

Emerging Trends In Climate Change Litigation

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Issues relating to climate change and global warming are at the forefront of both national and international environmental political discussions, but some groups, unsatisfied with the pace of the political process, have tried to force more radical action through litigation.

The 2015 Paris Climate Conference, also known as COP21, represented the culmination of a decade of meetings and negotiations. Nearly 200 countries signed the COP21 agreement and committed to lower their greenhouse gas emissions. See Coral Davenport, Nations Approve Landmark Climate Accord in Paris, N.Y. Times (Dec. 12, 2015). According to some, however, the COP21 agreement lacked the teeth needed to force change, as the deal provides “no legal requirement dictating how, or how much, countries should cut emissions.” *Id.*

This lack of legally enforceable requirements has long been a stumbling block for those trying to force action on climate change through litigation. For several years, private plaintiffs tried to force industry to address climate change or to apportion liability among emitters of greenhouse gases for their purported contributions to global warming. These efforts, however, were largely unsuccessful. Two of the largest and most well-known of these cases — *Native Village of Kivalina v. ExxonMobil Corp.* and *Comer v. Murphy Oil USA Inc.* — illustrate these failures.

Kivalina was filed in 2008 in the Northern District of California by residents of the city of Kivalina, located on the northwest coast of Alaska, against more than 20 oil, energy, and utility companies. See *Kivalina*, No. 08-cv-1138, D.E. 1 (N.D. Cal. Feb. 26, 2008). The complaint alleged that the defendants were responsible for contributing to global warming, which would result in the forced relocation or abandonment of Kivalina due to the erosion of the Arctic sea ice that protects the coastline. *Id.* ¶ 1. The complaint included claims for public and private nuisance, civil conspiracy and concert of action, and it sought damages potentially exceeding “hundreds of millions of dollars.” *Id.* ¶¶ 1, 249-82. The district

court granted the defendants' motions to dismiss on political question grounds, holding that the case could not be resolved "without an initial policy determination of a kind clearly for nonjudicial discretion." *Kivalina*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009). The court also concluded that the plaintiffs lacked Article III standing because they could not establish sufficient causation and because there was "no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Id.* at 880. The Ninth Circuit affirmed the decision of the district court, although it did so without reaching the issues raised by the political question doctrine and Article III standing. See *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012), cert denied, 133 S. Ct. 2390 (2013). The Ninth Circuit held, instead, that federal legislation preempted the plaintiffs' federal common law claims, explaining that any solution to the alleged effects of global warming "must rest in the hands of the legislative and executive branches of our government, not the federal common law." *Id.*

Comer was filed by residents of the Mississippi Gulf coast in the aftermath of Hurricane Katrina as a putative class action against multiple fossil fuel, energy, chemical and utility companies, as well as certain trade associations. See *Comer*, No. 05-cv-436, D.E. 79 (S.D. Miss. Apr. 19, 2006) ("*Comer I*"). The complaint alleged that the defendants' activities contributed to global warming through the release of greenhouse gases, which led to the severe and "unprecedented" strength of Hurricane Katrina. *Id.* ¶ 15. The complaint sought monetary damages for the plaintiffs' losses as a result of the storm, and it included claims for unjust enrichment, civil conspiracy, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment. *Id.* ¶¶ 21-39. After a number of rulings and appeals, both substantive and procedural, the plaintiffs' re-filed complaint was dismissed on several grounds, including *res judicata*, lack of subject matter jurisdiction, and lack of standing. *Comer*, 839 F. Supp. 2d 849, 855-62 (S.D. Miss. 2012) ("*Comer II*"). The district court also held that the plaintiffs' claims were barred by the political question doctrine, were preempted by federal statutes, and that they did not sufficiently plead proximate cause. *Id.* at 862-68. The Fifth Circuit affirmed the decision on *res judicata* grounds. See *Comer*, 718 F.3d 460, 469 (5th Cir. 2013).

These unsuccessful attempts by plaintiffs to hold industry accountable for alleged damages from global warming, however, have not dampened the enthusiasm of groups seeking change through the legal process. To the contrary, they appear to have led to increased efforts to force national and state governments, rather than industry, to address climate change issues. The most significant recent trend in U.S. litigation is the rise in cases based on the "public trust" doctrine, which traditionally has been used to secure the access to and availability of natural resources, in particular navigable waters, for the public.

Most recently, in August 2015, a group of youths from around the U.S. filed an action against the United States and several federal agencies based on the public trust doctrine. See *Juliana v. United States*, No. 15-cv-1517, D.E. 7 (D. Or. 2015). The complaint alleged that the federal government "has known for decades" that the emission of greenhouse gases contributed to climate change, and that in spite of this knowledge it has "continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation," including on federal lands. *Id.* ¶ 7. The complaint states claims for violations of several constitutional principles, including the due process clause and equal protection principles of the Fifth Amendment and certain unenumerated rights in the Ninth Amendment, as well as for violation of the public trust doctrine. As redress for these violations, the complaint requests that the court order the defendants to cease "permitting, authorizing, and subsidizing" fossil fuels and to develop and implement a "national plan" which would include limiting the atmospheric concentration of carbon dioxide to 350 parts-per-million by the year 2100. *Id.* ¶ 12.

The plaintiffs' claim for violation of the public trust doctrine is based on the federal government's alleged failure to protect "vital natural resources," such as "the air (atmosphere), water, seas, the shores of the sea, and wildlife," as well "the overarching public trust resource" of "our country's life-sustaining climate system." *Id.* ¶ 308. The crux of the plaintiffs' claim is that the defendants' acts — that is, permitting and supporting fossil fuel production and use — "have unconstitutionally caused, and continue to cause, substantial impairment to the essential public trust resources." *Id.* ¶ 309. The case is still pending in the District of Oregon, and several national organizations have recently appeared in the case — on both sides — as either intervenors or amici.

The plaintiffs' effort in Juliana to invoke the public trust doctrine is not unique, and similar litigation generally has been unsuccessful so far. In 2011, for example, a group of similarly situated plaintiffs filed a single-count complaint in federal court against the United States, including the Environmental Protection Agency and the Department of the Interior, alleging violations of the public trust doctrine and seeking declaratory and injunctive relief. See *Alec L. v. Jackson*, No. 11-cv-2235 (D.D.C.). The complaint was dismissed on the grounds that the public trust doctrine is a matter of state, not federal, law, and that the claim was preempted by federal legislation. See *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-17 (D.D.C. 2012), *aff'd*, 561 Fed. App'x 7 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 774 (2014). Actions based on the same or similar legal theories have been filed in multiple courts, including in Alaska, Arizona, Iowa, Kansas, Massachusetts, Minnesota, Montana, New Mexico, Oregon, Pennsylvania, Texas and Washington. Most of these actions have been dismissed, but some are still pending. None of these cases, as of yet, has been successful.

Courts and other adjudicative bodies around the world have seen a similar increase in climate change litigation and, in at least some cases, courts outside the United States have been more receptive to litigants' claims. In the Netherlands, for example, an environmental group called Urgenda sued the government in 2013 based on theories similar to general tort principles. Urgenda claimed the country's climate change policies were inadequate and alleged that they posed serious environmental and health risks. In order to remedy these perceived risks, Urgenda sought a court order compelling the government to impose more stringent restrictions on greenhouse gas emissions. In June 2015, the court agreed and granted the requested relief, which included reducing the country's emissions by 25 percent from 1990 levels, rather than the government's proposed 17 percent reduction. A similar lawsuit was filed in December 2014 by citizens of Belgium, and an environmental group in Australia is reportedly canvassing support for an action there.

Similarly, in late 2015, a Peruvian farmer filed suit against RWE, a large European energy company, for its alleged contributions to global warming based on its total emissions between 1751 and 2010. The complaint claims that global warming is causing glaciers near the farmer's home to melt, which in turn is causing lakes in the area to flood and threaten his property. The farmer is only seeking \$21,000 in damages from RWE, which represents the company's alleged proportional share of the total cost of protective measures based on its proportion of global emissions over the past two and a half centuries. Even while the requested sum is small, however, a finding of liability could potentially have far-reaching impacts.

Plaintiffs around the world also have resorted to nontraditional fora with claims relating to climate change. Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement recently filed a complaint with the Commission on Human Rights of the Philippines, allegedly supported by other organizations and individuals. The complaint asked the commission to initiate an investigation into identified fossil fuel companies and their responsibility for alleged climate change-related impacts, such as storms and typhoons. Residents of several other countries — including Vanuatu, Kiribati, Tuvalu, Fiji

and the Solomon Islands — also recently declared their intent to bring similar petitions.

It is unclear whether these international efforts will prove more viable than the cases brought unsuccessfully in the United States. What is clear is that, like they have for more than a decade, private plaintiffs and other advocacy organizations are continuing to pursue novel legal theories in new fora to try to force aggressive steps to address climate change outside the political process. Cases like Urgenda in the Netherlands appear to have encouraged this new wave of claims, but it is still too early to tell if Urgenda is an outlier or the beginning of a new trend in successful international climate change litigation.

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