GLOBAL WARMING LITIGATION HEATS UP

Whatever one's personal views of the existence, extent, or causes of global warming, there is no disputing the fact that global warming has vaulted to the forefront of environmental issues. This is reflected in the success of Al Gore's 2006 film, *An Inconvenient Truth*, and its two Academy Awards; the almost daily press reports regarding global warming appearing in newspapers across the country; the number of bills being introduced in Congress to address climate change; and even the recent decision from the United States Supreme Court holding that greenhouse gases in automobile emissions are subject to EPA's regulatory authority under the Clean Air Act. *See Massachusetts v. EPA*, _____ U.S. _____, 127 S. Ct. 1438 (2007). While these examples address direct regulation of greenhouse gases by legislatures or administrative bodies, climate change has also found its way into tort cases brought against a variety of industries that are alleged to contribute to global warming. Jones Day is representing Xcel Energy Inc. ("Xcel Energy"), one of the nation's largest electric utilities, in two such tort cases.

CONNECTICUT V. AEP

In July 2004, eight states—Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin—and the City of New York filed an action in federal court in New York against the five largest electric utilities in the United States, including Xcel Energy. *See Connecticut v. American Electric Power Co.*, No. 1:04-cv-05669-LAP (S.D.N.Y.). On the same day, three private land trusts—Open Space Institute, Inc.; Open Space Conservancy, Inc.; and Audubon Society of New Hampshire—filed a parallel suit making virtually identical allegations. *See Open Space Institute, Inc. v. American Electric Power Co.*, No. 1:04-cv-05670-LAP (S.D.N.Y.). In their complaints, plaintiffs asserted claims under federal common law or, alternatively, state nuisance law, to abate the "public nuisance" of "global warming." They asked the court to cap defendants' emissions of carbon dioxide from their plants and then reduce those emissions by some unspecified percentage each year for at least a decade.

Plaintiffs' assertion of "federal common law of public nuisance" and their attempt to assert tort claims based on the worldwide phenomenon of global warming raised a number of legal issues, including whether any federal common-law cause of action to abate global climate change was inconsistent with basic separation-of-powers principles, whether any cause of action that might have encompassed such claims had been displaced, whether plaintiffs lacked standing, and whether the alternative state law–based public nuisance claims were preempted. When the case was argued in the district court, Judge Loretta A. Preska also raised, and defendants endorsed, the concept that the basic separation-of-powers principles relied upon by defendants could also lead to the conclusion that plaintiffs' claims raised nonjusticiable political questions.

FEDERAL COMMON LAW OF PUBLIC NUISANCE

While the Supreme Court had previously recognized a federal common-law claim to abate an interstate public nuisance, *see, e.g., Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri*"), and *Illinois v. Milwaukee*, 406 U.S. 91 (1971) ("*Milwaukee I*"), the circumstances giving rise to claims in those cases are markedly different from those that exist with respect to any of the theories related to global warming. In *Missouri*, the Court permitted a claim to enjoin the discharge of "contagious and typhoidal diseases" into interstate waterways. In *Milwaukee I*, the Court recognized Illinois's right to challenge the discharge of raw sewage into Lake Michigan by cities in Wisconsin. The Supreme Court recognized the need for such judicial relief

as the *quid pro quo* for the states' surrender of their right to assert their claims through war on their neighbors.

In contrast, the scientific theories that attribute global warming to greenhouse gases recognize that those emissions are not inherently hazardous and not directly traceable to any single source. Instead, carbon dioxide, which comes from a wide variety of human activities over many decades, mixes in "relatively homogenous concentrations around the world." *See Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52927 (Sept. 8, 2003). In moving to dismiss the *Connecticut* case, defendants argued that the unique nature of global warming distinguished it from the previously recognized federal common-law cause of action to abate "simple type" interstate nuisances. Indeed, defendants argued that any effort to address global warming involved matters of high policy that could be resolved only by the political branches of the federal government. The Supreme Court's *Massachusetts v. EPA* decision bolsters defendants' argument, recognizing that the state's "sovereign prerogatives [to regulate greenhouse gas emissions] are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others)" in this area. 127 S. Ct. at 1454.

Moreover, just as the federal common-law cause of action initially recognized in *Milwaukee I* was subsequently displaced by the enactment of the Clean Water Act, *see Illinois v. Milwaukee*, 451 U.S. 304 (1982) ("*Milwaukee II*"), defendants argued that any federal common-law claim applicable to global warming has been displaced by multiple congressional actions legislating on global warming and carbon dioxide emissions. *See, e.g.*, National Climate Program Act of 1978, 15 U.S.C. §§ 2901 *et seq.*; Energy Security Act, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774–75 (1980); Global Change Research Act, 15 U.S.C. §§ 2932, 2933, 2936(3); Energy Policy Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002. Indeed, in 2005, Congress debated, but ultimately rejected, mandatory caps on greenhouse gas emissions. *See* 151 Cong. Rec. S6892, 6894 (daily ed. June 21, 2005). While plaintiffs contended that no displacement could occur unless Congress enacted a comprehensive remedy, Congress's decision not to adopt the remedy plaintiffs wanted should not give federal courts license to circumvent Congress and judicially create such federal law. The holding in *Massachusetts* that greenhouse gases come within the Clean Air Act's definition of "air pollutant" should conclusively resolve the displacement issue in defendants' favor and require the dismissal of the federal common-law claims asserted in *Connecticut*.[1]

ARTICLE III STANDING

Article III's core standing requirements—injury-in-fact, causation, and redressability—were another basis to challenge the sufficiency of plaintiffs' claims. While plaintiffs claimed a number of current environmental effects from global warming, they did not allege actual, current injuries from those effects. Instead, plaintiffs' complaints spoke of the future harms expected to occur over the next 100 years. Defendants also contended that the alleged future harms described by plaintiffs are not "fairly traceable" to defendants because, under any theory, defendants' emissions are harmful only as part of the worldwide, homogenous mix of greenhouse gases, as discussed more fully below with respect to *Comer* and the causation argument. Finally, defendants argued that plaintiffs' alleged injuries from global warming cannot be redressed by the relief they sought against these utilities in light of the extraordinarily small contribution attributed to these defendants and the failure to control concurrent emissions around the world from other sources.

In *Massachusetts*, the majority held that the Commonwealth has standing and, to a limited extent, discussed each standing element in the context of global warming. 127 S. Ct. at

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1453–58. Nonetheless, the majority relied heavily on the fact that Congress had created the right to challenge agency action in 42 U.S.C. § 7607(b)(1), based upon which it noted that a party " 'can assert that right without meeting all the normal standards for redressability and immediacy.' " 127 S. Ct. at 1453 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The Court noted that this statutory right was "of critical importance to the standing inquiry." *Id.*

No such statutory right of review is present in *Connecticut*, and as a result, *Massachusetts* should not directly affect the standing arguments. Not surprisingly, however, the state plaintiffs in *Connecticut* have already tried to use the Court's language regarding the "special solicitude" owed states protecting their quasi-sovereign interests to bolster their arguments before the Second Circuit. The Supreme Court's statements regarding standing, however, must be read in the context of the statutory right to challenge EPA's actions, which the Court noted did not require a plaintiff to meet "the normal standards for redressability and immediacy." 127 S. Ct. at 1453. Indeed, given the great emphasis in Justice Stevens' rebuttal to Justice Roberts' dissent that Massachusetts—the one state found to have standing—was asserting its rights under federal law, *i.e.*, the Clean Air Act, the Court's decision should not be read to alter traditional standing analysis when a state asserts claims under state law. *See* 127 S. Ct. at 1455 n.17.

THE DISTRICT COURT DECISION AND THE POLITICAL QUESTION DOCTRINE

In dismissing both the *Connecticut* and *Open State* cases, Judge Preska concluded that plaintiffs' claims raised complex issues of such economic and political significance that initial policy decisions by Congress and the Executive Branch will be required to address them. Because addressing those complex issues "requires identification and balancing of economic, environmental, foreign policy, and national security interests" and demands a "single-voiced statement of the Government's views," the district court determined that plaintiffs' claims raised nonjusticiable political questions. *Connecticut*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (internal quotation marks and citation omitted). The appeals in *Connecticut* and *Open Space* were argued on June 7, 2006, and remain pending. *See Connecticut v. American Elec. Power Co.*, No. 05-5104-cv (2d Cir.); *Open Space Institute, Inc. v. American Elec. Power Co.*, No. 05-5119-cv (2d Cir.).

COMER V. MURPHY OIL, U.S.A.

Global warming litigation moved beyond the automobile and utility industries in the wake of the devastation across Mississippi caused by Hurricane Katrina in 2005. As the citizens of Mississippi struggled to recover, some of them turned to the courts. The lawsuit began as a class action against seven insurance companies for claims arising out of property damage. *Cox v. Nationwide Mut. Ins. Co.*, No. 1:05-cv-00436 (S.D. Miss. filed Sept. 20, 2005). Just 10 days later, plaintiffs amended their complaint to name five major oil companies based on allegations that they contributed to global warming, which in turn caused or intensified Hurricane Katrina and thus its effects. After the district court dismissed the insurance-company defendants,[2] plaintiffs again amended their complaint to name additional oil companies, chemical companies, utility companies (including Xcel Energy), and coal companies as defendants.

In their Third Amended Complaint (recaptioned *Comer v. Murphy Oil, U.S.A.*), plaintiffs asserted state-law claims for negligence, trespass, public nuisance, fraud, unjust enrichment, and civil conspiracy. On behalf of Xcel Energy, the Firm filed a motion to dismiss that, like *Connecticut* and *Open Spaces*, challenged plaintiffs' standing and argued that plaintiffs' claims raise nonjusticiable political questions. Xcel

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Energy's motion, however, led with a causation argument, *i.e.*, the application of the remoteness doctrine, and also argued preemption, personal jurisdiction, and the failure to state a claim as to each of the specific causes of action pled by plaintiffs.[3]

REMOTENESS

Courts have long recognized that, while any tortious act can cause "ripples of harm" extending to a multitude of eventual persons, only those harms that are direct, proximate, and not remote are actionable. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992). If the alleged injuries are too remote, proximate causation is missing as a matter of law without the need for factual development. The remoteness doctrine has been applied by federal courts of appeals to dismiss union health fund cases against tobacco companies and by courts to dismiss cases brought by cities and counties against firearms manufacturers for alleged costs incurred by those governments as a result of the criminal misuse of firearms in their communities. *See, e.g., Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 930, 933–34 (3d Cir. 1999) ("sheer number of links in the chain of causation" demonstrated absence of proximate cause); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001).

In *Comer*, remoteness applies because there are simply too many "links in the chain" of causation from defendants' emissions to plaintiffs' alleged injuries resulting from Hurricane Katrina. Those links include at least (1) the emission of carbon dioxide from a single defendant's source; (2) the combination of those emissions with other greenhouse gases from around the world over many decades; (3) an increase in the amount of solar energy trapped in the atmosphere; (4) over an extended period of time, a resulting climate change and warming of the water in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico; (5) various weather developments that generated the conditions that gave rise to Hurricane Katrina; (6) the intensification of an otherwise weaker Katrina caused by the warmer temperatures of the earth's waters; (7) Katrina striking Mississippi; and (8) resulting damage to plaintiffs' properties from the intensified strength of Katrina.

The causation chain inherent in plaintiffs' claims is not only lengthy in its number of links, but also reflects the alleged combined effects of greenhouse gas emissions over an extraordinary period of time. At the same time, the chain involves contributions of greenhouse gases from around the world, alleged atmospheric changes on a planetary basis, and multiple interrelated and extraordinary weather phenomena that are, at least in part, naturally occurring. Simply stated, under the facts alleged in plaintiffs' complaint, the court would face an insurmountable hurdle in trying to determine what portion of plaintiffs' damages was caused by a particular defendant's actions as opposed to the actions of other persons or other factors. The remoteness doctrine requires the dismissal of such claims.

In the course of its standing analysis in *Massachusetts*, the Supreme Court addressed causation in a fairly short discussion, presumably so abbreviated because, as the Court noted, "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming." 127 S. Ct. at 1457. As a result, the Court found that "EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries." *Id.* Again, because the Court's statements are made in the context of the challenge to EPA's rulemaking decision, they are not applicable to *Connecticut* or *Comer*. EPA may be compelled to act and can act without regard to other potential causes and without having to make a finding sufficient for legal causation that would tie a particular defendant or emission source to a particular harm. In contrast, a civil lawsuit requires a specific determination of legal causation as to each defendant as a predicate to either abatement or damages. Thus, in the context of *Comer*, the remoteness argument should continue to be a powerful—indeed, perhaps even more important—argument.

PREEMPTION

As a general matter, preemption occurs when (i) federal law occupies a field, (ii) Congress expressly states the preemptive effect of a statute, and (iii) state law or regulation conflicts with the method or purpose of the federal statute. Xcel Energy argued that plaintiffs' state-law claims are preempted first because the issue of global climate change

is so uniquely national that there is simply no room for a patchwork of state laws that would be inconsistent, ineffective, and counterproductive. In addition, because the imposition of state tort liability on defendants for emitting "too much" greenhouse gas would necessarily compel emission reductions to forestall future liability, plaintiffs' claims would circumvent and frustrate the federal government's policy eschewing mandatory limits in favor of incentives for voluntary reductions and the development of new technology. (Indeed, Xcel Energy has already undertaken numerous voluntary actions to reduce its greenhouse gas emissions.) *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 874–75 (2000). Finally, state laws imposing mandatory emission limits on greenhouse gases should be preempted because they would give the President "less to offer" other countries and "less diplomatic leverage" in his foreign-policy efforts to bring developing countries into the process of limiting worldwide greenhouse gas emissions. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377 (2000).

The *Massachusetts* decision does not address preemption directly. While the Court states that "[c]ollaboration and research do not conflict with any thoughtful regulatory effort; they complement it," 127 S. Ct. at 1461, its statement was directed at EPA's argument that congressional actions since the Clean Air Act are inconsistent with the notion that Congress intended to regulate greenhouse gases when it passed the Clean Air Act. That is different from saying that *state* regulation of greenhouse gases would not be in conflict with the federal approach. Moreover, as indicated above, given the Court's statements that the authority to address greenhouse gas emissions—if not regulate them via mandatory limits—is lodged with the federal government, the preemption argument remains powerful. Permitting a patchwork of state-law tort actions would be inconsistent with the unique national interest in regulating those emissions in a uniform manner, *see United States v. Locke*, 529 U.S. 89, 108 (2000), and with the President's stated foreign-policy objective of securing concessions from developing countries in exchange for any restrictions within the United States on greenhouse gas emissions.

CONCLUSION

Even as *Connecticut* and *Comer* work their way through the courts, the fluid nature of EPA's reaction to the Supreme Court decision in *Massachusetts* and new legislation being proposed in Congress increase the uncertainties over future global warming litigation. Companies that find themselves targeted in such cases, however, have a variety of legal responses with which to defend such claims effectively. ■

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[1] In *California v. General Motors Corp.*, No. C06-05755-MJJ (N.D. Cal.), the State of California asserted a similar federal common-law public nuisance claim against a number of automobile manufacturers related to automobile emissions. Defendants there have made similar arguments regarding the absence of a federal common-law claim and displacement. Because the Supreme Court's *Massachusetts* decision deals specifically with regulation of automobile emissions under the Clean Air Act, it should be beyond question that any federal common-law claim has been displaced. Defendants' motion to dismiss has been briefed and argued and is pending in the *California* case.

[2] The district court required plaintiffs to refile separate actions against their own insurers and mortgage lenders (also added in the amended complaint), which many did. In one case, *Broussard v. State Farm Fire & Cas. Co.*, No. 1:06-cv-0006-LTS (S.D. Miss.), judgment was entered for policy limits of $211,222 and punitive damages of $1 million. State Farm has announced that it will not write any new commercial or homeowners insurance policies in the state.

[3] Plaintiffs have filed a motion for leave to file a Fourth Amended Complaint that would add a claim under federal common law to support subject-matter jurisdiction. If leave is granted over defendants' objections, plaintiffs' federal common-law claim would be subject to the same attacks as those in *Connecticut*.