) and the Fifth Circuit's opinion in *Comer v. Murphy Oil USA*, (5th Cir. Oct. 22, 2009). Both mark a recent shift in these types of cases by allowing plaintiffs to overcome procedural hurdles that had previously caused such cases to be dismissed in the early stages of litigation.

Connecticut v. American Electric Power Company

The Second Circuit, in *Connecticut v. American Electric Power Company*, held that eight states, New York City and three private land trusts could bring a federal common law nuisance claim against five electric utilities for their greenhouse gas emissions' contribution to global warming. In doing so, the Second Circuit overturned the district court's dismissal of the plaintiffs' claims finding that they were nonjusticiable political questions. Instead, the Second Circuit found that global warming is not a "political question" for Congress to determine and thus, liability could be adjudicated by federal courts. Additionally, the Court noted that the plaintiffs' claims were ultimately ordinary tort suits. The Second Circuit also went further and held that plaintiffs had Article III standing to bring their claims, had stated a claim under the federal common law of nuisance and that the claims were not preempted by federal legislation.

Under the standing analysis, the Second Circuit relied on *Massachusetts v. EPA*, 549 U.S. 497 (2007), to find that the plaintiffs had standing to bring claims for global warming. In particular, the Court found that plaintiffs' alleged injuries from global warming were not too speculative, that plaintiffs only had to allege that the defendants' emissions contribute to their injuries and that their injuries were redressable because the requested relief, reductions in defendants' greenhouse gas emissions, would lessen plaintiffs' injuries even if it did not stop global warming. The Second Circuit also found that at least until U.S. EPA makes an endangerment finding and regulates greenhouse gas emissions from stationary sources that plaintiff's federal common law nuisance claims for global warming would not be displaced by federal law. Ultimately, the Court remanded the case back to the district court for further proceedings.

Comer v. Murphy Oil USA

In *Comer v. Murphy Oil USA*, plaintiffs, who were residents along the Mississippi Gulf Coast filed a putative class action for property damage against various emitters of greenhouse gases alleging that these companies' emissions contributed to global warming, which in turn caused a rise in sea levels and added to the severity of Hurricane Katrina that caused the property damage. The plaintiffs asserted

state common law actions of public and private nuisance, trespass and negligence.¹ The district court below dismissed all of plaintiffs' claims because they were nonjusticiable political questions (*i.e.*, policy decisions for the executive and legislative branches).

However, the Fifth Circuit, in reversing the district court, found that not only were plaintiffs' claims justiciable and not political questions, but also that the plaintiffs had Article III standing to bring their claims. With regard to Article III standing, the defendants challenged only that plaintiffs' harms (e.g. property damage) were fairly traceable to defendants' actions (e.g. emitting greenhouse gases). The Fifth Circuit rejected Defendants' argument and instead held that there was a causal chain between greenhouse gas emissions and global warming, which in turn damaged plaintiffs' coastal property through sea level rise and the increased intensity of Hurricane Katrina. In doing so, the Fifth Circuit noted that the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), had already recognized this same causal link in finding that Massachusetts had standing to challenge U.S. EPA's decision not to regulate greenhouse gas emissions.

The Fifth Circuit also expressly reversed the district court's finding that plaintiffs' claims were nonjusticiable political questions. The Court found that the plaintiffs' were merely bringing tort claims for damages under Mississippi common law and did not implicate national policy decisions as alleged by the defendants. Further, the noted that issues of greenhouse gas emissions and global warming had not been exclusively committed by law to the legislative or executive branch. Thus, the plaintiffs' claims were justiciable and not political questions. The Court concluded by remanding the case back to the district court for further proceedings.

Conclusion/Implications

These recent circuit court cases signal a shift in the courts by allowing plaintiffs' common law nuisance claims for global warming to proceed against procedural challenges such as standing and justiciability. This will likely result in a new round of nuisance claims to be filed against significant emitters of greenhouse gases. Recognizing that defendants have other procedural and substantive defenses to such claims, this next round of suits will likely focus on nuisance and causation elements, *i.e.* whether greenhouse gas emissions pose an unreasonable interference with a public right and whether a plant's greenhouse gas emissions actually contribute to global warming and the alleged injuries. Additionally, when federal legislation is passed regulating greenhouse gas emissions this next round of suits will focus on whether the federal legislation preempts the common law nuisance claims. Accordingly, significant emitters of greenhouse gas emissions should be cognizant of the developments in these common law nuisance claims for global warming as it affects the likelihood of being named a defendant in such a suit, exposure to potential liability from such suits, and the impact on financial risk and disclosure obligations for public companies.

¹ The plaintiffs also asserted claims of negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. The Fifth Circuit upheld the dismissal of these claims, but for a different reason than the district court. The Fifth Circuit held that these claims did not satisfy federal prudential standing requirements as they were generalized grievances better left to the representative branches of government.

The Environmental Alert is intended to keep readers current on matters affecting environmental issues and is not intended to be legal advice. For information or assistance regarding any of the information noted above, please contact Scott R. Dismukes at 412.566.1998 or sdismukes@eckertseamans.com, Richard S. Wiedman at 412.566.5967 or rwiedman@eckertseamans.com, David A. Rockman at 412.566.1999 or drockman@eckertseamans.com, Kathryn L. Clark at 412.566.6188 or kclark@eckertseamans.com, Erin W. McDowell at 412.566.6070 or emcdowell@eckertseamans.com, Jessica L. Sharrow at 412.566.5941 or jsharrow@eckertseamans.com or any other attorney with whom you have been working.

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