The "Glorious Mess" Comes to Court

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Following the Second Circuit's decision in Connecticut v. AEP, *federal courts – not Congress – may be the first to decide the tough legal and policy questions implicated by global pollution problems. This article examines practical implications of litigating climate change nuisance cases, focusing on two of the more difficult issues that a trial court may face in adjudicating responsibility for climate change – impleading of responsible parties and determining whether carbon-emitting conduct is an unreasonable interference under existing nuisance law. Not only are these issues novel and complex and likely to lead to expensive and unwieldy litigation, but they also underscore the notion that addressing climate change raise policy laden questions best reserved to the elected branches of government.*

I. Introduction

Recognizing that existing Clean Air Act authorities are not well-suited to addressing climate change, former Energy and Commerce Committee Chairman John Dingell described the likely end result of climate change regulation under the Act as "a glorious mess."[1] In the wake of recent federal appellate decisions holding that tort-based court actions aimed at greenhouse gas emissions are justiciable, it could be that the "glorious mess" will come not through regulation, but rather through the federal courts.

Following the Second Circuit's decision in *Connecticut v. AEP*, the door is now open for Article III courts – rather than legislatures – to decide the tough legal and policy questions implicated by global pollution problems.[2] These questions include (1) Who, if anyone, should receive compensation for alleged damages caused by climate change? (2) How much should each recipient receive? (3) Who should pay the compensation? and (4) How much should each payer be required to pay?

This article examines some of the practical implications of litigating responsibility for climate change, given the fact that every person and entity in the world is partially responsible for greenhouse gas emissions and that the alleged impacts of climate change are widespread. In particular, this article focuses on two of the thornier issues that a trial court may face in adjudicating responsibility for climate change. First, because every participant in the U.S. economy shares responsibility for the concentration of greenhouse gases in the atmos-

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1 Chairman John D. Dingell, "Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities," statement during the Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, U.S. House of Representatives, 10 April 2008.

2 *See Connecticut v. Am. Elec. Power*, 582 F.3d 309 (2009) ("AEP"). The Second Circuit denied rehearing *en banc*.

phere, how should a trial court handle the impleading of additional potentially responsible parties for their involvement in climate change. Second, given the inherently vague "reasonableness" standards found in nuisance law, how is a court to determine which activities are actionable as an unreasonable interference and which are not. These issues are novel and complex; litigating them will likely be expensive and unwieldy.

II. Opening Pandora's Box

The prospect of litigating the merits of climate change responsibility is relatively new to the parties and courts alike. Until very recently, all courts addressing tort-based claims aimed at greenhouse gas emitters – whether seeking damages, as in *Comer v. Murphy Oil,* or injunctive relief, as in *AEP* – had uniformly dismissed such cases as nonjusticiable political questions.[3] The Fifth Circuit recently granted a petition for rehearing *en banc* and vacated the decision of that panel. But with two recent appellate court decisions, the legal landscape has changed dramatically, not just for large sources of greenhouse gases, but potentially for any entity that emits greenhouse gases.

Connecticut v. AEP involves claims by two groups of plaintiffs, one consisting of eight states and New York City, and the other consisting of three land trusts, separately suing six electric power corporations that own and operate fossil-fuel-fired power plants in twenty states.[4] Citing the fact that the defendants are the five largest emitters of carbon dioxide in the United States, the plaintiffs are seeking abatement of defendants' ongoing contributions to global warming, which is "causing and will continue to cause serious harms affecting human health and natural resources." The plaintiffs pled both federal and state law nuisance claims.

After the lower court dismissed the plaintiffs' case as nonjusticiable in 2005, the state and land trust plaintiffs urged on appeal that the political question doctrine did not bar adjudication of their claims; that they have standing to assert their claims; and that they have properly stated claims under the federal common law of nuisance. After delaying a decision on these threshold issues for nearly four years, the Second Circuit finally agreed with the plaintiffs, holding that the district court erred in dismissing the complaints on political question grounds; that all of Plaintiffs have standing; that the federal common law of nuisance governed their claims; and that Plaintiffs have stated claims under the federal common law of nuisance. The defendant's petition for rehearing was denied, so assuming that the case is not reviewed by the Supreme Court, the action should be remanded for discovery and pre-trial proceedings.

In *Comer v. Murphy Oil USA, Inc,* a group of property owners on the Gulf Coast are seeking damages from energy companies for their alleged contribution to climate change.[5] The plaintiffs argued that climate change increased the intensity of Hurricane Katrina, which in turn damaged their property. Unlike the claim in *Connecticut v. AEP*, the *Comer* plaintiffs only alleged Mississippi common-law actions of public and private nuisance. The plaintiffs also alleged state law claims of trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. The district court dismissed the case after finding that the plaintiffs did not have standing and that the case raised nonjusticiable political questions. The Fifth Circuit panel reversed, holding that plaintiffs do have standing to assert their public and private nuisance claims and further that none of the claims present a nonjusticiable political question. The full Fifth Circuit, however, voted to rehear the case *en banc* and vacated the panel decision. Subsequent to that vote, the *en banc* panel lost quorum, thus leaving the district court's decision intact.

A third case is pending before the Ninth Circuit. In *Native Village of Kivalina v. ExxonMobil Corp. et al.*, the governing bodies of an Inupiat Eskimo village are seeking damages from electric utilities, oil companies, and the nation's largest coal company because, "their massive emissions of greenhouse gases … contributed to global warming … that is rapidly melting the sea ice that formerly protected the[ir] village from harsh fall and winter storms."[6] The Inupiat Eskimo village is pursuing damages under the federal common law of public nuisance and the federal common law of conspiracy and concert of action.

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3 *Comer v. Murphy Oil, Inc*, 585 F.3d 855 (2009). The Fifth Circuit granted a petition for rehearing *en banc* and vacated the decision of that panel.

4 582 F.3d 309, 314–15 (2d Cir. 2009).

5 585 F.3d 855, 859 (5th Cir. 2009).

6 *See* Brief for Appellant at 2, *Native Village of Kivalina v. ExxonMobil Corp.* et al., No. 09-17490 (9th Cir. filed 10 March 2010).

Like the other two district courts to consider tort-based claims for climate change damages, the Northern District of California dismissed the Eskimos' case, holding that the case presented a nonjusticiable political question that would be impossible to decide in a "principled, rational" fashion. The court also held that Kivalina lacked standing because its injury was not "traceable" to the defendants' conduct. Briefing in this action is underway in the Ninth Circuit.

In initially holding that tort-based claims based on climate change responsibility are cognizable causes of actions, the Second Circuit opinion and now-vacated Fifth Circuit opinion do not discuss the practical implications of their decisions, do not offer the trial courts much guidance concerning how the lower courts should manage the actions (which could become enormous), and do not explain how the courts should apply traditional tort principles to the unique questions posed by climate change.

III. Opening the Courthouse Doors Wide: Finding a Courtroom Large Enough to Fit All of the Potential Defendants in a Climate Change Action

One of the most significant policy questions posed by climate change is, to the extent that certain parties have been impacted by climate change, and to the extent that the climate change has been caused by human activities, who should bear the responsibility for the resulting damages and for limiting their emissions? This question will be at the forefront of any tort-based action seeking damages or injunctive relief for climate change. Given that greenhouse gas emissions, primarily carbon dioxide, are the unavoidable result of fossil energy consumption, and given that every participant in the world economy is therefore partially responsible for the concentration of greenhouse gases in the atmosphere, a court will need to determine the proper parties to answer for the damages alleged in a climate-related tort action.

The Second and Fifth Circuit opinions in *AEP* and *Comer* are strikingly silent on this fundamental issue. Instead, they treat climate-related nuisance actions as being no different from traditional common law environmental nuisance actions such as *Georgia v. Tennessee Copper Co.*[7] and *Illinois v. City of Milwaukee,*[8] and conclude that there is nothing inherent in such claims that would render them non-justiciable. Taking this assumption to its logical extreme, however, could lead to a courthouse filled with millions of parties, each seeking to hold the others responsible for their share of climate change damages in the context of a particular tort claim.

Plaintiffs in climate change actions typically argue that the defendants are jointly and severally liable.[9] Under joint and several liability, an injured party may sue for and recover the full amount of his damages from any one, or more than one, jointly and severally liable party.[10] The remedy for a defendant unfortunate enough to be singled out by a plaintiff under joint and several liability is "impleader" of third parties who also are responsible for the claimed damage under Rule 14 of the Federal Rules of Civil Procedure (assuming jurisdiction may be maintained in that forum). Indeed, impleader is commonly used to seek contribution among joint tortfeasors.[11]

In the context of a nuisance action where there is a limited number of parties contributing to the alleged nuisance, impleading all of the potentially responsible parties is fairly straight-forward. However, in the context of climate change, such an impleader action will certainly raise insurmountable problems for a trial court. For example, although the plaintiffs in *Comer* only sued a limited number of companies involved in the energy, fossil fuels, and chemical industries, it cannot be seriously maintained that these defendants are the only contributors to the greenhouse gas emissions that allegedly caused climate change, and that in turn allegedly enhanced the strength of Hurricane Katrina. If this action were to proceed in the normal course of a typical nuisance claim, then the named defendant may seek to implead all of the other parties who are also contributors to climate change, and thus are also potentially jointly and severally liable for the claimed damages.

7 206 U.S. 230, 236 (1907).

8 406 U.S. 91 (1972).

9 *See, e.g., AEP*, 582 F.3d at 318 ("[T]he States seek to hold Defendants jointly and severally liable for creating, contributing to, or maintaining a public nuisance.").

10 *See* Restatement (Third) of Torts § 10 (1999).

11 *See, e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 n.17 ("[A] defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution.").

That list, of course, is endless, because every person and entity in the country is responsible for contribution to climate change to some degree – from the individual driving 50 miles to and from work each day in his gasoline-powered car, to the largest operator of coal-fired steam generating units. Neither the decisions in *Comer* or *AEP*, nor general principles of pleading and practice provide meaningful guidance as to where the line should be drawn along this continuum of potential defendants in a climate-related tort action.

IV. Unreasonable Interference and Nuisance: Judging the Reasonableness of the Greenhouse Gas Emitting Conduct

Once all of the parties who are responsible for greenhouse gas emissions have been brought before the court, the next issue for the court will be to determine which of them are legally liable under the theory advanced by the plaintiffs. This will turn on what is "reasonable" in the context of emitting greenhouse gases.

Litigants targeting climate change commonly use either a private or public nuisance cause of action. A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[12] A public nuisance is an "unreasonable interference with a right common to the general public."[13] Under both causes of action, courts focus on the "nature, severity, and reasonableness" of the alleged interference as a threshold matter.[14]

In making this "reasonableness" evaluation, courts can look to the balancing test in Section 826 of Restatement (Second) of Torts.[15] That authority provides that:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.[16]

By requiring courts to balance the gravity of the harm with the utility of the actor's conduct, the authors of the Restatement clearly incorporated the reasoning of the classic nuisance case *Boomer v. Atlantic Cement Co.*[17] There, the Court of Appeals for the State of New York cited the value of the defendant's operations and declined to enjoin conduct resulting in air pollution where that value outweighed the alleged harm.

The Restatement further defines gravity of harm by directing courts to consider: (a) the extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded

12 Restatement (Second) of Torts § 821D. In evaluating the plaintiff's complaint in *AEP*, 582 F.3d at 309, 327–29, 351, the Second Circuit relied upon the Restatement (Second) of Torts.

13 Restatement (Second) of Torts § 821B. With respect to public nuisance, the Restatement further prescribes "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. These "circumstances" are not conclusive tests controlling the determination of whether an interference with a public right is unreasonable – nor do they purport to be exclusive. *Id.* § 821B cmt. e. They are listed in the disjunctive; any one may warrant a holding of unreasonableness. Plaintiffs in climate change litigation have alleged that major greenhouse gas emitters engage in conduct that "significant interfere[s] with the public health, the public safety … [or] is of a continuing nature or has produced a permanent or long-lasting effect, [which] the actor knows or has reason to know, has a significant effect upon the public right." *See AEP*, 582 F.3d at 352–53. Additionally, the comments to the Restatements further explain that there are numerous differences between an action for tort damages and an action for an injunction or abatement. In determining whether to award damages, for example, "the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done." In contrast, "[i]n an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying." "Moreover, to maintain a damage action for a public nuisance, one must have suffered damage different in kind from that suffered by the general public; this is not necessarily true in a suit for abatement or injunction." *See id*. § 821B cmt. i. Plaintiffs in climate change nuisance cases have sought both damages and injunctive relief. *Compare Comer*, 585 F.3d at 355 (damages), *with AEP*, 582 F.3d at 304 (injunctive relief).

14 David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. Pa. L. Rev. 1741, 1788 (2007) (explaining that nuisance cases present different, and likely smaller, burdens for establishing liability relative to claims based on negligence theories).

15 The balancing test is set forth in the context of private nuisance but the comments explain that the test can be applied to public nuisance. *See* Restatement (Second) of Torts § 826 cmt. a.

16 *Ibid.* § 826.

17 26 N.Y.2d 219, 309 N.Y.S.2d 312 (N.Y. 1970).

to the character of the locality; and (e) the burden on the person harmed of avoiding the harm.[18] Measuring the "social utility" of an activity entails looking at: (a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion.[19]

By applying these Restatement factors to the facts of climate change, it becomes very clear that this balancing test puts the courts in the uncomfortable position of weighing the tough legal and policy questions implicated by global pollution problems as well as evaluating complex technical issues such as the viability and feasibility of technology that might be used to reduce greenhouse gas emissions.

To examine how this balancing of social utility and alleged harm might work, Professors David Hunter and James Salzman argue that the Restatement's balancing test "tracks closely Judge Learned Hand's" formulation for negligence in *United States v. Carroll Towing* when applied in the climate change context:

> [T]he trends in climate science that have demonstrated the increasingly grave consequences of climate change, on the one hand, and the emergence of new and more cost-effective technologies to avoid climate change, on the other, would push a social utility analysis toward liability in nuisance actions … As the potential economic and social costs of climate change mount, and as the costs of addressing carbon emissions decline … the relative social utility, and thus the reasonableness, of nuisance-creating activities also declines. At some point, we would expect this social-utility inquiry to tip toward a finding of liability.[20]

Applying this reasoning, some authors have argued that emerging technology, such as carbon capture and storage and coal gasification, has already pushed this balancing test towards "unreasonableness" in evaluating defendant's conduct.[21] Of course, defendants will aggressively question the relevance of current notions of what is "reasonable" in light of emerging technologies given that climate change is allegedly the result of industrial activity over the past century. Indeed, many will persuasively argue that such technologies are not readily available at this time, much less viable or feasible.[22]

Nevertheless, despite the undeniably profound policy implications of determining what is "reasonable" in the context of emitting greenhouse gases, Article III judges, who plainly lack technical expertise in these areas, will be called upon to make this determination in the first instance.

V. Conclusion

By deciding that tort-based nuisance actions do not present political questions and are therefore justiciable in federal court, the panels in *Comer* and *AEP* have left open many significant questions concerning how such cases would actually play out in the trial courts. Notably, every trial court that has considered these practical factors came to the conclusion that these actions were not justiciable. Adjudicating such claims will undoubtedly require a court to decide which segments of society – along the broad spectrum of contributors to climate change – should be held legally liable and which should be excused. Court will also be required to determine under what circumstances historical greenhouse gas emissions were reasonable, and retrospectively which were not. These issues pose questions that have long confounded the elected branches and, for the reasons above, might not be appropriately resolved by our court system.

18 Restatement (Second) of Torts § 827.

19 *Ibid.* § 828.

20 *See* Hunter & Salzman, *supra,* note 13, at 1792.

21 *See* Shi-Ling Hsu, "A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit," 79 *University of Colorado Law Review* (2008), 701, at 739 (citing these technologies and arguing that, "[w]ith so many possibilities, it has become implausible to argue that prospectively, it is 'impractical' for defendants to 'prevent' or 'avoid' the invading nuisance"); see also *Connecticut v. AEP*, 582 F.3d 309, 317 (2d Cir. 2009) (citing the state's arguments that defendants had "practical, feasible and economically viable options for reducing emissions without significantly increasing the cost of electricity for their customers.").

22 For example, there is only one commercial-scale coal gasification facility in the United States that manufactures natural gas. See on the Internet <www.dakotagas.com> (last accessed 28 March 2010). And recent statements by the federal government affirm that technology for carbon capture remains in its infancy. At a 2009 hearing before the Senate Appropriations Subcommittee for the Interior Department, for example, Secretary Ken Salazar announced that the Interior Department was just "begin[ning] initial stages of a national assessment of geologic sequestration of carbon dioxide in saline formations and depleted oil and gas reservoirs" and just starting to "develop methodologies to measure and assess biological carbon sequestration." President's Budget Request, 2010, Hearing Before the S. Appropriations Subcomm. on Interior, Environment, and Related Agencies (3 June 2009) (statement of Kenneth Salazar).