

# Client Alert

Latham & Watkins Environment, Land &  
Resources Department

## Fifth Circuit joins Second Circuit in Allowing Climate Tort Claims, but Northern District of California Disagrees

### Introduction

In the wake of the United States Court of Appeals for the Second Circuit's precedent-setting decision in *State of Connecticut, et al. v. American Electric Power Company Inc., et al.*, the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Northern District of California have issued opinions of their own in tort suits challenging the emission of greenhouse gases (GHGs).<sup>1</sup> In *AEP*, the Second Circuit, overturning the trial court's ruling, recognized the validity of federal common law public nuisance claims challenging the emission of GHGs, found that a number of states and private environmental groups have standing to press such claims, and rejected the argument that the claims are nonjusticiable.

Less than a month later, the Fifth Circuit has found in *Ned Comer, et al. v. Murphy Oil USA, et al.* that Mississippi Gulf coast property owners alleging injury from Hurricane Katrina have standing to bring state law public and private nuisance, trespass and negligence claims challenging energy sector emissions of GHGs and that the claims do not present political questions.<sup>2</sup> At about the same time, the Northern District of California

went in the other direction in *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp., et al.*, finding that residents of an Alaskan village threatened by rising sea levels lack standing to bring federal common law nuisance claims against GHG emitters and that the claims involve nonjusticiable political questions.<sup>3</sup>

The Second Circuit's decision in *AEP* was the first to find the existence of a federal common law nuisance claim against GHG emitters and that the standing and non-justiciability hurdles had been cleared in a climate tort case, and the Fifth Circuit and the Northern District of California diverged sharply in their views of *AEP*. The Fifth Circuit lauded *AEP*'s "careful analysis" of the political question doctrine and sharply criticized the *AEP* trial court's "serious error of law" in analyzing non-justiciability.<sup>4</sup> Judge Sandra Brown Armstrong's decision in *Kivalina*, on the other hand, found little to like in the *AEP* decision: "neither Plaintiffs nor *AEP* offers any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue." It will likely take some time—and a trip to the US Supreme Court—before this area of the law is settled.<sup>5</sup>

"Unless and until Congress passes legislation that displaces or pre-empts these common law claims, or unless and until the Supreme Court overrules the Second and Fifth Circuits, it is reasonable to expect to see more climate tort claims against GHG emitters."

## Background to *Comer*

In *Comer*, an alleged class of property owners along the Mississippi Gulf coast alleged that GHG emissions from a group of out-of-state energy and chemical companies contributed to global warming, consequently causing sea levels to rise and Hurricane Katrina to intensify and ultimately damage the plaintiffs' property. Invoking the federal courts' jurisdiction over state law claims between citizens of different states, the plaintiffs sought compensatory and punitive damages asserting state law claims of nuisance, trespass and negligence, among other things. The district court dismissed the claims on the grounds that the plaintiffs lack standing and that the matter involves a nonjusticiable political question.

## Summary of *Comer*

The Fifth Circuit reversed. Addressing the standing question, the court applied the Article III standing test from the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, which requires that plaintiffs establish that they have suffered an injury-in-fact, that this injury is traceable to the defendants and that it is likely that the injury would be redressed by the remedy sought. As to the nuisance, trespass and negligence claims, the court found that plaintiffs had alleged that they suffered a concrete injury in fact to their lands and that this injury can be redressed by the compensatory and punitive damages they seek. The court also found that the defendants' claim that the alleged causal chain was too attenuated to meet the traceability requirement was in essence an attack on the merits of the plaintiffs' claim that the defendants' emissions had caused their damages. It was sufficient for the plaintiffs to have alleged a chain of causation linking defendants' emissions and plaintiffs' injuries. While plaintiffs would later need to prove the allegations, at the pleading stage they must be taken as

true. Moreover, the court found that the defendants' argument that the causal link alleged was too attenuated and not traceable because defendants' GHG emissions were only a small portion of the emissions emitted worldwide has already been rejected by the Supreme Court in *Massachusetts v. EPA*.<sup>6</sup> (The court went on to dismiss on prudential standing grounds other state claims relating to the defendants' alleged efforts to manipulate the political process.)

Addressing the trial court's determination that the case presented a nonjusticiable political question, the Fifth Circuit also reversed, finding that the defendants were unable to identify a constitutional provision or federal law that commits a material issue in the case exclusively to a political branch. The court observed that nonjusticiable questions are rarely present in suits between private parties, in matters only involving common law tort claims or in actions merely seeking damages (as opposed to injunctive relief). Indeed, hearing ordinary tort suits between citizens of different states is one of the federal judiciary's characteristic roles. The court also criticized the trial court's decision in *AEP*, rejecting its contention that there is any initial policy determination that needs to be made by the political branches before common law nuisance claims can be adjudicated. The court noted that the Supreme Court has rejected similar arguments when asked to adjudicate trans-boundary water quality control cases. "The defendants have failed to show how any of the issues inherent in the plaintiffs' nuisance, trespass, and negligence claims have been committed by the Constitution or federal laws 'wholly and indivisibly' to a political federal branch."<sup>7</sup>

## Background to *Kivalina*

The residents of the Village of Kivalina, Alaska, alleged that the defendant

energy and utility companies' GHG emissions contributed to global warming, which has caused the Arctic sea ice surrounding the Village to diminish and will require the relocation of the residents. The plaintiffs filed a federal common law nuisance claim, as well as state law claims. Plaintiffs did not seek to enjoin the defendants, but they did seek damages for the costs of relocation.

### Summary of *Kivalina*

Defendants moved to dismiss and argued both that the federal common law nuisance claim is nonjusticiable under the political question doctrine and that the plaintiffs lacked Article III standing. The court agreed on both counts.

First, the court found the claims to be nonjusticiable because there are no judicially discoverable and manageable standards. The court observed that a public nuisance is the *unreasonable* interference with public rights. To determine if the defendants' conduct was unreasonable, the court would not only have to weigh the global costs and benefits of defendants' emissions-generating activities, but also the global cost and benefits of energy producing alternatives. "Plaintiffs...fail to articulate any particular judicially discoverable and manageable standards that would guide a fact finder in rendering a decision that is principled, rational, and based upon reasoned distinctions."<sup>8</sup>

The court also rejected the plaintiffs' contention that similarly complex air and water pollution cases have been adjudicated in the past, and disagreed with the Second Circuit's contrary finding: "Plaintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs."<sup>9</sup> Finally, the court found that resolving the nuisance claim would require the court to make policy decisions about which parties ought to

bear the cost of global warming and that such decisions are the proper province of the executive or legislative branches of government.

In addition to determining that the *Kivalina* plaintiffs' claim is nonjusticiable, the court found the plaintiffs to lack standing. As in *Comer* (and *AEP*), the court applied the Article III standing test from *Lujan*. But unlike *Comer* (and *AEP*), it found that the plaintiffs failed to meet the "traceability" requirement because the plaintiffs could not trace their alleged injuries directly to any emissions of the named defendants, but instead merely alleged that the defendants' emissions "contributed" to the plaintiffs' alleged injuries. The court's analysis centered on distinguishing Clean Water Act cases where defendants' discharges of pollutants in violation of statutory limits were alleged to have "contributed" to plaintiffs' injuries, creating standing. The court found that when adjudicating a claim where no allegation is made that federal discharge limits were violated, no presumption arises that there is a substantial likelihood that the defendants' conduct harmed the plaintiffs.

Further, the court found that the undifferentiated nature of greenhouse gas emissions prevent tracing any particular effect of global warming to any particular actor. The court also opined that traceability requires that the plaintiffs be within a certain proximity of the defendants—that is, within the "zone of discharge," and that plaintiffs' geographic proximity to the defendants' emissions is not sufficient. Finally, the court declined to extend *Massachusetts*-style "special solicitude" to the villagers as such solicitude is predicated upon an entity being a state (not a political subdivision of a state) and because, unlike in *Massachusetts*, the plaintiffs are not seeking to enforce a procedural right concerning an agency's rulemaking authority.

## Analysis

These decisions reveal a sharp conflict concerning the authority and capability of the federal courts to hear common law tort claims arising out of global warming, a conflict that will ultimately likely be decided by the Supreme Court. Should the Court review a climate tort case, the crucial issues will likely be: (1) whether the claim that a defendant emitted GHGs satisfies the traceability prong of the Article III standing test; and, (2) whether a court can decide whether and when a defendant's GHG emissions are "unreasonable."

First, *AEP* and *Comer* found "traceability" to be satisfied by the mere claim that the defendants emitted some GHGs which "contributed" to the plaintiffs' injury; these courts saw the ultimate question of whether the emissions were the legal cause of the plaintiffs' alleged injuries as a question to be decided on the merits. *Kivalina*, on the other hand, held that, regardless of plaintiffs' allegations of legal cause, the effects of undifferentiated GHG emissions cannot be fairly traced back to any one party, including the defendants. In reality, the *Kivalina* court found not only that the plaintiffs had no Article III standing, it also found that the plaintiffs could not prove their case.

Second, *AEP* and *Comer* largely failed to grapple with the principal non-justiciability argument in *Kivalina*—that, absent making its own social and political judgments, a court lacks standards to apply in determining when an emission of GHGs is "unreasonable." The response of *AEP* and *Comer* is little more than the assertion that the principles used in other complex tort suits (such as trans-boundary water disputes) and contained in the Restatement can be

applied. But perhaps these sources of law are inadequate when asking what is reasonable in the context of GHG emissions, where the web of emissions consists of virtually all of human activity, the impacts are global, the costs of regulation potentially enormous and no social or political consensus has been forged as to how to proceed.

## Conclusion

The green light given to the federal judiciary by the Second and Fifth Circuits, combined with the EPA's recent steps to regulate GHGs under the Clean Air Act, will place additional pressure on Congress and the relevant stakeholders to pass a comprehensive climate change law. Unless and until Congress passes legislation that displaces or pre-empts these common law claims, or unless and until the Supreme Court overrules the Second and Fifth Circuits, it is reasonable to expect to see more climate tort claims against GHG emitters.

### Endnotes

- <sup>1</sup> *Client Alert* No. 952—"Second Circuit Revives Federal Common Law Nuisance Suits Against Greenhouse Gas Emitters in *Connecticut v. American Electric Power*"
- <sup>2</sup> *Ned Comer, et al. v. Murphy Oil USA, et al.*, No. 07-60756 (5th Cir. Oct. 16, 2009).
- <sup>3</sup> *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp., et al.*, Case No. C 08-1138 SBA (N.D. Ca. Sept. 30, 2009).
- <sup>4</sup> *Comer* at \*29, n.15.
- <sup>5</sup> *Kivalina* at \*13.
- <sup>6</sup> *Client Alert* No. 583—"Supreme Court Rules that EPA Can Regulate Greenhouse Gases under the Clean Air Act"
- <sup>7</sup> *Comer* at \*34.
- <sup>8</sup> *Kivalina* at \*11,
- <sup>9</sup> *Id.* at \*13.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

**Robert A. Wyman**  
+1.213.891.8346  
robert.wyman@lw.com  
Los Angeles

**Michael G. Romey**  
+1.213.891.7591  
michael.romey@lw.com  
Los Angeles

**Beth A. Collins-Burgard**  
+1.213.891.7780  
beth.collins@lw.com  
Los Angeles

**Aron Potash**  
+1.213.891.8758  
aron.potash@lw.com  
Los Angeles

---

*Client Alert* is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney whom you normally consult. A complete list of our *Client Alerts* can be found on our Web site at [www.lw.com](http://www.lw.com).

If you wish to update your contact details or customize the information you receive from Latham & Watkins, please visit [www.lw.com/LathamMail.aspx](http://www.lw.com/LathamMail.aspx) to subscribe to our global client mailings program.

<b>Abu Dhabi</b>	<b>London</b>	<b>Paris</b>
<b>Barcelona</b>	<b>Los Angeles</b>	<b>Rome</b>
<b>Brussels</b>	<b>Madrid</b>	<b>San Diego</b>
<b>Chicago</b>	<b>Milan</b>	<b>San Francisco</b>
<b>Doha</b>	<b>Moscow</b>	<b>Shanghai</b>
<b>Dubai</b>	<b>Munich</b>	<b>Silicon Valley</b>
<b>Frankfurt</b>	<b>New Jersey</b>	<b>Singapore</b>
<b>Hamburg</b>	<b>New York</b>	<b>Tokyo</b>
<b>Hong Kong</b>	<b>Orange County</b>	<b>Washington, D.C.</b>