Legal Opinion Letter

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 17 No. 24 November 16, 2007

THREE FEDERAL COURTS REJECT PUBLIC NUISANCE AS CLIMATE CHANGE CONTROL TOOL

by
Peter Glaser and Lynne Rhode

On September 17, 2007, the United States District Court for the Northern District of California in San Francisco dismissed the State of California's lawsuit seeking to hold the nation's six largest automakers responsible in damages for their alleged role in exacerbating global warming. The decision in *California v. General Motors Corp*. was the third federal court ruling that companies cannot be liable under tort law for purportedly creating a public nuisance through their greenhouse gas emissions. It followed on the heels of a 2005 Southern District of New York case and an August, 2007 Southern District of Mississippi case in which similar public nuisance and other tort law claims were dismissed. All three decisions in favor of the corporate defendants were based, at least in large part, upon the political question doctrine.[1]

In *California v. General Motors Corp*., California alleged that emissions from vehicles manufactured by the six defendants were responsible for more than 30% of California's total carbon dioxide emissions. Those greenhouse gas emissions, California claimed, cause global warming, which is responsible for coastline erosion, increased risk of wildfires, and melting of the snow pack in the Sierra Nevada, thereby reducing a large source of the state's water and increasing the risk of flooding. These consequences, California argued, constitute a public nuisance under both federal and state common law. The defendant automakers argued that claims based on global warming were non-justiciable political questions.

In granting the automakers' motion to dismiss, Judge Martin Jenkins ruled that the judiciary is "ill-equipped" to decide how much auto emissions contribute to global climate change, what is and what is not a reasonable amount of greenhouse gas emissions, and who should bear the costs of global climate change. Judge Jenkins based his ruling in part on the concern that exercising jurisdiction over California's claims would impermissibly encroach upon the political branches' powers over interstate commerce. He noted that "recognizing such a new and unprecedented federal common law nuisance claim for damages would likely have commerce implications in other States by potentially exposing automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce within those States." The court expressly noted, however, that California was free to re-file its case in State court to pursue its public nuisance claim under the common law of California. California also may choose to appeal the decision to the Ninth Circuit Court of Appeals.

[1]The United States Supreme Court has explained that the federal courts do not have jurisdiction to decide a claim if that claim properly involves a "political question" (*Baker v. Carr*, 369 U.S. 186 (1962)). The rationale underlying this political question doctrine is one of separation of powers – where significant questions are, or should be, before elected governmental institutions (the executive or legislative branches), the judiciary should not preempt the other branches.

Peter Glaser is a partner in Troutman Sanders LLP's Washington, D.C. office. **Lynne Rhode** is an associate in Troutman Sanders LLP's Richmond, VA office.

In the 2005 case of *Connecticut v. American Electric Company, Inc*., the United States District Court for the Southern District of New York dismissed a public nuisance lawsuit brought by a coalition of eight states and New York City against five electric utilities, none of which has electric generation in New York. The plaintiffs argued that global warming, allegedly caused by emissions of greenhouse gases from sources including facilities owned by the defendants, would cause flooding of cities in the northeast and other catastrophic damages. The suit sought an injunction restricting the defendant utilities' greenhouse gas emissions by an unspecified amount.

Judge Loretta Preska dismissed the case on political question grounds. Judge Preska found that statements by Congress and the Executive branch over the years concerning the issue of global climate change and the federal government's refusal to impose limits on carbon dioxide emissions clearly indicated that making the initial policy determination as to how to address global climate change was vested not in the judiciary but in the other political branches. The case has been appealed to the Second Circuit.

In a third recent case, *Comer v. Murphy Oil, Inc.*, the United States District Court for the Southern District of Mississippi on August 30 dismissed claims by Gulf Coast property owners that energy companies should be liable for damages under public nuisance and other tort law for their greenhouse gas emissions. The landowners sued a large number of electric utilities, coal companies, oil companies and chemical companies alleging that their emissions intensified Hurricane Katrina, resulting in greater damage to the landowners' properties than otherwise would have occurred. The plaintiffs sought damages for personal injuries, loss of property, and business interruption under tort law theories of unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment. Judge Louis Guirola, Jr. based his decision in favor of the defendants on two issues, the political question doctrine and standing.

On the political question issue, Judge Guirola ruled that the claims raised non-justiciable political questions that could only be addressed by the legislative or executive branches of government. He reasoned that in order to determine whether defendants were guilty of tortious conduct, the court needed additional guidance on what standards defendants should be held to concerning greenhouse gas emissions. Referring to the extensive activity currently underway in many states to address global warming, the Judge said that such standards were political questions properly left to the elected institutions to develop.

The court further ruled that the plaintiffs lacked standing to bring the case, stating that global warming is not "traceable to these individual defendants but is instead … attributable to a larger group that are not before this court, not only within this nation but outside of our jurisdictional boundaries as well . . . all of us are responsible for the emission of CO_2 . . . ." The *Comer* decision is the first since the United States Supreme Court's April, 2007 decision in *Massachusetts v. EPA* to address the standing of plaintiffs seeking remedies for injuries allegedly caused by greenhouse gas emissions. In *Massachusetts*, the Supreme Court ruled in a 5-4 decision, *inter alia*, that States, such as Massachusetts, had standing to sue based on their "special status" as sovereign entities. The Court's opinion failed to address whether the interests of private parties would be sufficient to confer federal court jurisdiction over claims for damages against greenhouse gas emitters. The *Comer* decision, without mentioning *Massachusetts*, suggested that private parties do not have sufficient standing to seek judicial relief for global warming damages. The decision has been appealed to the Fifth Circuit.

So far, the federal district courts have declined to recognize what might be called the tort of global warming. The matter will now be considered by the federal courts of appeal. Oral argument in the Second Circuit *Connecticut v. American Electric Company, Inc.* appeal was held on June 7, 2006. On June 21, 2007, the court issued an order requiring each party to file a letter brief discussing the effect of the *Massachusetts* decision. Briefs were filed by both sides on July 6. A decision would seem imminent.

ISBN 1056 3059