

Climate Alert

Significant Climate Change-Related News and Updates from the LLB&L Climate Change Practice Team

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Global Warming Nuisance Litigation is Too Hot for the Fifth Circuit

Appeal of Decision in Comer v. Murphy Oil USA is Dismissed on Procedural Quirk

In 2009, both the Second and Fifth Circuit Courts of Appeals waded into the global warming pool and issued important decisions that allowed public nuisance claims based on alleged contributions to global warming to proceed beyond a motion to dismiss. While the Second Circuit's decision in *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009) (hereafter, "*Connecticut v. AEP*") is proceeding toward potential Supreme Court review, a procedural quirk has resulted in the effective reversal of the Fifth Circuit's decision in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (hereafter, "*Comer*"). Although the Fifth Circuit's action of vacating the *Comer* decision was purely a procedural maneuver, the effect could be that the Fifth Circuit would be a less favorable forum for such public nuisance based global warming claims. Additionally, the Fifth Circuit's change in course could create the argument for a circuit split that would edge the Supreme Court towards a review of this hot button issue.

Comer v. Murphy Oil USA: Panel Decision is Vacated

Last October, a three-judge panel of the Fifth Circuit issued an opinion that reversed a district court decision that had dismissed a public nuisance based global warming claim. (See our October 28, 2009 *Climate Alert*, "[The Action Heats Up in Global Warming Nuisance Litigation](#)"). The panel's decision held that the district court had improperly found that the plaintiffs lacked standing and that the political question doctrine precluded their claims that the defendants' greenhouse gas emissions had contributed to global warming, which in turn caused a rise in sea level and added to the intensity of Hurricane Katrina.

Defendants moved for a rehearing *en banc*, which is a rehearing by all of the judges that compose the Fifth Circuit. On February 26, 2010, the Fifth Circuit granted rehearing *en banc*. Upon granting the motion for rehearing *en banc*, the Fifth Circuit immediately issued an order that vacated the prior panel decision.

At this point, things began to get procedurally muddy. One of the judges who had already voted in favor of the rehearing had to recuse herself. Unfortunately, several judges had already recused themselves prior to the vote for rehearing *en banc*, thus, when the latest judge recused herself, the number of judges eligible to participate in the rehearing dropped below the quorum of nine judges. The Fifth Circuit was left with an interesting decision: What should it do with an appeal where the three-judge panel decision was already vacated but the *en banc* court lacked a quorum?

The Fifth Circuit solved this procedural limbo by issuing an order that simply dismissed the appeal, which effectively affirms the decision of the district court. The Fifth Circuit reasoned that while the grant of the rehearing *en banc* and the vacation of the panel decision was "properly constituted," without a quorum "no court is authorized to transact judicial business." The Fifth Circuit considered and rejected several possible alternatives, including: (1) requesting the appointment of another judge from another circuit to hear the case; (2) declaring that a quorum does exist under Federal Rule of Appellate Procedure 35(a); (3) adopting the rule of necessity that would allow disqualified judges to hear the case; (4) "dis-enbancing" the case and ordering the panel opinion to be reinstated; and (5) holding the case in abeyance until the composition of the court changes. In

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Global Warming Nuisance Litigation is Too Hot for the Fifth Circuit (cont'd.)

the end, the Fifth Circuit ordered that “[b]ecause neither this *en banc* court, nor the panel, can conduct further judicial business in this appeal, the Clerk is directed to dismiss the appeal.” Several judges dissented from the dismissal, largely arguing that the Fifth Circuit had a duty to address the merits of the appeal and should have adopted one of the alternatives that were rejected by the majority.

Commentary

By vacating the panel decision, the Fifth Circuit made that decision a legal nullity with no binding precedential effect. Thus, the federal courts of the Fifth Circuit (namely those in Texas, Louisiana and Mississippi) are free to find that global warming public nuisance claims may or may not be barred by the political question doctrine. By vacating the panel decision, the district court’s *Comer* decision now goes from being reversed to an authority that, while not binding on another district court, can be cited as instructive. This makes the Fifth Circuit a much less favorable forum to bring a global warming public nuisance claim than it would have been had the original *Comer* panel decision not been vacated. This would appear to be important considering the concentration of energy companies and other large emitters of greenhouse gases in the states that compose the Fifth Circuit (*i.e.*, Texas, Louisiana and Mississippi).

While the Fifth Circuit did not ultimately reach the merits of whether the political question doctrine bars public nuisance global warming claims, it certainly can be asserted that its non-action on the *Comer* appeal, which effectively affirmed the district court’s dismissal, creates a circuit split between the Fifth Circuit and the Second Circuit’s decision in *Connecticut v. AEP*. This is important because currently the defendants in the *Connecticut v. AEP* case are likely preparing to file a cert petition for Supreme Court review. On May 26, 2010, the defendants in *Connecticut v. AEP* requested an extension until July 6, 2010, to file their cert

petition. Additionally, the plaintiffs in *Comer* will likely seek review by the Supreme Court, considering the Fifth Circuit never reached the merits of their appeal.

While we will continue to monitor and report on the significant developments in these cases, as well as the pending appeal in the case of *Native Village of Kivalina v. ExxonMobil Corp.*, in the event that you would like further insight into these developments or for assistance with any questions you may have on these issues, feel free to contact the authors listed on the first page or any member of LLB&L’s Climate Change Practice Team.

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