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GLOBAL WARMING LAWSUITS: POISED FOR SUPREME COURT HOT LIST?

by

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A fiery storm is brewing between federal trial and appellate courts over the propriety of lawsuits seeking to blame a select group of American companies for weather events allegedly caused by “global warming.” Four such lawsuits have been filed targeted at businesses associated with the production and use of energy in this country.

The allegations are based on the following attenuated premise: U.S. companies, through operations or products, emitted gases that mixed together in the earth’s atmosphere with similar gases released from sources throughout the world; over many decades, these gases collectively built up and caused global warming; global warming has changed weather patterns, including making some storms more severe; these weather events are a public nuisance and cause weather-related injuries. Therefore, if these lawsuits are successful, a handful of American companies will be on the hook for money damages, injunctive relief, or abatement costs whenever plaintiffs, now or in the future, could suggest that their weather-related injuries were caused by global warming.

In all four cases, which were filed in geographically diverse jurisdictions, federal trial judges dismissed the claims as nonjusticiable political questions. The judges recognized that the suits were simply tools in the political debate over global warming, namely whether global warming exists and whether and how it should affect America’s energy policy, and had nothing to do with traditional tort law. They explained that in order to adjudicate the claims, the judges and juries would have to usurp the regulatory function by setting emissions standards for each defendant, potentially resulting in unfair, retroactive liability. Companies emitting below the litigation-created standard would be deemed “reasonable” emitters and have no liability, whereas those above it would have massive liability. Even today, nobody knows what these standards for liability might be.

The unanimity of the trial judges, along with commonsense, gave the perception that the law was settled: no person or company is responsible for the weather. But, in the fall of 2009, federal Courts of Appeals for the Second and Fifth Circuits shocked the legal world by reinstating two cases. The panels for both circuits said the claims did not rise to the hard-to-reach standards of the political question doctrine. The Fifth Circuit has since vacated its decision, but did not rehear the case *en banc* due to multiple judicial recusals; defendants in the Second Circuit will be filing *certiorari* petitions with the U.S. Supreme Court.

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The Four Cases:

- ***Connecticut v. AEP*, 582 F.3d 309 (2d Cir. 2009):** The Second Circuit resurrected claims brought in 2004 by eight states, the city of New York, and several land trusts alleging that six electric and power companies caused the public nuisance of global warming through carbon dioxide emissions. Plaintiffs, in trying to set emissions policy, said that if the companies reduced emissions by exactly three percent each year for ten years, then they would not be liable for any such “public nuisances.”
- ***Comer v. Murphy Oil, Inc.*, 585 F.3d 855 (5th Cir. 2009):** Victims of Hurricane Katrina in Mississippi are suing a few dozen energy companies under the theory that global warming caused water temperatures to rise in the Gulf of Mexico, which strengthened Hurricane Katrina, thereby causing their Katrina-related damages. While the Fifth Circuit initially allowed the case to go forward, the court vacated that opinion and decided to rehear the case *en banc*. Several of the justices later had to recuse themselves, causing the number of judges eligible to rehear the case to fall below the quorum threshold for *en banc* review. Plaintiffs must now, therefore, appeal to the U.S. Supreme Court.
- ***Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009):** A small coastal Alaskan village is alleging that two-dozen oil, energy, and utility companies, through global warming, caused ice caps to melt and sea levels to rise, thereby causing the Village of Kivalina to flood. The trial court issued its decision to dismiss the case only a few weeks after the appellate decision in the Second Circuit and the initial ruling in the Fifth Circuit, and used the opinion to rebut some of those courts’ assertions. Plaintiffs appealed and the case is presently before the Ninth Circuit.
- ***State ex. rel. Lockyer v. General Motors Corp.*:** California Attorney General Bill Lockyer sued American car-makers for making cars that produced exhaust, thereby allegedly contributing to global warming. The case, which was dismissed by the trial courts, was later withdrawn while on appeal.

Future Implications

These cases represent the quintessential example of “regulation through litigation,” a term coined by former Clinton Labor Secretary Robert Reich, because the standards the courts set for liability, as a practical matter, become a regulation for that activity. The threat of a large damage award prompts a response that would be similar to one if a regulation were in place. But since there is no actual regulation, subjectivity and guesswork enter the picture. If these cases proceed, emission levels would be subjectively established by courts. Plaintiffs’ attorneys would be empowered to concoct emissions standards through threats of imposing liability. They could also subjectively choose which “deep pockets” to sue for global warming.

The trial courts dismissed the claims because the “regulatory” issues implicated are far broader than the parties’ interests, the courts’ jurisdiction, and the tools of the judiciary. The varied stakeholders not before the courts should be heard from in public hearings. Scientific claims need to be fully scrutinized. Decisions must be put into context of other major emission generators in the world, for example China and India. Finally, companies need to know in advance the emissions levels to which they are accountable.

Thus, at stake is more than potentially billions of dollars in liability. The Second Circuit panel and the earlier, now vacated, Fifth Circuit panel decisions have potentially created a new vehicle for “regulation through litigation,” where plaintiffs’ attorneys can use courts to impose personal political agendas even when unpopular or objectively wrong. The threat of massive liability forces businesses to change their operations or products, or pay for perceived environmental or social “harms,” regardless of whether they wrongfully caused the alleged harms. Fortunately, it is not too late. The Supreme Court can and should settle the issue once and for all. If guided by traditional legal principles and commonsense, these cases should be dismissed.