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What Litigation of a Climate Nuisance Suit Might Look Like

In *American Electric Power Co. v. Connecticut (AEP)*,¹ the Supreme Court explicitly left ajar the door to litigation under state (as opposed to federal) common law for greenhouse gas (GHG) emissions. Some plaintiffs' lawyers are also arguing that the decision leaves room for seeking money damages (rather than injunctive relief) even in a federal common law case.

For purposes of this Essay, let's imagine a world in which the courthouse doors are swung open to common law claims for damages for GHG emissions, and the courts have rejected all defenses based on displacement, preemption, political question, and standing. In other words, the plaintiffs finally are able to litigate the merits. What would that litigation look like?

Because I have spent thirty years as a practicing environmental litigator (sometimes acting for plaintiffs, sometimes for defendants²) prior to entering academia, my head swims with the challenges such a case would pose. Most of the voluminous commentary on the common law GHG cases looks at the threshold issues; let's now peer across the threshold and see what's on the other side. What we'll find is an extraordinary number of open questions that would face the parties and the courts; in this Essay I attempt to enumerate them, without undertaking the daunting task of answering them.

1. 131 S. Ct. 2527 (2011).

2. The author's law firm, Arnold & Porter LLP, represents a defendant in *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 873-76 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009), which is now under appeal to the U.S. Court of Appeals for the Ninth Circuit, and a defendant in *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010), which was recently refiled in the U.S. District Court in Mississippi. The author writes this Essay, however, purely in his academic capacity.

I. SELECTION OF DEFENDANTS

It is well recognized that these cases pose unique difficulties because current atmospheric levels of GHGs result from the cumulative emissions of millions or billions of emitters since the onset of the industrial revolution. Adverse impacts result from this global cumulative load; no specific injury can be attributed to any specific polluter. Thus one early question in any suit for money damages is whether liability is joint and several or whether liability is proportional.

If the joint and several prong prevails, the inevitable result is third-party litigation. The defendants who are named in the complaint will sue numerous other GHG emitters who were not named, and those new defendants will in turn sue still more. That is what happened in the litigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980³ over liability for cleaning up contaminated sites. The courts ruled that in some circumstances CERCLA imposes joint and several liability,⁴ and it was common in large sites—especially landfills that had accepted waste from entire regions—to see concentric circles of third-, fourth- and fifth-party defendants, ultimately sometimes reaching into the hundreds. At least one CERCLA case grew so large that no existing courtroom could accommodate the hundreds of lawyers, and a special courtroom had to be built in another building.⁵ Stories abounded about how large chemical companies were impleading donut shops and nursing homes to spread the pain, to achieve coercive settlements, and to drag out the cases.⁶ The number of potential defendants in a GHG case is staggering, and the consequent case management challenges are immense.

Determining which parties are liable in turn raises several questions:

1. Personal Jurisdiction. It's not clear whether a state court would find it has jurisdiction over GHG sources in distant states. Moreover, only approximately 18% of today's carbon dioxide emissions come from the United

3. Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. § 9607 (2006)).

4. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).

5. See Jack Hitt, *Toxic Dreams: A California Town Finds Meaning in an Acid Pit*, HARPER'S, July 1995, at 57.

6. See, e.g., Robert Tomsho, *Pollution Ploy: Big Corporations Hit by Superfund Cases Find Way To Share Bill*, WALL ST. J., Apr. 2, 1991, at 1.

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States.⁷ Of the remainder, some are from multinational companies with sufficient contacts in the U.S. to be susceptible to service of process here. How will a U.S. court assert jurisdiction over the rest, and then enforce judgments against them?

2. Reasonableness of Conduct. Public nuisance liability is generally imposed only on those who engaged in unreasonable conduct.⁸ There has been no statutory or regulatory limitation on carbon dioxide emissions, at least before the Environmental Protection Agency (EPA) began regulating GHGs in January 2011.⁹ Thus the emissions that are the basis for the assertion of liability were for the most part lawful. How will unreasonableness be defined? What is the effect of the absence of any commercial technology for controlling GHG emissions from fossil fuel combustion (other than using non-fossil energy, or using less energy)? Since one of the factors in determining reasonableness may be the social value of the conduct,¹⁰ what is the social value of fossil fuel use? Is use of fossil fuels intrinsically unreasonable? What is the relevance of more than a century of U.S. policy encouraging fossil fuel use and the historical dependence of the U.S. economy on fossil fuel use? Does it matter whether the fossil fuels were used to support a very comfortable lifestyle (e.g., United States, Canada, Europe, Japan, Australia) or to lift a population out of poverty (e.g., China, India)?

3. Permits. As some decisions have suggested,¹¹ is the fact that a facility has operated under governmental permits a complete defense to a nuisance claim? Does it matter that the permits are silent as to GHG emissions?

7. U.N. Statistics Div., *Indicator 7.2: Carbon Dioxide Emissions, Total, Per Capita and Per \$1 GDP (PPP)*, MILLENNIUM DEV. GOALS INDICATORS, <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=749&crd=> (last updated July 7, 2011).

8. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 821B, 826 (1965).

9. A minor exception is the Regional Greenhouse Gas Initiative (RGGI), a program of ten northeastern and mid-Atlantic states that has imposed a cap on carbon dioxide emissions from electric power generating stations as of January 2009. However, RGGI is overallocated, meaning that available allowances have exceeded emissions, so that the carbon dioxide emissions fell within permissible levels. *See* Carbon Offset Research & Educ., *Regional Greenhouse Gas Initiative*, STOCKHOLM ENVTL. INST. & GHG MGMT. INST. (Jan. 2011), <http://www.co2offsetresearch.org/policy/RGGI.html>.

10. RESTATEMENT (SECOND) OF TORTS § 827(c).

11. *E.g.*, *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010).

4. Statute of Limitations. Many states bar claims for money damages for nuisance that were incurred more than a set period before the filing of the complaint; in New York, for example, that time is three years.¹² Does that mean that, for a suit brought in 2011, damages could only be sought for emissions from 2008 and later?

5. Choice of Law. Which state's laws apply to determinations of reasonableness, statutes of limitations, and other issues? If a defendant company has emitting facilities in twenty states, do twenty different sets of rules apply to the litigation? What about emissions outside of the United States?

6. Successorship. Many emissions may be attributable to facilities that closed or companies that dissolved decades ago. What principles of successor liability might apply? Where no successor exists, who pays for the orphan shares?

7. Supply Chains. Many GHG emissions come from automobile tailpipes. In order for that to happen, oil is extracted from wells, transported to refineries, refined into gasoline, transported to filling stations, and pumped into vehicles that are assembled by various manufacturers (from parts fabricated by numerous companies) and then driven by motorists. Who along this supply chain is liable—the oil producers, the refiners, the fuel transporters, the filling stations, the vehicle manufacturers, the motorists? (The same sort of question could be asked, for example, about coal that is mined from the ground, sent by rail to a power plant, and burned there, generating electricity that travels by wire to homes, where it runs lights and appliances.) What principle is used in selecting the point(s) along the chain where liability attaches? How does a court assess the reasonableness of the conduct at each step in this chain?

8. Governmental Liability. If a national or state government affirmatively encouraged fossil fuel use or other GHG-generating activities, such as through subsidies, leasing of publicly owned resources (e.g., offshore lands), provision of facilities for the use of the fuels (e.g., interstate highways), use of governmental powers (e.g., eminent domain), technological mandates, or direct purchases, does it share in the liability? What if the government knew of a risk but failed to take steps to protect its population, such as by building or

12. N.Y. C.P.L.R. 214 (McKinney 2011).

enlarging flood protection levees? Is sovereign immunity a total bar to such claims, or have there been waivers? If the government would be liable but for sovereign immunity, is private defendants' liability reduced proportionately?

9. Non-Industrial Emissions. Approximately 61.4% of global GHG emissions result from energy use, and about 18.3% are attributed to deforestation.¹³ Much of this deforestation occurs on governmentally owned land. Are the entities that engaged in or allowed this deforestation liable? If so, would that include, for example, the governments of countries in South America and Africa, where the highest annual loss of forests is occurring?¹⁴

II. OTHER ISSUES

GHG tort litigation would raise many other issues:

1. Causation. It has become a truism in climate policy circles that specific weather events cannot be attributed to GHG emissions.¹⁵ We can say that hurricanes, droughts, and heat waves will be more frequent and severe on a warmer planet, but such events occurred long before the industrial era; there has always been natural variability. How would the victims of one such event establish that it specifically was caused by climate change? Would they have to? What burden of proof would they have to bear? (This problem might be somewhat eased for injuries resulting from longer trends, such as coastal erosion and snowpack melt, and for expenses for reasonable adaptation efforts.)

2. Class Actions. If causation can be established and defendants can be found who are potentially culpable, subject to the court's jurisdiction, and sufficiently wealthy to be worth suing, the number of potential plaintiffs may be very large. A class action would be the natural way to proceed. The same day that the Supreme Court issued its decision in *AEP v. Connecticut*, it also

13. KEVIN A. BAUMERT, TIMOTHY HERZOG & JONATHAN PERSHING, NAVIGATING THE NUMBERS: GREENHOUSE GAS DATA AND INTERNATIONAL CLIMATE POLICY 5 fig.1.3 (2005), available at http://pdf.wri.org/navigating_numbers.pdf.

14. See FOOD & AGRIC. ORG. OF THE U.N., GLOBAL FOREST RESOURCES ASSESSMENT 2010: MAIN REPORT 17 (2010), available at <http://www.fao.org/docrep/013/i1757e/i1757e.pdf>.

15. See, e.g., Paul Krugman, *Droughts, Floods and Food*, N.Y. TIMES, Feb. 7, 2011, <http://www.nytimes.com/2011/02/07/opinion/07krugman.html>.

announced *Wal-Mart Stores, Inc. v. Dukes*,¹⁶ which evinced skepticism toward sprawling class actions.¹⁷ Will the courts now be receptive toward class actions against GHG emitters?

3. Issue Preclusion. If this kind of litigation succeeds, any entity deemed to be a major emitter (e.g., a large electric utility) is likely to find itself the subject of multiple lawsuits. If it litigates its liability in one case and loses, is that holding binding against it in subsequent cases under doctrines such as *res judicata*? What if it litigates and wins one—can it use that victory in subsequent cases?

4. Measure of Damages. If a neighborhood is wiped out by an event that a court finds was caused by climate change, are only purely economic losses recoverable? What about the loss of community and other less tangible losses? Can anyone recover for loss of biodiversity and other ecological impacts? Can recovery be obtained for losses that are inevitable (as a result of the GHGs already in the atmosphere) but that will not be incurred for another generation or two?

5. Assumption of Risk. If someone builds, or remains in, a house in an area now known to be vulnerable to flooding as a result of sea-level rise, and that house is in fact flooded, can the owner fully recover damages for the loss? Is there any obligation to avoid (or abandon) the area, or to mitigate damages in the face of newly understood perils?

6. Insurance Coverage. Much of the litigation under CERCLA concerned insurance coverage for cleanup liability; the transaction costs were enormous.¹⁸ Would the same pattern recur, with many or most GHG emitters seeking insurance coverage?

7. Non-Emissions Conduct. In assessing the liability of a GHG emitter, are its quantified emissions the only factor? What if, as some of the pending suits allege, certain defendants misrepresented the science of climate change?

16. 131 S. Ct. 2541 (2011).

17. See also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

18. See JAN PAUL ACTON & LLOYD S. DIXON, INST. FOR CIV. JUSTICE, RAND CORP., SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS (2002), available at <http://www.rand.org/content/dam/rand/pubs/reports/2007/R4132.pdf>.

Or what if some defendants offset their emissions by, for example, helping pay for a wind farm? Does any of this count in terms of imposing liability?

8. Venue and Consolidation. If joint and several liability is the rule, and virtually every large GHG emitter in the world is ultimately brought in, there may be multiple litigations raising the same issues of liability (as opposed to damages) against many of the same parties. Where will these cases be brought? Will all the federal cases be consolidated before one district judge under the multidistrict litigation rules?¹⁹ What becomes of the state cases? What happens if similar cases proceed in another common law country?

9. Discovery. What is the scope of discovery in these cases? May plaintiffs probe into corporate defendants' industrial processes (to see whether there were opportunities to operate more efficiently), their public statements and private communications about climate change (to see whether there are inconsistencies), and their lists of suppliers and customers (in search of additional defendants)? May defendants explore whether the plaintiffs were themselves profligate energy users and whether they should have known not to live on a beach?

10. Alien Torts. If a U.S. GHG emitter's conduct is found to be tortious, may a resident of another country use the U.S. courts to claim damages?²⁰ Would high GHG emissions rise to the level of extreme breach of long-accepted norms that is needed to trigger such claims? If so, what are the limits on how many foreigners may bring such cases?

CONCLUSION

As this Essay shows, if any plaintiffs successfully make their way through the keyholes that may have been left by the Supreme Court in *AEP*, they and the courts in which they seek redress will still face extraordinary difficulties.

At its core, *AEP* is a separation of powers decision. Even those participating members of the Court who are presumably most enthusiastic about controlling GHGs agreed that the job of setting emissions limitations is beyond the competence of the courts and that Congress has assigned it to the EPA. If any trial court does eventually approach the merits of a suit seeking money

19. 28 U.S.C. § 1407 (2006).

20. Alien Tort Statute, 28 U.S.C. § 1350 (2006). *But see* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

damages for GHG emissions, it may find it is embarking down a wormhole, and upon comprehending the journey it may recoil. Interpreting and enforcing congressional and regulatory mandates is an important and proper role for the courts in confronting climate change; erecting a new liability scheme to redress the impacts of our economic system is an entirely different and perilous voyage.

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