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Climate Change: Avoid Political Thickets

A federal judge recently dismissed a lawsuit in which the plaintiffs alleged that defendants' production of chemicals and electricity had "added to the ferocity of Hurricane Katrina." The judge's reasoning reveals the inherent limitations of courts unilaterally initiating policies to address climate change issues:

> [This] debate . . . has no place in the court, until . . . Congress enacts legislation which sets appropriate standards by which [the] court can measure conduct . . .
>
> [Plaintiffs' complaint asks] this court . . . to balance economic, environmental, foreign policy, and national security interests. . . . Adjudication of Plaintiffs' claims . . . would necessitate the formulation of standards dictating, for example, the amount of greenhouse gas emissions, that would be excessive and the scientific and policy reasons behind those standards.

However, this judicial recalcitrance was reversed in October 2009 by a panel of judges from the Fifth Circuit Court of Appeals in *Comer v. Murphy Oil*. This chapter of the *Comer* story would delegate to a jury the responsibility to decide whether defendants should pay damages to compensate for losses caused by Hurricane Katrina. No statutory or regulatory standards would be available to guide the jurors; the case would turn on Mississippi "common law."

In February 2009, the Fifth Circuit vacated this decision, granting the defendants' petition for rehearing *en banc*. In late May of this year, due to a recusal of the majority of its judges, the remaining Fifth Circuit judges dismissed the appeal, which effectively reinstates the dismissal by the original judge but enables the plaintiffs to request that the U.S. Supreme Court hear the matter. The legal and policy implications of the *Comer* odyssey are intertwined with two other pending climate change actions. (See "Climate Change: Policy via Litigation" and "*Conn. v. AEP:* Call for Congressional Action" in July 2008 and November 2009 issues of *POWER,* respectively.)

In *Native Village of Kivalina v. ExxonMobil,* the court in September 2009 dismissed the claims by residents of an Alaskan island that the defendants' (oil, energy, and utility companies) production of greenhouse gas (GHG) emissions contributed to global warming, caused erosion, and rendered their island uninhabitable. This decision is on appeal. Also in September 2009, the Second Circuit in *Connecticut v. American Electric Power Co.* authorized the plaintiffs to seek global warming–caused damages against electric generators and oil producers based on "federal common law." The Second Circuit denied rehearing, and, absent some intervening action by the Supreme Court, the matter is headed back to the trial court.

Assessing Fault/Promoting Policy

Given its binary framework of blame/no blame, the judicial system is a poor place to seek workable resolutions to global warming issues. Assessing damages for past actions affords no promise of any decrease in world temperatures. Imposing damages will cause emitting industries to focus on minimizing liability for past actions, as opposed to reducing future emissions.

The disparate and inconclusive results among *Comer, Kivalina,* and *AEP* underscore the questionable viability of allowing the courtroom to become center court for resolving climate change issues. Common law has evolved for over a thousand years on a "case-by-case" basis and by definition is designed to change.

A Definitive and Comprehensive Approach Required

If the adverse consequences of climate change demand an immediate societal response, we can not develop policy piecemeal, one case at a time, subject to years of appellate uncertainty. Any judicial determination that some purposely assembled group of "deep pocket" defendants is to blame offers little hope for a balanced, cohesive national and international policy.

Moreover, the judicial panel in the now-vacated *Comer* decision reasoned that until Congress enacts legislation, courts of Mississippi and other states should develop climate change jurisprudence reflective of each state's unique common law. Thus, pending some preemptive federal legislation, judges and juries across the nation would be empowered to fashion individual climate change standards and remedies.

The possibility of the current Congress fashioning a positive policy based on scientific knowledge, balancing competing economic and regional values, and divorcing itself from partisan politics and pseudo-religious debates appears remote. Thus, having Congress by its inaction empower seemingly sage and unbiased judges to become climate change "czars" will to many offer a desirable option. It is not.

Keeping Things in Perspective

Energy production companies operating in compliance with environmental and other permit requirements should not be exposed to endless litigation and the prospect of being assessed damages in the tens, if not hundreds, of millions of dollars. The *Kivalina* court explained that there must be an assessment of the benefit of the defendants' actions as compared to the harm caused. However, having a court assess whether society would be better off today with a theoretically reduced level of GHG emissions—but devoid of the communications, information exchange, and transportation capabilities that depend on electricity and gasoline—will not reduce emissions. The solution, if any, must originate with Congress. ■

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