

Climate Change Litigation

Charles T. Wehland

Disclaimer

CONFIDENTIALITY NOTICE: This e-mail message including attachments, if any, is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Then again, it may not, but who is to say, really? This is, after all, law firm email, and we do like small print and disclosures. Therefore, any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Smash your hard drive and bury it. Then bury the shovel. If you are the intended recipient but do not wish to receive communications through this medium, please so advise the sender immediately. . .

Federal Common Law of Public Nuisance



Public Nuisance
Common Law Claims

```
graph TD; A[Public Nuisance Common Law Claims] --- B[Injunctive Relief]; A --- C[Monetary Damages]
```

Injunctive Relief

Monetary Damages

Injunctive Relief

What is a Public Nuisance?

Unreasonable Interference with a
Right Common to the General
Public

Connecticut v. American Electric Power

Common law nuisance claims against six power companies

- 2005: District Court dismisses political question
- 2009: Second Circuit reverses
 - Standing – Injury/Traceability/Redressability
 - Political Question
 - Pre-Emption/Displacement

Korsinsky v. EPA

Alleged public nuisance due to failure to implement available CO2 controls

- 2005: District Court dismissed claims:
 - No standing:
 - “Hypothetical and conjectural” risk of illness
 - Mental illness is generalized grievance not redressable by requested relief
- 2006: Second Circuit affirmed

Monetary Damages

What is a Private Nuisance?

Intentional and unreasonable invasion of interest in private use and enjoyment of land

Comer v. Murphy Oil

Hurricane Katrina damages under state law

- District Court dismisses political question
- October 2009: 5th Circuit permits compensatory and punitive damage claims
- March 2010: Rehearing en banc granted

Native Village of Kivalina v. ExxonMobil

Sea level rise forcing relocation of village
\$400 million damage claim

- District Court dismissed political questions
- Also no standing due to traceability
- Appeal pending.

California v. General Motors

State sued six auto makers for damages from climate change public nuisance

- District court dismissed political questions
 - Did not address other standing issues or merits
- Appeal dismissed with state waiver and GM bankruptcy

Additional Avenues to bring Climate Change Lawsuits

- Litigation under federal environmental laws
 - Endangered Species Act
 - NEPA
 - Clean Air Act
 - Clean Water Act
- Permit and regulatory challenges –
 - Massachusetts v. EPA (D.C. Cir. 2005)
 - New York v. EPA (D.C. Cir. 2006)
- Lawsuits in international courts and tribunals

What next?



Future Questions

- Flood of climate change lawsuits?
- Can plaintiffs overcome hurdles?
 - Causation
 - Injury
 - Damages Proof and Allocation
- Eventual Supreme Court review?
- Impact of New Laws and Rules?