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Expert Analysis

Negligence in the Air: International Greenhouse Gas Emissions Litigation

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On Oct. 16, 2009, the U.S. Court of Appeals for the Fifth Circuit held that private plaintiffs—a putative class of residents and owners of land and property along the Mississippi Gulf Coast—could proceed with claims against certain U.S. energy companies based on an allegation that those defendants were responsible for greenhouse gas emissions that contributed to global warming, which, in turn, increased global surface air and water temperatures, which, in turn, increased the strength and damage caused by Hurricane Katrina when it struck the coast of Mississippi on Aug. 29, 2005. In doing so, the Fifth Circuit reversed the judgment of the District Court for the Southern District of Mississippi dismissing plaintiffs' claims on standing and political question grounds.

The case in question, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), came only a few weeks after the decision of the U.S. Court of Appeals for the Second Circuit in *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009). In that case, eight states (including New York), the City of New York and three U.S. land trusts (the Open Space Institute, Open Space Conservatory and the Audubon Society of New Hampshire) sued six U.S. electric companies operating in 20 states seeking abatement of their alleged contribution to the public nuisance of global warming. There, the Second Circuit reversed the judgment of the District Court for the Southern District of New York, which had dismissed the case on political question grounds.

While both cases concern claims by U.S. plaintiffs against U.S. defendants for damages suffered in the United States, nothing in the logic of these decisions would limit their holdings to domestic victims, actors or territory. As a result, the decisions could have far-reaching international implications. This is because global warming is just that—global. Greenhouse gas emissions generated in one country flow across national boundaries with ease and mix with the greenhouse gas emissions generated by other actors in other countries, and their impact—rising temperatures and sea levels and the resulting harm—could be felt anywhere.[1]

The result may be a wave of international climate change litigation in the U.S. courts: parties injured by the consequences of global warming anywhere would, under *Comer*, have standing to bring claims against U.S. energy companies and foreign energy companies subject to personal jurisdiction in the United States that emit greenhouse gases.

'Comer'

In *Comer*, plaintiffs sued defendants for public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. Defendants moved to dismiss plaintiffs' claims on three grounds: (i) lack of standing; (ii) the political question doctrine; and (iii) plaintiffs' failure to allege facts sufficient to plead proximate causation. The district court granted the motion on the first two grounds and declined to reach the third. On appeal, the Fifth Circuit reversed the judgment of the district court, finding that the plaintiffs had standing to assert some of their claims (nuisance, trespass and negligence), and that these claims did not raise nonjusticiable political questions. The court did not reach the ground for dismissal not relied upon by the district court, but remanded the case to the district court to consider that issue.[2]

> The effect of 'Comer' might be to channel into the U.S. courts private litigation concerning global warming involving harm suffered elsewhere.

In addressing standing under federal law,[3] the Fifth Circuit distinguished two classes of claims advanced by plaintiffs: first, those claims (nuisance, trespass, negligence) that relied on an allegation of a causal connection between defendants' greenhouse gas emissions, global warming, rising sea levels, the increased strength of Hurricane Katrina, and the damages suffered by plaintiffs; and second, those claims—unjust enrichment, civil conspiracy and fraudulent misrepresentation—that rested on the allegation that defendants had deceived consumers and the government about the harmful effects of greenhouse gases and global warming in marketing their products and had artificially inflated their prices.

The Fifth Circuit held that the second set of claims could not be maintained because plaintiffs lacked prudential standing, which prohibits "the adjudication of generalized grievances more appropriately addressed in the representative branches." *Comer*, 585 F.3d at 868. The court found that those claims "involve every purchaser of petrochemicals and the entire American citizenry because the plaintiffs are essentially alleging a massive fraud on the political system…. Such a generalized grievance is better left to the representative branches…" Id. at 869.

The Fifth Circuit held, however, that plaintiffs had standing to bring the first set of claims. Defendants' main argument in opposition had been that plaintiffs lacked standing under Article III of the Constitution, which requires a plaintiff to demonstrate that its injuries are "fairly traceable" to the defendant's actions. Defendants objected that plaintiffs had not satisfied the traceability test because (i) the causal link between their emissions and the hurricane was too attenuated and (ii) defendants were only one group of many contributors to greenhouse gas emissions.

But the Fifth Circuit found these arguments to be similar to those already rejected by the U.S. Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, the Supreme Court acknowledged a causal link between greenhouse gas emissions, global warming, hurricane strength and resulting damages, and as a result held that the Commonwealth of Massachusetts had standing to petition for review of an Environmental Protection Agency decision not to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. The Fifth Circuit also read *Massachusetts* to hold that the traceability requirement could be satisfied if an actor merely "contribute[d] to" greenhouse gas emissions and global warming—and that it mattered not whether that actor was the sole or material cause of the injuries. *Comer*, 585 F.3d at 866.[4]

Having found standing for at least some of plaintiffs' claims, the court turned to the question of whether those claims raised non-justiciable

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political questions. The political question doctrine, which provides that certain matters are not appropriately resolved by the courts, is "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government." *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). Like the Second Circuit in *American Electric*, the Fifth Circuit held simply that this doctrine did not apply to "ordinary tort claims" of the type advanced by plaintiffs.

International Implications

In *Massachusetts v. EPA*, upon which the Fifth Circuit relied in finding that the traceability requirement was satisfied, the Supreme Court was focused on harms suffered in Massachusetts. However, the Supreme Court acknowledged that global warming causes a rise in ocean temperatures and sea levels everywhere, and that these phenomena can cause damage anywhere. The Court noted that "[t]he harms associated with climate change are serious and well-recognized," and that experts "have reached a 'strong consensus' that global warming threatens (among other things) a precipitate rise in sea levels by the end of the century, …'severe and irreversible changes to natural ecosystems,' …a 'significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences,' …an increase in the spread of disease, …[and] that rising ocean temperatures may contribute to the ferocity of hurricanes." 549 U.S. at 521-22. The Court further noted that "these climate-change risks are 'widely shared'…" Id. at 522.

Based on this analysis, nothing in *Comer* would preclude foreign plaintiffs injured by a hurricane anywhere from having standing to assert claims in U.S. courts against companies that emit greenhouse gases from operations in the U.S. Moreover, it is not just damage caused by hurricanes that may give rise to claims of the type permitted in *Comer*. Suits may be brought for other personal injury or property damage allegedly caused by global warming, such as those resulting from heat waves, floods, reduced water levels, increased smog, or wildfires.

While in *American Electric*, the Second Circuit noted plaintiffs' description of the consequences of global warming in the United States, for example, flowing from the impaired shipping, recreational use, and hydropower generation resulting from the lowering of the water levels of the Great Lakes, or the damage caused by the increase in wildfires in California, similar consequences could be felt anywhere.[5] Under *Comer*, foreign plaintiffs who are victims of such injuries in other countries would have standing to assert similar claims to those permitted in that case against U.S.-based companies responsible for greenhouse emissions.

To be sure, U.S. defendants will resist suits by foreign plaintiffs by arguing that foreign law applies and that plaintiffs' claims are not cognizable under such law, or by invoking the doctrine of forum non conveniens to seek dismissal of such suits on the ground that they would be more appropriately litigated in the courts at the place of the injury, or by resorting to other devices to avoid having a suit go forward in the U.S. courts.[6] But there is no guarantee that these doctrines or devices will succeed.[7]

Moreover, while *Comer* involved U.S. defendants, there is nothing, in principle, that would prevent *Comer* from applying to any energy company in the world—be it in China, Russia, Brazil or India—subject to personal jurisdiction in the United States. Foreign energy companies could be subject to personal jurisdiction in the United States if they do business here or based on state long-arm statutes—which can subject companies to personal jurisdiction if an act outside of the United States causes an injury within—subject to a minimum contacts showing. And at least some courts have held that an agency of a foreign state—which might include a state-owned energy company—may be sued in the United States without it being necessary to satisfy the Due Process Clause.[8]

It is important to stress that, under the Foreign Sovereign Immunities Act, immunity does not extend to cases in which the action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. §1605(a)(2). Of course, while U.S. plaintiffs may be able to assert a claim against foreign companies based on harm suffered in the United States, foreign plaintiffs would unlikely be able to use the U.S. courts to sue foreign defendants.[9]

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It is too early to assess whether, as a result of *Comer*, we will see a wave of international global warming litigation in the U.S. courts. It could be that the Fifth Circuit will reverse itself en banc, or if not, that new legislation will stop plaintiffs in their tracks, or that potential plaintiffs will wait to see how courts rule on the issue of proximate cause in connection with injuries allegedly resulting from global warming before commencing new lawsuits.

But, in considering the appropriateness of allowing claims such as those advanced in *Comer* to proceed in U.S. courts, the international implications should not be overlooked. The problem of global warming cannot be resolved by one country acting alone, but, because greenhouse gas emissions move quickly and easily across national borders, its resolution requires international cooperation.[10] Yet the effect of *Comer* might be, regrettably, to channel into the courts of the United States private litigation concerning global warming involving harm suffered elsewhere and plaintiffs and defendants from all over the world.

1. See Thomas R. Karl and Kevin E. Trenberth, "Modern Global Climate Change," 302 SCIENCE 1719 (2003). The reference to 'negligence in the air' in the headline, of course, is to the much-used phrase made famous by Chief Justice Cardozo in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 99 (1928) ("Proof of negligence in the air, so to speak, will not do") (quoting Pollock, torts (11th ed.) p. 455).

2. In a special concurrence, Judge W. Eugene Davis of the Fifth Circuit stated that he would have affirmed the district court on the ground that plaintiffs had failed to allege facts that could establish that defendants' actions were a proximate cause of plaintiffs' alleged injuries, but he acknowledged that the Fifth Circuit panel had the discretion not to decide the case on a ground not relied upon by the district court.

3. The Fifth Circuit found *Mississippi's* liberal standing requirements to be satisfied.

4. It is important to stress that the Fifth Circuit was careful to distinguish the traceability requirement, necessary to establish standing, from the proximate causation doctrine, necessary to establish liability, holding that it was easier to satisfy the former than the latter. "[T]he Article III traceability requirement 'need not be as close as the proximate causation needed to succeed on the merits of a tort claim. Rather, an indirect causal relationship will suffice….'" Id. at *5 (quoting *Toll Bros. Inc. v. Township of Readington*, 555 F.3d 131, 142 (3d Cir. 2009)).

5. The Second Circuit stated: "With regard to future injuries, the complaint categorizes in detail a range of injuries the states expect will befall them within a span of 10 to 100 years if global warming is not abated. Among the injuries they predict are: increased illnesses and deaths caused by intensified and prolonged heat waves; increased smog, with a concomitant increase in residents' respiratory problems; significant beach erosion; accelerated sea level rise and the subsequent inundation of coastal land and damage to coastal infrastructure; salinization of marshes and water supplies; lowered Great Lakes water levels, and impaired shipping, recreational use, and hydropower generation; more droughts and floods, resulting in property damage; increased wildfires, particularly in California; and the widespread disruption of ecosystems, which would seriously harm hardwood forests and reduce biodiversity. The states claim that the impact on property, ecology, and public health from these injuries will cause extensive economic harm." 582 F.3d 317-18.

6. See generally John Fellas, "Strategy in International Litigation," 16 INTERNATIONAL QUARTERLY 433 (2004).

7. Take, for example, the doctrine of forum non conveniens. In order to prevail on a motion to dismiss on grounds of forum non conveniens, a defendant has to demonstrate that there is an "adequate" alternative forum for plaintiffs' claim. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22 (1981) ("At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction…. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."). Typically, this is not a hard standard to meet. However, while other countries may recognize causes of action for nuisance, trespass or negligence, their courts may take a different view than that taken by the court in *Comer* on whether the victims of injuries caused by global warming may assert such causes of action against companies responsible for greenhouse gas emissions. In such circumstances, the alternative forum may be characterized as not "permit[ting] litigation of the subject matter of the dispute," raising a question about its adequacy. This is not to say that a U.S. defendant would inevitably fail to demonstrate that a foreign court is adequate in such circumstances, but only that the analysis may be complicated by the fact that the foreign court may not allow suits of the type permitted in *Comer*.

8. See, e.g., *Frontera Resources Azerbaijan Corp. v. SOCAR*, 582 F.3d 393 (2d Cir. 2009).

9. Such suits would be analogous to the foreign cubed securities fraud cases, which courts have been hesitant to permit to go forward absent a showing of conduct or effects in the United States. See *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008) cert. granted, 78 USLW 3309, 78 USLW 3319 (U.S. Nov. 30, 2009) (No. 08-1191). In the context of claims by foreign plaintiffs against foreign defendants based on injuries suffered as a result of global warming, foreign defendants could rely on the RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW §403 (1987), which sets forth principles governing the extraterritorial application of U.S. law, to seek dismissal of claims by foreign plaintiffs against them based on injuries suffered as a result of global warming.

10. The United Nations Climate Change Conference concluded its meeting in Copenhagen in December 2009, with little major progress.