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Attorneys at Law

AEP v. Connecticut: Will the U.S. Supreme Court Shape the Future of Climate Change Litigation?

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Today's panel features:

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Significance of *AEP v. Connecticut*

- "In the 222 years that this Court has been sitting, it has never heard a case with so many potential perpetrators and so many potential victims, and that quantitative difference with the past is eclipsed only by the qualitative differences presented today. . . . The very name of the alleged nuisance, 'global warming,' itself tells you much of what you need to know. There are billions of emitters of greenhouse gasses on the planet and billions of potential victims as well."
  - Acting Solicitor General Neal Katyal at oral argument on 4/19/11
- "[C]ourts have successfully adjudicated complex common law public nuisance cases for over a century."
- "A decision by a single federal court concerning a common law of nuisance cause of action . . . does not establish *national* or *international* emissions policy. . ."
  - Second Circuit

AEP v. Connecticut: Who Might Be Impacted? Some Examples of GHG Emitters

- Stationary combustion sources
- Electricity generation
- Adipic acid production
- Ammonia manufacturing
- Aluminum production
- Cement production
- Ferroalloy production
- Glass production
- HCFC-22 production
- Hydrogen production
- Iron and steel production
- Lead production
- Municipal solid waste landfills
- Lime manufacturing
- Electronics/semiconductor industry
- Nitric acid production
- Petrochemical production
- Petroleum refineries
- Phosphoric acid production
- Pulp and Paper manufacturing
- Silicon Carbide production
- Soda ash manufacturing
- Titanium dioxide production
- Zinc production
- Commercial Livestock / Agriculture

AEP v. Connecticut: Who Filed Amicus Briefs?

- Examples
  - Other utilities
  - Automobile manufacturers
  - Chamber of Commerce
  - Property Casualty Insurers Association of America
  - Home Builders
  - Other states
  - Petroleum industry
  - Chemical industry
  - Mining interests
  - Farming interests
  - Law professors
  - Other public interest groups

AEP v. Connecticut: Who Else Might Be Impacted?

- NGOs
- States
- Other Parties Claiming Damage Due to Climate Change
- Insurance Industry

Background: Key Issues in Climate Change Nuisance Litigation

- Justiciability - Political Question Doctrine
- Standing
- Displacement of Federal Common Law
- Preemption of State Law
- Causation
- Science

Background

- *Comer v. Murphy Oil USA* (5th Circuit)
- *Kivalina v. ExxonMobil* (9th Circuit)
- *North Carolina v. TVA* (4th Circuit)

Climate Change Tort Litigation Timeline

- *Connecticut v. AEP* filed (July 21, 2004)
- *AEP* – trial court decision (Sept. 19, 2005)
- *Comer v. Murphy Oil USA* filed (Sept. 20, 2005)
- *Comer* – trial court decision (Aug. 30, 2007)
- *Kivalina v. ExxonMobil* – filed (Feb. 26, 2008)
- *North Carolina v. TVA* – trial court decision (Jan. 13, 2009)
- *Comer* - Fifth Circuit decision (Oct. 16, 2009)
- *AEP* – Second Circuit decision (Sept. 21, 2009)
- *Kivalina* – N.D. Cal. Decision (Sept. 30, 2009)
- *Comer* – Fifth Circuit lack of quorum for hearing *en banc* decision (May 28, 2010)
- *North Carolina v. TVA* – 4th Circuit decision (July 26, 2010)
- *AEP* – certiorari granted by SCT (Dec. 21, 2010)
- *Comer* – writ of mandamus denied by SCT (Jan. 11, 2011)
- *Kivalina* – Ninth Circuit appeal stayed pending decision in *AEP* by SCT (Feb. 23, 2011)

Comer v. Murphy Oil USA

The Players

- PLAINTIFFS: Putative class of residents and owners of land and property along the Mississippi Gulf coast

- DEFENDANTS: energy, fossil fuel, and chemical companies *Alliance Resource Part.*; *Arch Coal*; *Alpha Natural Resources*; *Consol Energy*; *Foundation Coal*; *Massey Energy*; *Natural Resource Partners*; *Peabody Energy*; *Westmoreland Coal*; *Allegheny Energy*; *Reliant Energy*

Comer v. Murphy Oil USA

Nature of the Lawsuit

- The *Comer v. Murphy Oil USA* case originated in Mississippi. In the aftermath of Hurricane Katrina, Gulf Coast property owners sued oil companies, coal companies, and chemical manufacturers for property damage alleging that the companies' greenhouse gas emissions contributed to global warming which in turn contributed to increased sea levels and the ferocity of Hurricane Katrina.
- Causes of action: state nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims

Trial Court – Dismissed the case on political question doctrine and standing grounds.

Comer in the Fifth Circuit

- 5th Circuit 2009 Merits Decision (585 F.3d 855): Reversed.
  - Held that (1) plaintiffs had standing to bring their nuisance, trespass, and negligence claims; and (2) plaintiffs' nuisance, trespass, and negligence claims did not present non-justiciable political questions.
  - Did not reverse the trial court's decision that plaintiffs did not have standing to bring their unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims.
- Defendants sought rehearing *en banc*.
  - Seven of the sixteen judges recused themselves leaving nine active judges, the minimum quorum needed for *en banc* review. Six of the nine judges voted to grant rehearing en banc. This grant had the effect, per court local rules, of vacating the initial Fifth Circuit decision.
- Additional recusal after *en banc* review granted → no quorum → no review (*see* 607 F.3d 1049)
- Result – trial court decision reinstated

Kivalina v. ExxonMobil Corp.

THE PLAYERS

- PLAINTIFFS: Inupiat Eskimo village who reside in the City of Kivalina, Alaska
- DEFENDANTS: 24 power, utility and oil companies including *ExxonMobil*; *BP America*; *Chevron*; *Conoco Phillips*; *Shell Oil*; *Peabody Energy*; *AES*; *AEP*; *DTE Energy*; *Duke Energy*; *Dynergy*; *Edison Int'l*; *Mid Am. Energy*; *Mirant*; *NRG Energy*; *Pinnacle West*; *Reliant Energy*; *The Southern Co.*; *Xcel*

NATURE OF THE LAWSUIT

- In 2008, Plaintiffs commenced a federal lawsuit in the N.D. Cal. seeking damages based upon federal and state nuisance claims, civil conspiracy, and concert of action.
- Plaintiffs claim that Defendants' GHG emissions have caused global warming which in turn has caused erosion of the Kivalina coastline due to thinning of sea ice; Plaintiffs allege that Kivalina is becoming uninhabitable.

Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009)

- Decision Overview:
  - Federal nuisance claim presented non-justiciable political questions
  - Plaintiffs' federal nuisance claim could not meet the "fairly traceable" standard for causation for Article III standing, and
  - Plaintiffs state claims are dismissed without prejudice based upon the court's discretion not to decide pendent state law claims.
- PQD
  - Neither the Constitution nor any federal law prescribes the issues in the case to a decision by the political branches, but such a finding is not dispositive.
  - No workable standards for a jury to decide whether Defendants' emissions caused more harm (erosion to the Kivalina coastline) than good (providing power, utilities, and oil to industry and residences).
  - The allowable amount of GHGs Defendants can emit and who should bear the cost of global warming, requires the court to make an initial policy determination that is best left to the political branches.

Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009)

- Standing
  - Contribution theory cannot satisfy fairly traceable requirement
  - Plaintiffs do not allege sufficient facts to show that Defendants' emissions are the "seed" of Plaintiffs' injury. Plaintiffs cannot trace the erosion of the Kivalina coastline to any Defendant's emissions.
  - Any argument by Plaintiffs that they are within the "zone of discharge" of Defendants' emissions also fails because the link between the injuries alleged and the Defendants' specific emissions is too tenuous. If the court adopted Plaintiffs' argument, the entire world would be within the "zone of discharge.
  - Special solicitude not applicable.
- Ninth Circuit appeal stayed pending decision in AEP by SCT (Feb. 23, 2011)

North Carolina v. TVA

NATURE OF THE SUIT

- North Carolina alleged TVA emissions in upwind states created a public nuisance in North Carolina

RELIEF SOUGHT

- injunctive relief and attorneys fees and costs

TRIAL COURT DECISION (593 F. Supp. 2d 812 (W.D.N.C. 2009))

- declared air emissions from some plants to be a public nuisance
- imposed injunction requiring use of pollution control technology

North Carolina v. TVA, 615 F.3d 291 (4th Cir. 2010)

4TH CIRCUIT DECISION

- held district court applied the wrong standard: NC law instead of law of the states where the plants are located
- held laws of the states where plants were located specifically permitted the activities and thus that state law precluded the nuisance actions
- nuisance suit was preempted by the Clean Air Act
  - fell short of saying CAA preempted the field but non-source state could not attempt to replace comprehensive federal emissions regulations
  - savings clause cannot be read to allow challenges to activities permitted in the source state
  - little would not be preempted under this holding

PETITION FOR WRIT OF CERTIORARI PENDING

- **Case No. 10-997**
  - Waiting to decide *AEP* first?
  - Issues related but are not identical
  - preemption of state nuisance causes of action as opposed to displacement of federal common law of nuisance
  - GVR ("grant, vacate, and remand") order in light of *AEP* a possibility

AEP - NATURE OF THE LAWSUIT

- Plaintiffs: Coalition of 8 States, City of NY, and 3 land trusts
  - Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin
- Defendants: Six electric power companies
- In 2004, Plaintiffs commenced a lawsuit seeking an order requiring that Defendants abate the public nuisance of global warming.
- Plaintiffs alleged that Defendants' coal-operated power plants constitute a public nuisance under federal and state common law but only the federal common law issue is before the Supreme Court.
- Plaintiffs claimed that Defendants are "the five largest emitters of carbon dioxide in the U.S."

AEP - HARM ALLEGED

ExAMPLES

- California: less mountain snowpack → less melting snowpack → less runoff → less fresh water
- Warmer average temperatures, late fall freezes, early spring thaws
- Future injuries: increased deaths and illness due to heat waves; increased smog; increased concomitant respiratory problems; beach erosion; sea level rise and coastal inundation; salinization of marshes and water supplies; droughts; floods; wildfires

AEP - RELIEF SOUGHT

- Plaintiffs asked the court to hold each Defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance; and
- To permanently enjoin each Defendant to abate its contribution to global warming by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.
- No monetary damages sought.

AEP - TRIAL COURT DECISION

- Dismissed Plaintiffs' case on grounds that the lawsuit raised "non-justiciable political questions that were better suited to resolution by the political branches and that were beyond the limits of the court's jurisdiction."
- In other words, the district court held that these kinds of cases should be handled by the Executive Branch and Congress, not the Courts.

Connecticut v. AEP, 582 F.3d 309 (2d Cir. 2009)

- **The Second Circuit reversed and concluded:**
  - Plaintiffs' claims did not present non-justiciable political questions. Seeking to limit emissions from coal-fired power plants is something that could be adjudicated by the courts; "ordinary tort suit";
  - All plaintiffs have standing to bring their claims;
  - Plaintiffs stated a claim under the federal common law of nuisance; and
  - Plaintiffs' federal common law claims have not been displaced by federal legislation. The Clean Air Act and other legislation on the subject of greenhouse gases have not displaced federal common law public nuisance claims.
  - Court did not reach Plaintiffs' state common law nuisance claims because they held federal nuisance claim was not displaced.

- Note – This was a decision by two judges because Judge Sotomayor recused herself after having heard oral argument.

AEP: Petitioners asked the High Court to address 3 questions

- **Standing:** Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.
- **Displacement:** Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.
- **PQD:** Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

POLITICAL QUESTION DOCTRINE (PQD)

- Threshold question of justiciability
- Based on separation of powers
- "Political question" = issue reserved for the political (i.e., elected) branches of the Federal Government (i.e., the Executive Branch and Congress)
- Seminal PQD case is *Baker v. Carr*, 369 U.S. 186 (1962)
- First three *Baker* factors at issue:
  1. "textually demonstrable constitutional commitment of the issue to a coordinate political department"
  2. "lack of judicially discoverable and manageable standards for resolving [the issue]"
  3. "impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion"

PQD – SECOND CIRCUIT'S HOLDING

PQD does not bar the suit.

- **First *Baker* factor does not apply:**

  "We find no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance."

- **Second *Baker* factor does not apply:**

  "Federal courts have successfully adjudicated complex common law public nuisance cases for over a century. . . . Well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims and the federal courts are competent to deal with these issues"

- **Third *Baker* factor does not apply:**

  "Where a case appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. . . . Not every case with political overtones is non-justiciable"

AEP – PARTIES' POSITIONS ON THE PQD AT THE SUPREME COURT HEARING

Plaintiffs: This is an "ordinary" tort suit that does not involve political questions, and that federal courts are well equipped to handle by using ordinary tort law standards

→ **Justice Kagan**: Ordinary tort suits "don't involve these kinds of national/international policy issues"

→ **Justice Alito**: "In setting these standards, there would be some difficult trade-offs . . . Could you just explain in concrete terms how a district judge would deal with those . . . Is it just what's reasonable?"

→ **Justice Scalia**: "Inplausible is the word you're looking for"

AEP – PARTIES' POSITIONS ON THE PQD AT THE SUPREME COURT HEARING

Utilities:

→ This case presents nonjusticiable political questions, which along with the standing and federal common law displacement issues, "flow from the same basic separation of powers principles"

→ "If Congress enacts a statute providing a standard, then our political question argument goes away"

→ "To classify climate change as a tort would trigger a massive shift of institutional authority away from the politically accountable branches, and to the courts, which we think would be inconsistent with separation of powers ...."

AEP – PARTIES' POSITIONS ON THE PQD AT THE SUPREME COURT ORAL ARGUMENT

U.S.:

→ Given the "standardless nature of the adjudication," the PQD "is an appropriate way to dismiss this case," but the Court need not reach it since the parties lack prudential standing

→ If a statute were announced to provide standards, that would provide a way around the political question problem that exists in this case

→ **Justice Kagan:** "A lot of your arguments really sound like prongs two and three from *Baker v. Carr*, but you say that we shouldn't go there, that we should instead address this matter on prudential standing grounds. But the political question doctrine seems more natural, given the kinds of arguments that you're making. So why not?"

Standing: Background

- Federal court jurisdiction is limited to "cases" or "controversies" under Article III of the Constitution
- Basic Three-Part Test for Article III Standing:
  1) Injury-in-fact
     - "invasion of a legally protectable interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'"
  2) Causation
     - "there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly trace[able] to the challenged action of the defendant…'"
  3) Redressability
     - "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

Standing: Background
Different Standard for State Plaintiffs?

- Parens Patriae Doctrine
  - State has a right to sue on behalf of its citizens to protect its quasi-sovereign interests—such as "the health and comfort of its inhabitants" and "earth and air in its domain." *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

- *Massachusetts v. EPA*, 549 U.S. 497 (2007)
  - States and environmental groups sought review of EPA order that Clean Air Act did not authorize regulation of GHG emissions from new cars.
    - EPA argued plaintiffs lacked standing.
    - Court held MA entitled to "special solicitude" in standing analysis because of its quasi-sovereign interests.
    - But did special considerations actually impact the Court's *Lujan* three-part standing analysis?
      - Court did not indicate where relaxed standard was needed.
      - Court relied on MA's ownership interest in coastal property – not a quasi-sovereign interest for purposes of parens patriae.
      - GHGs cause global warming, EPA's refusal to regulate contributes to MA's injury.

- Impact of the "special solicitude" analysis on climate change nuisance cases?

Standing Holding: *Connecticut v. AEP* Second Circuit

- *Parens patriae* standing
  - States articulated an interest apart from interests of particular citizens (more than a nominal party); expressed quasi-sovereign interests in public health and welfare; and injury affects significant population segment (carbon dioxide will affect all citizens)
  - and in any event, states satisfy *Lujan* Article III test for standing / state suing in capacity as landowner → proprietary interest

Standing Holding: *Connecticut v. AEP* Second Circuit

- **Proprietary Article III standing**
  - **Injury in fact**
    - Current injury – e.g., coastal erosion, loss of snowpack
    - Future injury – e.g., sea level rise, flooding, associated impacts on infrastructure, habitat destruction, crop risk
    - No strict temporal requirement; certainty of injury is the requirement
    - Refers to *Massachusetts v. EPA* holding that incremental injury suffices
  - **Causation**
    - Ps alleged that Ds are the 5 largest emitters of CO2 in the US and that Ds directly contribute to their injuries.
    - Particularly at the pleadings stage, the "fairly traceable" requirement is not equivalent to tort causation.
    - Plaintiffs "are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries." *Id.* at 347.
  - **Redressability**
    - Capping Defendants' emissions and reducing them by a certain percentage would redress Ps' alleged injuries.
    - Court rejected Ds' arguments that there is no redressability because Ds account for 2.5% of man-made emissions and global warming will continue even if Ds reduced emissions. Injuries could be less if Ds reduced emissions.

Second Circuit in AEP
Distinguishing Standing vs. Merits Analysis

- Factual allegations accepted as true.
- Reasonable inferences drawn in plaintiffs' favor.
- "At the pleadings stage, the 'fairly traceable' standard is not equivalent to a requirement of tort causation."
  - *Connecticut v. AEP*, 582 F.3d 309, 333 (2d Cir. 2009).
- "At this point in litigation, Plaintiffs need not present scientific evidence to prove that they face future injury or increased risk of injury, that Defendants' emissions cause their injuries, or that the remedy they seek will redress those injuries."
  - *Id.* at 333.

AEP – Second Circuit Decision on Standing

- Current and future injuries (harm to the environment, harm to the states' economies, and harm to public health) are sufficiently traceable to Defendants.
- Contribution is enough to satisfy fairly traceable element.
- Plaintiffs also showed that the relief they requested -- limit on Defendants' emissions -- would redress their injuries.

Standing – Parties' Positions on Appeal to the Supreme Court

- TVA (US)
  - At least some of the state plaintiffs have Article III standing, but it is appropriate to resolve the case on prudential-standing grounds before looking at other threshold issues
  - plaintiffs lack prudential standing because their suits are generalized grievances more appropriately addressed by the representative branches
  - prudential standing (different than Article III) embodies judicially self-imposed limits on the exercise of federal jurisdiction
- Petitioners
  - alleged injuries are not fairly traceable to Defendants' emissions
  - alleged harms will not be redressed by relief sought
  - statutory standing cases (*Mass. v. EPA*) do not apply
  - prudential standing also bars suit

Standing – Parties' Positions on Appeal to the Supreme Court

- States
  - Article III standing established
  - standing more firmly established than in *Mass. v. EPA*
  - need not consider prudential standing
  - generalized grievance doctrine is not a standing issue
- Organizations – similar only without the potential "state" issues

Standing – Treatment at *AEP* Oral Argument

Examples

- Roberts – skeptical of prudential standing approach
- Scalia – what good does it do you to decide this case on Article III grounds – the plaintiff could go to state court . . .
- Kennedy – "you're lacking any clear precedent" [to petitioners]
- Ginsburg – states would have standing on same basis as *Mass. v. EPA*; thought generalized grievance was Article III
- Kagan – *Mass. v. EPA* does not say it is limited to statutory causes of action

Displacement
What is it?

- "[T]he concept of 'displacement' refers to a situation in which 'federal statutory law governs a question previously the subject of federal common law." *AEP* (2d Cir.).
- "[T]he question [of] whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.*
- The test is "whether the federal statute [speaks] directly [to] the question otherwise answered by federal common law." *Id.*

AEP – Second Circuit Decision on Displacement

- "[A]t least until the EPA makes the requisite findings, for the purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources."
- "Accordingly, the problem of which Plaintiffs complain certainly has not 'been thoroughly addressed' by the CAA."
- Expresses no opinion at time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA would displace the federal common law remedy.

AEP – Displacement – Positions of the Parties

- Plaintiffs - NY Solicitor General Barbara Underwood's Argument:
  - There is a strong federal interest in providing the States with a federal remedy for interstate pollution; providing a federal remedy was part of the "deal" when States gave up their own sovereignty regarding interstate commerce and joined the Union.
  - Federal common law, and the injunctive remedy that it can provide, is the "default position" unless and until there is federal regulation of a particular interstate source of pollution (here, carbon dioxide emissions from stationary source electric utilities).
  - There is currently no federal regulation for such pollution; under the CAA and *Mass. v. EPA*, EPA has the authority to regulate, but has not yet done so.
  - EPA's mere "promise" of future regulation is not enough to displace federal common law.

AEP – Displacement – Positions of the Parties

- Petitioners
  - There is no federal common law nuisance cause of action for climate change.
  - Congress' enactment of the CAA was itself sufficient to displace plaintiffs' federal common-law claims without regard whether EPA is further regulating pursuant to the CAA.
- TVA
  - Distinguishes CAA and CWA.
  - CWA directly prohibits discharge of pollutants; CAA imposes few restrictions without EPA promulgation of regulations pursuant to CAA.
  - But since January 2, 2011, GHGs have been "subject to regulation" under CAA and EPA is actively exercising its discretion to determine when and how certain categories of sources should be regulated.
  - Thus, plaintiffs' federal common law action is displaced.

Displacement vs. Preemption

- The issue in *AEP v. Connecticut* is whether federal regulation of carbon dioxide as a "pollutant" under the Clean Air Act displaces any federal common law remedies for abating sources of interstate pollution.
- Displacement of federal common law (i.e., federal court-made law) by federal legislation or federal regulation is a function of the separation of powers intrinsic to the U.S. Constitution.
- In contrast, "preemption" normally refers to the supplanting of state law (state regulatory law and/or state common law) by federal law under the Supremacy Clause of the Constitution; federal preemption of state law can be express or implied.
- *In Milwaukee v. Illinois*, the Supreme Court drew a contrast between the "presumption against preemption" that applies to state law vs. the "assumption that it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law" 451 U.S. 304, 317 (1981).

Timeline of Some Key Climate Change Events

- 4/2/2007 - *Massachusetts v. EPA*
- 9/15/09 - EPA and NHTSA Proposed Light-Duty Vehicle GHG Standards and Corporate Average Economy Standards
- 9/21/09 - Second Circuit decision in *Connecticut v. American Electric Power*
- 9/22/09 - EPA issues final GHG Reporting Rule
- 9/30/09 - EPA announces Proposed Rule on Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule
- 9/30/09 – N.D. California decision in *Kivalina* case
- 10/16/09 – Initial Fifth Circuit decision in *Comer v. Murphy Oil*

Timeline of Some Climate Change Events (cont'd)

- 12/7/09 – EPA endangerment finding and cause and contribution finding on GHGs
- 4/2/10 – EPA memo on when GHGs subject to regulation for stationary source NSR.
- 5/13/10 - EPA sets greenhouse gas (GHG) emissions thresholds to define when permits under the New Source Review Prevention Significant Deterioration (PSD) and Title V Operating Permit programs are required for new and existing industrial facilities.
- 2010 - EPA amendments to GHG Reporting Rule (additional categories)
- 1/2/11 – EPA Light Duty Rule takes effect and "GHGs subject to regulation"
- 4/6/11 – Senate votes down bill to strip EPA of authority to regulate GHGs

Reading the Tea Leaves; Potential Outcomes

- This particular lawsuit likely will not survive.
- Open question as to how Supreme Court will reach the reversal.
- Reversal may be on narrower grounds than some had hoped.
- Future state common law actions in state court.

What's Next?

- Impact of the Supreme Court's decision in *AEP* will depend on how broad or narrow it is
- State court suits
- Litigation outside United States
- New paths and avenues developed by Plaintiffs' bar
- Recall tobacco and asbestos experience
- A ruling on standing could impact environmental and other litigation outside climate change arena

Courts as Battlefields in Climate Fights

The New York Times

By JOHN SCHWARTZ
Published: January 26, 2010

Tiny Kivalina, Alaska, does not have a hotel, a restaurant or a movie theater. But it has a very big lawsuit that might affect the way the nation deals with climate change.

Kivalina, an Inupiat Eskimo village of 400 perched on a barrier island north of the Arctic Circle, is accusing two dozen fuel and utility companies of helping to cause the climate change that it says is accelerating the island's erosion.

Blocks of sea ice used to protect the town's fragile coast from October on, but "we don't have buildup right now, and it is January," said Janet Mitchell, Kivalina's administrator. "We live in anxiety during high-winds seasons."

The village wants the companies, including ExxonMobil, Shell Oil, and many others, to pay the costs of relocating to the mainland, which could amount to as much as $400 million.

The case is one of three major lawsuits filed by environmental groups, private lawyers and state officials around the nation against big producers of heat-trapping gases. And though the village faces a difficult battle, the cases are gathering steam.

In recent months, two federal appeals courts reversed decisions by federal district courts to dismiss climate-change lawsuits, allowing the cases to go forward. In Connecticut, environmental lawyers joined forces with attorneys general of eight states and the City of New York seeking a court order to reduce greenhouse gas emissions.

In Mississippi, Gulf Coast property owners claim that industry-produced emissions that contribute to climate change increased the potency of Hurricane Katrina in 2005.

And although a federal judge in Oakland, Calif., dismissed the Kivalina suit in October, the village is appealing the decision.

Tracy D. Hester, who has taught a course in climate lawsuits at the University of Houston law school, said that with the issues "very much in play" in three circuits of the federal court system, "the game pieces are being set for eventual Supreme Court review."

The cases need not even get that far to have an impact, said James E. Tierney, the director of the National State Attorneys General program at Columbia Law School.

Kivalina alleged in its complaint that the industry conspired "to suppress the awareness of the link" between emissions and climate change through "front groups, fake citizens organizations and bogus scientific bodies."

That claim echoes those in suits against the tobacco industry that ultimately led to industry settlements and increased government regulation.

If the climate-change cases even get to the discovery stage, and if the energy industry possesses embarrassing e-mail messages and memorandums similar to those that proved devastating to tobacco companies, Mr. Tierney said, "it's a hammer" that could drive industries to the negotiating table.

The cases generally rely on the common-law doctrine of nuisance, the same concept that allows neighbors to sue one another over noises, odors and the like that interfere with the use or enjoyment of property. In the context of climate change, such cases were once derided as frivolous long shots that would be shot down quickly. Scott H. Segal, a lawyer for energy companies, joked in a 2004 article in Grist magazine that the cases brought "new meaning to the term 'nuisance lawsuit.' "

No one is laughing now. In a report issued last year, Swiss Re, an insurance giant, compared the suits to those that led dozens of companies in asbestos industries to file for bankruptcy, and predicted that "climate change-related liability will develop more quickly than asbestos-related claims."

The pressure from such suits, the report stated, "could become a significant issue within the next couple of years."

The American Justice Partnership, a business-oriented group that is critical of the plaintiffs' bar, argued in a 2008 report that the conspiracy accusations made the Kivalina case "the most dangerous litigation in America."

The case could stifle debate over climate-change issues, the report stated, and increase "the threat of being named as a defendant or co-conspirator subject to invasive and costly inquiry."

President Obama's senior adviser for energy and climate change, Carol M. Browner, underscored the potential for the suits to affect policy in a briefing with reporters in September. Citing the Connecticut case, Ms. Browner warned that "the courts are starting to take control of this issue," and argued that setting environmental standards "is best done through legislation."

She suggested that the situation increased the pressure on Congress to pass legislation to curb heat-trapping gases. The Environmental Protection Agency is drafting regulations on such emissions as dangerous pollutants under the Clean Air Act, an authority confirmed by the 2007 [illegible] E.P.A.

A bill to curb such [illegible] House last year has not advan[illegible] Senate. And the climate talks last month in Copenhagen produced little.

That sense of inaction has left a situation in which those intent on reducing gas emissions could try to make the courts "a significant battleground," said Harold Kim, an official in the administration of President George W. Bush who is now senior vice president for reform initiatives at the United States Chamber Institute for Legal Reform. "This is trending into an area that could be explosive — for better or for worse, depending on how you look at it," Mr. Kim said.

Pat D. Hemlepp, a spokesman for American Electric Power, a defendant in the Connecticut case, said that he could not comment directly on the suit, but that "our view is that litigation is not the appropriate way to address climate concerns."

The company, Mr. Hemlepp said, supports the House bill. "We are not one of those heels-dug-in, just-say-no companies on climate action," he said.

[illegible] organize the Kivalina litigation, said the case was about affecting public policy.

"I filed these cases because I expect and want to win in court," Mr. Pawa said. "I'm a litigator, and that's what I do."

Despite the recent victories, climate lawsuits are still at a preliminary stage. Mr. Segal, the lawyer who made the "nuisance lawsuit" joke, said issues like proving climate change, its link to the companies and the further link to the damage "have not been addressed."

If the cases go to trial, he said, "these burdens will be particularly tough in the climate context."

A lawyer working with Mr. Pawa in the Kivalina suit, Stephen D. Susman, agreed that the road ahead was uphill.

"The legal landscape is horrible," said Mr. Susman, of Houston. "No lawyer can say this is a way to make money."

He also said he doubted that the cases would prompt large numbers of class-action suits, since courts would not be likely to allow the formation of a class of litigants among people with such diverse experiences.

Michael B. Gerrard, a professor at Columbia University law school and director of its Center for Climate Change Law, said the first efforts to sue tobacco companies had appeared to be weak as well.

"They lost the first cases; they kept on trying new theories," Mr. Gerrard said, "and eventually won big."

Kivalina alleged in its complaint that the industry conspired "to suppress the awareness of the link" between emissions and climate change through "front groups, fake citizens organizations and bogus scientific bodies." That claim echoes those in suits against the tobacco industry that ultimately led to industry settlements and increased government regulation. (James E. Tierney, Director, National State Attorneys General program at Columbia Law School).

If the climate-change cases even get to the discovery stage, and if the energy industry possesses embarrassing e-mail messages and memorandums similar to those that proved devastating to tobacco companies, "it's a hammer" that could drive industries to the negotiating table. (James Tierney)

In a report issued last year, Swiss Re . . . compared the [climate change-related] suits to those that led dozens of companies in asbestos industries to file for bankruptcy, and predicted that "climate change-related liability will develop more quickly than asbestos-related claims" and that "[t]he pressure from such suits . . . could become a significant issue within the next couple of years."

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Climate Change – Beyond the Tort Litigation World

- Science
- EPA regulation
- Future federal legislative efforts
- State and local regulation
  - E.g., Renewable energy – state requirements
- The International Sphere – UN, EU, etc.

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