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Premature Burial? The Resuscitation of Public Nuisance Litigation

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On Sept. 22, the U.S. Court of Appeals for the Second Circuit, in *Connecticut v. American Electric Power Co.*, held that federal common-law nuisance suits can proceed against major greenhouse gas emitters. Nine days later, a federal trial court reached the opposite conclusion in another case. In this Analysis & Perspective article, attorneys Richard Faulk and John Gray discuss these rulings, and the revival of public nuisance litigation.

Premature Burial? The Resuscitation of Public Nuisance Litigation

By Richard O. Faulk and John Gray

"It's alive! It's alive!"[1]

Preface

Only recently, it seemed that state supreme courts were sounding the death knell for public nuisance litigation. Alliances between public authorities and private counsel failed repeatedly to win final judgments,[2] and although large public nuisance cases remained pending,[3] the outlook was generally discouraging.

In the climate change arena, the news was equally dismal. Suits based on public nuisance under federal common law, as opposed to the more commonly pursued state principles, were dismissed either voluntarily[4] or on motions by various district courts,[5] and appeals from those rulings mysteriously remained pending for years without resolution.[6] As the parties in those cases

[1] Colin Clive as Dr. Victor Frankenstein in *Frankenstein* (Universal Studios 1931)(clip available at http://www.youtube.com/watch?v=5URYhXE55bo&NR=1).

[2] *See* Bender, Faulk and Gray, *The Mouse Roars! Rhode Island High Court Rejects Expansion of Public Nuisance*, Washington Legal Foundation (July 2008); Faulk and Gray, *Judges Impose Reality Check on Public Nuisance Litigation*, 22 Legal Backgrounder, No. 28 (Washington Legal Foundation, July 27, 2007); *see generally*, Faulk and Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation,* 2007 Mich. St. L. Rev. 941 (2008)(discussing the development of the public nuisance controversy); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745 (2003)

[3] *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 6 Dist 2006).

[4] *See California v. General Motors Corp.,* No. 07-16908 (9th Cir.)(unopposed motion to dismiss appeal filed June 19, 2009).

[5] *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sep 17, 2007) (granting defendants motion to dismiss). The state moved to voluntarily dismiss its appeal to the Ninth Circuit on June 19, 2009. *See* Unopposed Motion to Dismiss, No. 07-16908 (9th Cir., June 19, 2009).

[6] Memorandum Opinion, *Comer v. Nationwide Mut. Ins.* 2006 WL 1066645 (S.D. Miss., Feb. 23, 2006) (granting defendants motion to dismiss).

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awaited appellate decisions, only one case, *Kivaliana v. ExxonMobil Corp.*,[7] remained pending in federal district court in San Francisco, and that tribunal was deliberating motions to dismiss.

A crack in the dam occurred when a North Carolina federal district court allowed a major public nuisance case to proceed in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*.[8] Although an appeal of that decision is pending in the Fourth Circuit, the case was the first successful ruling enjoyed by plaintiffs pursuing federal common law public nuisance litigation regarding interstate pollution claims based upon air emissions.[9] Still, however, the case remained a relatively localized controversy, and a successful extrapolation of its model to the broader issue of global climate change seemed unlikely.

The Quickening

Everything changed, however, on September 21, 2009, when the Second Circuit finally ruled on the appeal in *State of Connecticut v. American Electric Power Co. Inc.*.[10] In a surprising ruling, the court of appeals reversed the district court's dismissal and remanded a climate change case to be litigated on its merits against several utilities. The ink on the decision barely had time to dry before White House climate change czar Carol Browner stepped forward to proclaim that courts are ready, willing and able to use their power to regulate greenhouse gases. ''[T]he courts are starting to take control of this issue . . . if they were to follow this logic out, they would be setting standards,'' she told reporters during a White House briefing.[11]

Indeed, the Second Circuit's two-judge panel ruling has all the hallmarks of public policy – poured from the crucible of federal common law. Under the ruling, five of the nation's largest power utilities can be sued by a coalition of states, land trusts, and the city of New York, for creating a common law public nuisance commonly referred to as ''global warming.'' If Ms. Browner is correct – and the judiciary has ''finally ruled that it is acceptable to use common law to sue an emitter of greenhouse gases for causing a nuisance''[12]—a wave of climate change litigation seems imminent.

To say the least, the prospects for successful climate change litigation have improved dramatically since the Second Circuit's decision. Although the ultimate impact of the case on controversies pending in other circuits cannot be foreseen, advocates pursuing those cases must surely be encouraged.

District Court Proceedings – A Global ''Political Question''

In the district court, plaintiffs complained about the utilities' emission of greenhouse gases into the atmosphere, and they sought to force the companies to abate their ''ongoing contributions to a public nuisance.''[13] They asked the court to require the utilities to reduce their carbon emissions 3 percent per annum over the next decade.[14]

The U.S. District Court for the Southern District of New York dismissed the lawsuit as a non-justiciable ''political question'' that could not be decided due to a lack of standards for determining whether the defendants' conduct was unreasonable, and the overarching national and international policy implications of regulating greenhouse gases.

Specifically, the district court held that the plaintiffs' claims could not be adjudicated without (i) determining the appropriate level at which to cap Defendants' carbon dioxide emissions; (ii) the appropriate percentage reduction to impose upon Defendants; (iii) creating ''a schedule to implement those reductions''; (iv) determining and balancing ''the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change''; (v) assessing and measuring ''available alternative energy resources''; and (vi) determining and balancing ''the implications of such relief on the United States' energy sufficiency, and thus its national security—all without an ''initial policy determination'' having been made by the elected branches.[15]

Appellate Proceedings – An ''Ordinary Tort Case''

The Second Circuit disagreed, stating that: ''[i]t is error to equate a political question with a political case. Given the checks and balances among the three branches of our government, the judiciary can no more usurp executive and legislative prerogatives than it can decline to decide matters within its jurisdiction simply because such matters may have political ramifications.''[16] Moreover, the court also held that all of the plaintiffs had standing to bring the suit, and that none

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[7] Complaint, *Kiviliana v. ExxonMobil Corp.*, Civ. No. CV-08-01138 SBA (N.D. Cal. filed Feb. 28, 2008), *available at http://www.adn.com/static/adn/pdfs/Kivalina%20Complaint%20-%20Final.pdf*. (seeking damages under a federal common law claim of nuisance, alleging that excessive emissions of carbon dioxide and other greenhouse gases from 24 oil and energy companies are causing global warming).

[8] *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 2009 WL 2497934 (W.D.N.C. 2009, August 14, 2009).

[9] *See generally,* R. Trent Taylor, *State of North Carolina v. TVA – A New Era in Public Nuisance Law?,* 24 Toxics L. Rptr. 352 (March 12, 2009).

[10] —- F.3d ——, 2009 WL 2996729 (2d. Cir., September 21, 2009) (NO. 05-5119-CV, 05-5104-CV).

[11] White House Briefing by Todd Stern, Mike Froman, and Carol Browner on the President's Climate Change Speech (Sept. 22, 2009), available at http://www.whitehouse.gov/the_press_office/Briefing-by-Todd-Stern-Mike-Froman-and-Carol-Browner-on-the-Presidents-Climate-Change-Speech/

[12] *Id.*

[13] *Connecticut v. American Electric Power Co. Inc.*, 2009 WL 2996729 at *1.

[14] *Id.* at *3 (seeking to ''permanently to enjoin each Defendant to abate that nuisance first by capping carbon dioxide emissions and then by reducing emissions by a specified percentage each year for at least ten years.''); *see also* Complaint, *Connecticut v. American Electric Power Co. Inc.*, Nos. 05-5104-cv, 05-5119-cv, ¶ 148 (July 21, 2004) (discussing the effect of a 3 percent annual reduction in emissions), available at http://ag.ca.gov/globalwarming/pdf/Connecticut_%20AEP_Complaint_2004July24.pdf.

[15] *State of Connecticut v. American Elec. Power*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

[16] *Connecticut v. American Electric Power Co. Inc.*, 2009 WL 2996729 at *16 (internal citation omitted).

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of their claims are currently displaced by regulations or legislation.[17]

Although this decision may well open the floodgates on current and future litigation, the ruling was not made in haste. The court provided a lengthy, complex ruling, and its full impact may only be known as the layers are peeled away. Several key points, however, demand immediate evaluation.

Despite the controversy that swirls around any discussion on climate change, the court characterized the lawsuit as an ''ordinary tort case.''[18] The panel explained that the case concerned emissions caused by the localized activities of only six power plants. As a result, the controversy entailed no overarching national or international issues. The case was therefore governed by ''well-settled'' principles of tort and public nuisance, which federal courts were fully competent to resolve.[19]

With this ruling, the court trivialized the significance and scope of the controversy. It belittled the ultimate impact of its holding – even though the decision almost certainly will be used as a ''bellwether'' determination for many controversies yet to arise. If this is truly an ''ordinary'' case, it seems obvious that all climate change claims are equally mundane and that no court, however situated, can redress the entirety of global warming. Instead, any relief is destined to become only a symbolic public gesture.

Standing to Pursue Climate Change Claims

The court also inappropriately applied reduced standing requirements. Although the Supreme Court held in *Massachusetts v. EPA*[20] that states have ''special solicitude'' standing to pursue relief when challenging environmental regulatory issues,[21] the Second Circuit held that States, municipalities and even private nonprofit entities have standing to bring *tort* suits based largely on the impact of global warming on properties they allegedly own.[22]

There are, of course, substantial differences between regulatory challenges and tort litigation. Most notably, standing to pursue tort actions requires proof, as a jurisdictional prerequisite, that the plaintiff has suffered injuries traceable to the defendant's acts or omissions.[23] Here, it is distinctly implausible that plaintiffs can show, as a threshold matter, that they have sustained injuries distinctly attributable to any particular defendant—after all, global warming is a universal problem caused by the cumulative emissions of all persons, businesses, animals and, indeed, natural events.

Recent U.S. Supreme Court decisions, as well as at least one Second Circuit case, require plaintiffs to plead specific facts sufficient to show the plausibility of their claims,[24] and it is entirely consistent with those decisions to require the same specificity to establish standing. If that standard is applied, one seriously questions whether climate change plaintiffs could justify the arbitrary selection of certain defendants and the equally arbitrary exclusion of others. Dismissal would be the probable result.

The court's standing holding also conflicts with the substantive law of public nuisance. Contrary to the Restatement of Torts, which the court professed to follow, the court did not require these injuries to be a ''substantial interference.'' Instead, they need only be an ''identifiable trifle'' involving ''recreational'' or ''esthetic interests''.[25] Apparently, the court decided to graft the standing requirements for statutory citizen suits[26] onto the common law tort of public nuisance. Common law public nuisance has never justified the abatement of ''trifling'' or insignificant conditions that do not, standing alone, disrupt, interfere, impede or impair rights held collectively by citizens.[27] To be a nuisance, a defendant's interference with the public right must be ''substantial.'' It cannot be a ''mere annoyance,'' a ''petty annoyance,'' a ''trifle,'' or a ''disturbance of everyday life.''[28] The interference must be substantial, objectionable to the ordinary reasonable man, and one that materially interferes with the ordinary physical comfort of human existence according to plain, sober, and simple notions.[29] Surely standing to pursue a claim cannot be justified by allegations that fail to conform to the elements of the underlying tort. Under the Second Circuit's reasoning, however, it is difficult to imagine anyone who lacks standing to file nuisance claims regarding greenhouse gas emissions.

The same problems—merging tort standards with standing requirements for litigation challenging or enforcing environmental statutes and regulations—infects the panel's ''redressability'' discussion. For example, the court relies on the Supreme Court's holding in *Massachusetts v. EPA* that parties need not allege that their requested relief will ''by itself reverse global warming'' but instead, it is sufficient to show that the remedy will ''slow or reduce'' it.[30] Again, this is a standard that applies in *regulatory* litigation—not tort cases involving

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[17] *Id*. at *1, *32, *62.

[18] *Id*. at *13-*15.

[19] *Id*. at *13.

[20] 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007).

[21] *Id*. 549 U.S. at 520.

[22] *Connecticut v. American Electric Power Co. Inc*., 2009 WL 2996729 at *51.

[23] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)

[24] *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 570 (2007); *Harris v. Mills*, No. 07-2283-CV, 2009 WL 1956176, at *4 (2nd Cir. July 9, 2009). Notably, the case upon which the Second Circuit relied to hold that ''federal pleading rules do not require heightened pleading standards to allege standing'' was decided before *Ashcroft* and *Twombly*. *See Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc*., 448 F.3d 138, 145 (2d Cir. 2006).

[25] *Connecticut v. American Electric Power Co. Inc*., 2009 WL 2996729 at *24.

[26] *See, e.g. Friends of the Earth, Inc. et al. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183 (2000).

[27] *See* RESTATEMENT (SECOND) OF TORTS § 821B (defining public nuisance as ''an unreasonable interference with a right common to the general public''); *see generally*, Faulk and Gray, *Alchemy in the Courtroom: The Transmutation of Public Nuisance Litigation*, *supra* note 2 at 964; Gifford, *supra* note 2.

[28] *See generally*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 557-58 (1941); *see also* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L. Q. 755, 772 (2001).

[29] Prosser, William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1002-03 (1966); *see also* Antolini, *supra* note 28, at 772 n.57 (citing FRANCIS HILLIARD, THE LAW OF TORTS FOR PRIVATE WRONGS 631 (2d ed. 1861)).

[30] *Massachusetts,* 549 U.S. at 525.

unregulated activities, such as greenhouse gas emissions. Tort cases require a substantial and *significant* interference that can be meaningfully *abated*, not nominally ''reduced.'' They require specific allegations regarding particular conduct traceable to each particular defendant—allegations that plausibly show both the necessity and efficacy of abatement. In the absence of such a showing, any ''redress'' ordered by the court will be a hollow remedy. Moreover, massive amounts of time, effort and resources will be wasted in litigation where the ultimate ''relief'' is merely symbolic, not efficacious. Indeed, since this was an equitable proceeding, and the maxims of equity do not compel courts to render vain or useless orders,[31] the court could properly have denied relief because equity does not require idle gestures.

Displacement of Federal Common Law

Finally, the court held that the federal public nuisance remedy was not ''displaced'' by the Clean Air Act or regulations issued pursuant to it. Quoting language from *Illinois v. Milwaukee*,[32] a 1971 U.S. Supreme Court opinion dealing with similar common law questions concerning interstate water pollution, the panel stated: ''It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance.''[33] Following this quote, the court inserted the words ''by greenhouse gases'' in lieu of ''by water pollution.'' [34]

Given these holdings, until Congress or the EPA actually chooses to preempt federal common law, public nuisance remains a viable cause of action. Currently the EPA and Congress are merely considering climate change measures. Nothing comprehensive has been finalized. In the absence of concrete and comprehensive actions sufficient to supersede federal common law, the court concluded that plaintiffs may pursue their public nuisance remedies.

The Kivalina Dismissal

Nine days after the Second Circuit ruled, the U.S. District Court for the Northern District of California issued a ruling in *Native Village of Kivalina, Alaska v. ExxonMobil Corp.*,[35] that starkly contrasted with the Second Circuit's decision. Contrary to the Second Circuit's sweeping and unprecedented ruling, the *Kivalina* court held that Plaintiffs global climate change allegations cannot support federal question jurisdiction. Despite looking at substantially the same case law and the same controversy (climate change), the two courts reached completely opposite conclusions.

In granting standing, the Second Circuit saw little distinction between the geographically discrete air and water pollution cases of yesteryear and today's planet-wide climate claims. On the other hand, the *Kivalina* court decided that the case could not be resolved without considering the truly global nature of climate change. Without any ascertainable standards to determine the controversy's resolution, the court was unwilling to indulge its creativity to invent liability criteria on a planetary scale.

In granting standing, the Second Circuit relied on Clean Water Act citizen suit cases that only required allegations that defendants ''contributed'' to plaintiffs' injuries. The *Kivalina* court disagreed, holding that in those cases the plaintiffs were complaining about pollution that exceeded permitted limits. The court stressed that the reduced standard of mere ''contribution'' was inappropriate in tort cases based on climate change because there are no permits limiting greenhouse gas emissions. Hence, plaintiffs could not show that defendants exceeded any applicable limits.

Additionally, the *Kivalina* court found that standing was lacking because plaintiffs admitted that they could not allege facts sufficient to show that their injuries could be plausibly traced to the acts of the named defendants. There was no showing that the defendant's actions were the ''seed'' of their injuries, nor was there an allegation that specified how any emissions by particular defendants substantially contributed to the global climate. Finally, unlike the Second Circuit, the district court found major differences between *Massachusetts v. EPA*—a regulatory claim under administrative principles – and climate change damage claims based in tort.

Although the court's ruling disposes of the case insofar as federal litigation is concerned, an appeal is likely. Moreover, the court dismissed the state law public nuisance claims without prejudice, thereby allowing the case to be refiled in state court to resolve those issues. Hence, although the scope of the risk has been narrowed, the Kivalina controversy remains unresolved and potentially dangerous.

Conclusions

The ultimate resolution of these complex controversies is difficult to project. It is, however, ironic that the phenomenon of public nuisance litigation, which so recently was ''on the ropes'' after being rejected by the highest courts of several states, is now being reinvigorated by some members of our federal judiciary.

The Second Circuit's panel decision will almost certainly be challenged by a motion for rehearing which, if overruled, will probably followed by a motion for rehearing en banc. But until the ruling is modified or reversed, the decision will likely rekindle the enthusiasm of litigants and open the door for other creative claimants and lawyers to bring new public nuisance suits against a wide range of industries.

This claimants' enthusiasm was most vividly displayed when Connecticut Attorney General Richard Blumenthal, who personally argued the matter before the Second Circuit, told the press: ''This ruling restoring our legal action breathes new life into our fight against greenhouse gas polluters and changes the legal landscape to impose responsibility where it belongs. Our legal fight is against power companies that emit a

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[31] *See, e.g., Foster v. Mansfield,* 146 U.S. 88, 101-02, 13 S.Ct. 28, 33 (1892)(''A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice, or to compel the defendants to buy their peace.'').

[32] 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1971).

[33] *Connecticut v. American Electric Power Co. Inc.*, 2009 WL 2996729 at *14 (citing *Milwaukee I*, 406 U.S. at 103-04).

[34] *Id.* at *73.

[35] No. 08-1138 SBA (N.D. Cal., Oct. 15, 2009).

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huge share of our nation's CO^2 contamination, but it will set a precedent for all who threaten our planet with such pernicious pollution. This ruling vindicates our tenacious and tireless battle on behalf of a powerful coalition of states and environmental advocates – a battle that will now have its day in court.''[36]

The Second Circuit's decision presents business interests with a ''Hobson's choice'' scenario. As long as industries resist regulations and legislation, they risk public nuisance liability in the courts. If the decision stands, delaying regulation does not confer any advantages. Indeed, it may be advantageous to accept comprehensive regulations and statutes that ''displace'' private tort remedies. However, if the regulations and legislation are not sufficiently comprehensive, industries may still face lawsuits to the extent that claims are not completely displaced. Clearly, the entire process must be addressed carefully.

The maelstrom of economic, judicial, regulatory, Congressional, and international activities currently underway regarding climate change is enough to bewilder even the most attentive observers. The Second Circuit has contributed another confounding chapter in this extraordinary saga, which is being played out in all three branches of government. The *Kivalina* decision has added even more fuel to feed the fires of debate. Although the public nuisance phenomenon has been revived, and remains viable—for now—its survival and ultimate success depends upon whether it can be managed constructively, or whether, as many fear, it will yet become ''a monster that [will] devour in one gulp the entire law of tort.''[37] Whatever the next step in the evolution of public nuisance may be, the rumors of its demise are greatly exaggerated.

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[36] Press Release, Connecticut Attorney General's Office, *Attorney General Praises Appeals Court Ruling Reinstating Global Warming Lawsuit* (Sept. 21, 2009), available at http://www.ct.gov/ag/cwp/view.asp?Q=447400&A=3673.

[37] *In re: Lead Paint Litigation*, 924 A.2d 484, 505 (N.J. 2007) (citing *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)).