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Dismissal of Climate Change Lawsuit

ENERGY/ENVIRONMENTAL LAW ALERT

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In a controversial opinion issued on October 16, 2009, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit held that private property owners could pursue state common law nuisance claims against major greenhouse gas (“GHG”) emitters for allegedly contributing to climate change that increased the intensity of Hurricane Katrina. See *Comer v. Murphy Oil Co.*, No. 07-60756, October 16, 2009 (“*Comer I*”). The Fifth Circuit’s original decision was discussed in our November 6, 2009 Energy/Environmental Alert, “[Impact of Recent Litigation on the Climate Change Debate.](#)”


On May 28th, 2010, an *en banc* panel for the Fifth Circuit issued an order dismissing Plaintiffs’ appeal in *Comer v. Murphy Oil USA*, and reinstating the decision of the District Court. Since the lower court had dismissed Plaintiffs’ suit, this ends the case unless Plaintiffs can obtain review by the Supreme Court. As is discussed below, the impact of this dismissal on climate change litigation is uncertain at this time.

The May 28th order turned on a very unusual procedural point. After the three-judge panel of the Circuit Court ruled that Plaintiffs could pursue claims against major GHG emitters, the full Court vacated the panel decision and ruled that it would itself consider the appeal from the District Court. However, seven of the 16 active judges on the Court recused themselves from the decision to grant an *en banc* hearing and from the *en banc* decision itself. Several months later, an eighth judge recused herself. By a 5-3 majority, the remaining judges found that this action deprived the Court of a quorum so that the case could not be heard and that the decision to grant *en banc* had vacated the panel’s prior decision. Therefore, it dismissed the appeal. The three judges who had sat on the original panel dissented vigorously.

While some commenters have heralded the May 26 order in *Comer* as a blow for climate change plaintiffs, other active cases throughout the country make this conclusion far less certain. As we discussed in our November 6th Alert, the U.S. Court of Appeals for the Second Circuit examined a similar question and decided that the Plaintiffs in that case could proceed against major GHG emitters on a nuisance theory. *Connecticut v. American Electric Power Co.*, No. 05-5104 CV, September 21, 2009. The Second Circuit denied a petition for an *en banc* hearing some time ago, and Defendants only have a few more days in which to seek a *writ of certiorari*. Of course, there is no guarantee that the Supreme Court will grant cert.

Another climate change case has also wended its way to the appellate level. On September 30, 2009, the U.S. District Court for the Northern District of California dismissed a very similar lawsuit. *Native Village of Kivalina v. Exxon Mobil Corp.*, No. C 08-1138. Plaintiffs in that case appealed in November, and the matter is currently being briefed.

The dismissal of *Comer* suggests that a wave of climate change litigation is unlikely to materialize in the short term. Rather, it appears more likely that the plaintiffs bar and



environmentalists are awaiting the outcomes of these three cases before proceeding. Climate change cases will involve extensive discovery, including the testimony of experts and thus will be quite expensive for both plaintiffs and defendants. Further, the prospect of Congressional action, which will likely eliminate common law climate litigation, has most likely chilled enthusiasm for initiating additional climate change cases at this time. The situation is quite fluid and will obviously be affected by developments in *Comer* (if any), *AEP*, and *Kivalina*, as well as by Congressional action or inaction. It is simply too early to say whether reports of the death of climate change litigation have or have not been greatly exaggerated.

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