

LEGAL ALERT

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Climate Change Public Nuisance Appeal Dismissed; Future of Broader Litigation Unclear

On May 28, 2010, the United States Court of Appeals for the Fifth Circuit dismissed the appeal in *Comer v. Murphy Oil USA, Inc.*, CV 05-0436 (S.D. Miss. filed Sept. 20, 2005). The ruling represents a dramatic reversal of fortune for the plaintiffs in that case, and raises questions about the future of climate change public nuisance litigation in general.

The Comer Appeal

In *Comer*, a group of private plaintiffs whose property was damaged by Hurricane Katrina seek money damages from oil and energy companies on the theory that their emissions strengthened the storm. The district court dismissed the suit, characterizing it as a non-justiciable debate that has no place in court until the legislature enacts laws governing greenhouse gas emissions. Plaintiffs appealed to the Fifth Circuit and a three-judge panel reversed, holding that the plaintiffs have standing to bring nuisance, trespass and negligence claims under Mississippi law, and that those claims do not present non-justiciable political questions.

On February 26, 2010, the Fifth Circuit granted the defendants' petition for en banc rehearing, a step which technically vacated the panel's reversal. However, eight of the sixteen circuit court judges later recused themselves from hearing the matter (presumably on the basis of stock ownership or some other conflict of interest), leaving the court without a quorum. On May 28, an order was issued stating that the district court decision stands and plaintiffs' claims have been dismissed.

Members of the energy industry can take some comfort in this result. *Comer* was widely considered the most dangerous of the three major climate change public nuisance suits because it was the only action that was filed by private plaintiffs and was based solely upon state law theories of liability. The other two cases were filed by governmental or quasi-governmental entities and center mainly upon federal public nuisance law. See *Connecticut v. American Elec. Power Co., Inc.*, Nos. 04 Civ. 5669 and 5670 (S.D.N.Y. filed July 24, 2004) and *Native Village of Kivalina v. ExxonMobile Corp.*, No. C 08-1138 (N.D. Cal. filed Feb. 26, 2008). Thus, the unique exposures presented by *Comer* have been neutralized – at least for the moment. The *Comer* plaintiffs have until August to file a petition for certiorari with the U.S. Supreme Court.

Supreme Court Review

The potential for a Supreme Court appeal in *Comer* raises several interesting issues. For one thing, the now-vacated circuit panel decision in that case came to the same conclusion as the still-valid panel

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decision in *Connecticut* – namely, that plaintiffs’ claims could proceed – but the two opinions conflicted in their reasoning, specifically with respect to the proper test for standing. This led some to believe there was a circuit split justifying Supreme Court review, and that such a review might be accepted by the end of the year. This belief was based upon the fact that the Second Circuit denied the defendants’ request for an en banc rehearing in *Connecticut* and petitions for certiorari were originally due in that case on or about June 3, 2010.

The reinstatement of the district court decision in *Comer* changes this analysis. That ruling, which calls for the dismissal of plaintiffs claims, directly contradicts the Second Circuit’s opinion in *Connecticut*. However, the district court ruling in *Comer* was issued from the bench without a written opinion and is based entirely on political question grounds. Thus, assuming the *Comer* plaintiffs are entitled to seek Supreme Court review on issues other than the Fifth Circuit’s procedural decision regarding a quorum, a question would still remain as to whether the differences between the district court’s oral ruling in that case and the circuit court’s opinion in *Connecticut* constitute a “circuit split,” and if so, whether the split extends beyond the political question doctrine to issues such as standing.

An Unclear Future

Answers to these questions are not likely to come soon. The deadline for filing petitions for certiorari in *Connecticut* was recently extended to July 6, 2010 and, as stated above, the deadline for filings in *Comer* falls in August. Moreover, while the district court decision in *Kivalina* is similar to the district court decision in *Comer* insofar as it dismisses plaintiffs’ claims, it is significantly different to the extent that it directly criticizes the Second Circuit’s holdings on justiciability and standing in *Connecticut*. *Kivalina* is currently on appeal to the Ninth Circuit, with briefing due to conclude in early July, so it seems reasonable to conclude that the Supreme Court may wait to act until an appellate decision is rendered.

Conclusion

The May 28, 2010 dismissal of the *Comer* appeal is good news for the energy industry, but any celebration should be measured – for now. *Comer* is limited to state law claims and plaintiffs may still appeal to the Supreme Court. In addition, *Connecticut* and *Kivalina* remain pending and either case could result in a favorable ruling for plaintiffs with respect to federal common law. Such an outcome could be delayed, or may never occur, but climate change public nuisance litigation cannot be written off until a final decision is rendered. Until then, members of the affected industries seeking advice concerning this evolving area of the law should contact attorneys familiar with energy law, environmental law and/or mass tort/industry-wide litigation.

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