



A Gathering Storm

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Substantive conflicts in recent decisions make further appellate action possible—including Supreme Court review.

New Developments in Climate Change Litigation

On September 21, 2009, the United States Court of Appeals for the Second Circuit issued its long-awaited decision in *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009) (*AEP*). The decision

was the first to provide a detailed analysis of how to plead a federal, public nuisance cause of action premised on climate change. It was also the first decision to permit a federal climate-change-as-public-nuisance claim to proceed beyond the pleading stage.

AEP was followed immediately by two other climate change decisions: *Comer v. Murphy Oil USA, Inc.*, 2009 WL 3321493 (5th Cir. 2009) and *Native Village of Kivalina v. ExxonMobile Corp.*, No. 08-CV-2095, 2009 WL 3326113 (N.D. Cal. 2009). Although they confronted many of the same issues as *California*, the *Comer* and *Kivalina* holdings differed. *Comer* permitted plaintiffs' claims to go forward, while *Kivalina* granted the defendants' motion to dismiss.

AEP, *Comer* and *Kivalina* are fundamentally different opinions, both in terms of their underlying pleadings and their application of the law. While some parts of these opinions present interesting independent holdings, others involve direct con-

flicts that may require further appellate review. Defense counsel should stay abreast of appeals, political action and state law claims in this evolving area of the law.

Climate Change 101

Widely accepted science is that climate change is driven by the "greenhouse effect." When the sun heats the Earth, some of the heat is absorbed by the planet and the rest is reflected back toward space. A portion of the reflected heat escapes into space, while the rest is trapped by water vapor and gases in the atmosphere. U.S. Envl. Prot. Agcy., Frequently Asked Questions About Global Warming and Climate Change: Back to Basics (April 2009), http://www.epa.gov/climatechange/downloads/Climate_Basics.pdf.

Some "greenhouse gases" are naturally occurring and are a normal part of atmospheric processes. However, atmospheric concentrations of naturally occurring greenhouse gases have increased over the past 250 years. *Id.* at 3. The increase has overwhelmed natural elimination pro-



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cesses, leaving a surplus of greenhouse gases in the air. With more of the sun's reflected heat trapped in the atmosphere, surface temperatures rise. Higher surface temperatures change the world's oceans, animals and plants, which have attendant effects on human health, commerce and welfare. *Id.* at 5–6.

It is generally believed that the increase in naturally occurring greenhouse gases is a result of human activity. It has also been noted that certain synthetic greenhouse gases have been detected in the atmosphere. "Fluorinated gases"—hydrofluorocarbons, perfluorocarbons and hexafluoride—are commonly associated with a variety of industrial processes and are used as substitutes for ozone-depleting substances. U.S. Env'l. Prot. Agcy., Climate Change—Greenhouse Gas Emissions (updated Sept. 8, 2009), <http://epa.gov/climatechange/emissions/index.html>.

There is ample evidence documenting the effects of global warming. According to the Intergovernmental Panel on Climate Change, 11 of the last 12 years rank among the 12 hottest years on record since 1850; since 1900, the Northern Hemisphere has lost seven percent of the maximum area covered by seasonally frozen ground; since 1978, the extent of Arctic sea ice during the summer has shrunk by more than 20 percent; and since 1961, the world's sea levels have risen. See Intergovernmental Panel on Climate Change Fourth Assessment Report (2007).

Similarly, a report issued by the U.S. Global Change Research Program states that in the Northeast, average temperatures have increased by 2°F, with winter temperatures rising twice this much. Temperatures are expected to rise an additional 1.5 to 4°F over the next several decades, and cities such as Hartford and Philadelphia could average nearly 30 days over 100°F each year. In the Southwest, the spring snow pack and Colorado River flow have declined. Water supplies are projected to become increasingly scarce, resulting in a slowing of population growth in cities such as Phoenix and Las Vegas; a 60 to 90 percent decline in high-elevation forests in California; and an ecological transformation of the Sonoran Desert. See generally T. Karl, J. Melillo & T. Peterson (eds.), *Global Climate Change Impacts in the United*

States, (Cambridge Univ. Press, 2009), at 107–110 and 129–134.

Climate Change as a Public Nuisance

As of mid-2009, five cases had been filed which sought recovery based on the theory that climate change constitutes a public nuisance under state or federal law: *Connecticut v. American Elec. Power Co., Inc.*, Nos. 04-CV-5669, 04-CV-5670 (S.D.N.Y.); *Comer v. Murphy Oil USA, Inc.*, No. 05-CV-00436 (S.D. Miss.); *Korsinsky v. EPA*, 05-CV-00859 (S.D.N.Y.); *California v. General Motors Corp.*, No. 06-CV-05755 (N.D. Cal.); and *Native Village of Kivalina v. ExxonMobile Corp.*, No. 08-CV-02095 (N.D. Cal.). This article will not discuss *California* and *Korsinsky* because the decisions in *AEP*, *Comer* and *Kivalina* do not directly affect them. *California* was dismissed based on an almost verbatim reading of the district court decision in *AEP*. The appeal of that dismissal was subsequently withdrawn. *Korsinsky* involved a pro se plaintiff who asserted hypothetical, conjectural injuries that were general in nature and not subject to redress via injunctive relief.

Connecticut v. AEP

In *AEP*, eight states, one city and three private land trusts filed federal and state law public nuisance claims against five of the largest power companies in the United States District Court for the Southern District of New York. The plaintiffs alleged that the defendants' carbon dioxide emissions contributed to global warming, which in turn, had caused and would continue to cause irreparable harm to the environment, damage to real property and disruption of the public's health, safety and well-being. They sought an order requiring the defendants to abate their emissions by an unspecified amount each year for at least a decade.

The defendants moved to dismiss, arguing that the plaintiffs had failed to state a claim because there is no federal common law cause of action to abate carbon dioxide emissions; federal legislation had displaced the cause of action and plaintiffs' claims presented a nonjusticiable political question. The defendants also argued that the court lacked jurisdiction because the plaintiffs had no standing to sue. One defendant, the Tennessee Valley Author-

ity (TVA), added the argument that it was immune from suit as an agency of the United States operating within its discretionary function.

The district court granted the defendants' motion to dismiss on the sole ground that the plaintiffs' claims presented a nonjusticiable political question. The court found it impossible to resolve the mer-

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its without an initial policy determination by the political branches of government respecting emissions limits. *Connecticut v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). It did not distinguish between the plaintiffs' federal and state claims in rendering its decision.

The plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which heard arguments in 2006. On September 21, 2009, the Second Circuit vacated the district court's dismissal order and remanded the case for further proceedings. *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009). The circuit court not only held that the political question doctrine was inapplicable, it also found that all the plaintiffs had standing to sue, the federal common law of nuisance governed their claims, the plaintiffs' complaint stated a claim upon which a court could grant relief, federal legislation did not displace the plaintiffs' claims and the TVA did not enjoy immunity from suit. The circuit court did not adjudicate the plaintiffs' state law claims because it permitted the federal claims to proceed.

Comer v. Murphy Oil

In *Comer*, Gulf coast residents affected by Hurricane Katrina filed a putative class action against several oil and energy companies in the United States District Court



for the Southern District of Mississippi. The plaintiffs claimed, among other things, that the defendants' greenhouse gas emissions contributed to global warming, which in turn, caused a rise in sea levels that added strength to the storm; the defendants' emissions caused hazardous substances and other materials to enter and damage their property; and the defendants

The Second Circuit

in *AEP* issued several interesting holdings that remain undisturbed at this time.

breached a duty to conduct their businesses without endangering the environment, the citizens of Mississippi, public health, or public and private property. They sought compensatory and punitive damages under seven Mississippi state law causes of action, including public nuisance, private nuisance, trespass and negligence.

The defendants moved to dismiss on the grounds that the plaintiffs lacked standing and their claims presented nonjusticiable political questions. The district court granted the motions and dismissed the case. The court did not issue a written opinion, but in ruling from the bench, it characterized global warming as a debate that had no place in court until the legislature enacted laws setting appropriate standards for adjudicating claims. *Comer v. Murphy Oil USA*, 2009 WL 3321493 (5th Cir. 2009).

The plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. On October 16, 2009, the circuit court affirmed in part, reversed in part and remanded for further proceedings. In reversing the lower court, the circuit court held that the plaintiffs had standing to bring their state law nuisance, trespass and negligence claims, and that those claims did not present nonjusticiable political questions. By doing this, the Fifth Circuit became the second federal appellate court to reverse a trial court decision and

allow a federal climate-change-as-public-nuisance claim to proceed.

Kivalina v. Exxon

On February 26, 2008, the Native Village of Kivalina and the City of Kivalina, Alaska, filed suit against numerous oil, energy and utility companies in the United States District Court for the Northern District of California. The plaintiffs alleged, that as a result of global warming, the Arctic sea ice that protects Kivalina from winter storms had diminished, causing erosion and other destruction requiring the relocation of the city's residents. In addition to asserting state law claims for civil conspiracy and concert of action, the plaintiffs claimed that the defendants' greenhouse gas emissions contributed to global warming, and as such, constituted a public nuisance under federal law and a public and private nuisance under state law. Plaintiffs did not seek a specific amount of monetary damages, but they estimated the cost of relocating at \$95–\$400 million.

The defendants moved to dismiss, arguing that the plaintiffs' claims presented nonjusticiable political questions and that plaintiffs lacked standing. On September 30, 2009, the district court dismissed plaintiffs' federal claims on these grounds. It did not, however, rule on the remaining state law causes of action. *Native Village of Kivalina v. ExxonMobile Corp.*, 2009 WL 3326113 (N.D. Cal. 2009).

Issues Ripe for Review

Notably, district courts dismissed all of these climate-change-as-public-nuisance claims but circuit panels revived them on appeal, with the exception of *Kivalina*, which the Ninth Circuit will likely review in the future. However, examining the interplay between the decisions reveals existing and potential circuit splits that may ultimately require resolution in the United States Supreme Court. The most important splits concern the political question doctrine and proprietary standing.

Political Question Doctrine

The Second and Fifth Circuits have split regarding whether and to what extent the political question is governed by *Baker v. Carr*, 369 U.S. 186 (1962) (setting forth six indicia of nonjusticiability). In *AEP*, the

Second Circuit held that a finding of nonjusticiability is warranted if any of the six *Baker* factors are inextricable from the case at hand. However, in *Comer*, the Fifth Circuit held that a court must consider justiciability without applying the *Baker* factors if a defendant cannot point to a constitutional provision or federal law committing the material issue to the political branches. If the Ninth Circuit hears an appeal in *Kivalina*, it would likely weigh in on the Northern District of California's holding that the *Baker* factors govern but that a court must apply them as they are distilled by *Goldwater v. Carter*, 444 U.S. 996 (1979) (combining factors three through six).

A different split could occur between the Second and Ninth Circuits with respect to the second *Baker* factor's application, lack of manageable standards. In applying the second factor, the Second Circuit held that the vagaries of climate science and public nuisance law do not represent an absence of standards sufficient to indicate nonjusticiability. It cited several complex, public nuisance cases involving states and private companies that courts adjudicated according to federal common law, as well as a large number of matters in which federal courts relied on the Restatement (Second) of Torts to develop standards for resolution.

The Northern District of California disagreed. It held that evaluating whether the defendants' conduct was unreasonable necessarily involved an objective balancing of the burdens and benefits of the alleged nuisance, which in *Kivalina* would entail the unguided weighing of things such as the reliability and safety of energy-producing alternatives and the impact of those alternatives on every level of commerce. It distinguished *Kivalina* from the prior air and water pollution cases cited by the Second Circuit on the grounds that *Kivalina* sought to impose liability and damages on a scale unlike any prior environmental pollution claim, while the cited cases involved different injuries, as well as a different sequence of events between the defendants' emissions and the plaintiffs' alleged injuries.

Another split could occur between the Second and Ninth Circuits with respect to the third *Baker* factor's application, the need for an initial policy determination. In *AEP*, the Second Circuit held that an initial policy determination by a political branch

was not a prerequisite for judicial action. It held that if federal statutes concerning water pollution do not cover a plaintiff's claims and provide a remedy, the plaintiff is not required to wait for the enactment of useful legislation: he or she is free to sue under the federal common law of nuisance.

In *Kivalina*, the Northern District of California held that an initial policy determination was required because the plaintiffs had asked the court to make a political judgment—that the defendants alone should bear the cost of global warming. Moreover, the court held that even if the defendants bore more responsibility for the problem than anyone else in the nation, the executive or legislative branches should determine allocation of fault for and cost of global warming.

Proprietary Standing

A split in the circuits has also started to develop with respect to the three-part test for standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (injury-in-fact, causal nexus and redressability). In *AEP*, the Second Circuit held that to demonstrate a causal nexus plaintiffs had to allege that their injuries were “fairly traceable” to the defendants’ actions. Plaintiffs could establish fair traceability by showing a “substantial likelihood” that the defendants’ conduct caused the plaintiffs’ damages in accordance with the requirements of *Public Int. Rsch. Grp. of N.J., Inc. v. Powell-Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990) (holding that the plaintiffs met standing requirements in showing that the defendant discharged pollutant in concentrations that exceeded the permissible amount into a waterway in which the plaintiffs had an interest or which may have been adversely affected by the pollutant, which also “causes or contributes to” the injuries alleged by plaintiffs). However, in finding that the *AEP* plaintiffs had standing, the Second Circuit applied *Powell-Duffryn* in a strange manner. The Second Circuit found that the first requirement did not apply because no statutes governed carbon dioxide emissions, ignored the second requirement, and with respect to the third requirement, held that determining whether the defendants’ emissions were significant enough to cause the plain-

tiffs’ alleged injuries was best left for summary judgment and trial.

The Fifth Circuit also diluted the “substantial likelihood” requirement in *Comer*, interpreting *Massachusetts v. EPA*, 549 U.S. 497 (2007) as standing for the proposition that injuries may be “fairly traceable” to actions that “contribute to” greenhouse gas emissions and global warming. Moreover, the Fifth Circuit noted that it interprets *Powell-Duffryn* as articulating the “fairly traceable” test as an inquiry into whether the pollutant “causes or contributes” to the kinds of injuries alleged by the plaintiffs. In support of this position, it cited *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (“a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern”).

The Ninth Circuit may be asked to rule on whether the “substantial likelihood” test or the “cause or contribute” test applies in the context of climate change public nuisance suits. In *Kivalina*, the Northern District of California rejected the plaintiffs’ argument that they had standing under *Powell-Duffryn* and *Gaston Copper* because greenhouse gas emissions caused or contributed to the kinds of injuries that they alleged. Although recognizing that the plaintiffs did not need to establish a nexus with a scientific certainty, the district court pointed out that *Powell-Duffryn* and *Gaston Copper* diverged from the strict general rule—“substantial likelihood”—for reasons related to specific situations involving the Clean Water Act. The district court did not adopt the exception in *Kivalina* because discharge under the Clean Water Act is strictly regulated under congressionally prescribed limits, making it possible to presume that discharge exceeding the limits was substantially likely to have caused the plaintiffs’ injuries even if other parties made similar discharges. No such presumption arises in greenhouse gas nuisance cases because there are no federally prescribed emissions standards.

The district court in *Kivalina* explicitly took issue with the Second Circuit’s application of *Powell-Duffryn* in *AEP*, opining that the circuit court improperly applied the *Powell-Duffryn* test, noting that *Powell-Duffryn* stated the “substantial likelihood”

test “in the conjunctive, not the disjunctive,” and characterized as “circular” and “illogical” the circuit court’s holding that the first *Powell-Duffryn* requirement did not depend on the defendants’ discharges exceeding federal limits, because no limits existed for to greenhouse gases. *Kivalina*, 2009 WL 3326113, at *n.7.

The district court went on to hold that even if the “cause or contribute” test applied outside of statutory water pollution cases, it would not be appropriate to rely on it in *Kivalina* because, in *Gaston Copper*, the court held that the “contribution” approach can be used only if a plaintiff has pointed to the defendants’ discharge as the “seed” of his or her injury, the owner of the polluting source has supplied no alternative culprit, and the plaintiffs lie in the “discharge zone” of the polluter. The *Kivalina* plaintiffs did not allege that the “seed” of their injuries were traceable to any of the defendants. Rather, they acknowledged that global warming was centuries-old, caused by a multitude of sources other than the defendants’ emissions, and involved emissions that could not be traced to a specific source. Thus, the plaintiffs’ pleadings “[made] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular time.” *Id.* at *13.

The district court also held that the “cause or contribute” approach could not be applied in *Kivalina* because plaintiffs were not within the “zone of discharge.” Unlike water pollution cases in which discharges that exceeded the permitted amount are deemed harmful within a determinable radius, global warming is caused by an attenuated sequence of events that was removed in space and time from the defendants’ emissions. The plaintiffs attempted to avoid this by arguing that the “zone of discharge” in global warming cases should be the entire world, but the district court declined to adopt this position on the grounds that it would effectively eliminate the “zone of discharge” requirement altogether.

Other Interesting Holdings

Comer and *Kivalina* do not conflict with every aspect of *AEP*. The Second Circuit in *AEP* issued several interesting holdings



that remain undisturbed at this time. They concern justiciability, standing, failure to state a claim and federal corporations.

Baker Factors Four, Five and Six

AEP is the only case that ruled on the final three *Baker* factors in adjudicating the political question issue. The Second Circuit found that judicial action would not

Federal laws or regulations

limiting greenhouse gas emissions would have a profound impact on pending and future climate change litigation.

demonstrate a lack of respect for the political branches, contravene an already-made political decision, or result in conflicting pronouncements that would embarrass the nation, because the U.S. did not have a unified policy on carbon dioxide emissions. The Second Circuit in *AEP* held that, in ordering the study of global warming and participating in international negotiations regarding emissions, the political branches have demonstrated their interest in stabilizing and reducing the generation of carbon dioxide. Moreover, Congress can displace a judicial decision by enacting an appropriate law, while the executive branch can regulate accordingly through the Environmental Protection Agency.

Parens Patriae Standing

AEP is also the only case to address whether state plaintiffs have *parens patriae* standing to sue under *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). The Second Circuit acknowledged that the Supreme Court questioned whether *parens patriae* standing sufficed for Article III standing in *Massachusetts*. However, it concluded that the Supreme Court conflated *parens patriae* and proprietary standing by recognizing Massachusetts' quasi-sovereign interest in protecting its environment and popu-

lace, but then assessing the state's proprietary property interests under the three-part test set forth in *Lujan*. As such, the Second Circuit raised, without deciding, the question of whether a plaintiff's *parens patriae* standing was contingent on meeting both the *Snapp* and *Lujan* tests.

Proprietary Standing

AEP is the only case that issued specific rulings regarding the first prong of the *Lujan* test—injury-in-fact. The Second Circuit defined injury-in-fact as meaning an invasion of a legally protected interest that is concrete, particularized and actual or imminent. The court found that the *AEP* plaintiffs met this test by alleging a litany of specific past and future environmental changes that have had and will have a negative impact on natural resources, public works and property values. The court believed that this reasoning was consistent with the opinion in *Massachusetts*, which held that past coastal erosion caused by global warming constituted an injury-in-fact, and current greenhouse gas emissions constituted “imminent” exposures, creating a risk of harm.

Stating a Claim

AEP is the only case that considered whether the plaintiffs had stated a claim under the federal common law of public nuisance. The Second Circuit held that the principles set forth in the Restatement (Second) of Torts §821B and §821C governed the analysis. In *AEP* the court found that the state plaintiffs adequately stated a claim by alleging that the defendants' emissions contributed to global warming, interfered with the use and value of real property, and threatened public health and well-being. Further, the court found that the city stated legitimate claims by alleging unreasonable interference with public health, that is, heat-related illness and respiratory disease, public safety, specifically, hazards associated with increased flooding, and public comfort and convenience, flooding of transit hubs and municipal infrastructure. The land trusts adequately stated claims by alleging that the defendants' emissions constituted a significant interference with the public right to freedom from widespread environmental harm caused by the effects of global warming, which impinged on public health, comfort and convenience.

Federal Corporations

Finally, *AEP* is the only decision that considered issues relative to a federally owned corporation. The Second Circuit disagreed with the Tennessee Valley Authority's (TVA) argument that it had immunity from suit as a United States agency operating within its discretionary function. Relying heavily on *North Carolina v. Tenn. Valley Auth.*, the court found that sue-and-be-sued clauses are commonly recognized as broad waivers of sovereign immunity, and that this was the case with the clause in the TVA Enabling Act. See *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006), *aff'd*, 515 F.3d 344 (4th Cir. 2008). Moreover, while immunity waivers can be circumscribed, but only in limited circumstances, none of which the court found present in *AEP*.

The Second Circuit also rejected the TVA's argument that the court could not hear the plaintiffs' claims because the Property Clause served as a “textually demonstrable constitutional commitment” that appoints the power to protect and control the use of federal lands to Congress, which, in turn, has authorized the TVA to act in that regard. The court found that the TVA is a corporation distinct from the federal government that operates independently and has taken positions adverse to the United States in a number of cases. *AEP*, 582 F.3d 309, at 390.

Pending Developments

In addition to monitoring the anticipated appeals in *AEP*, *Comer* and *Kivalina*, counsel should stay abreast of other developments that could impact these appeals or involve other venues.

Appeals

2010 will likely see appellate action in *AEP*, *Comer* and *Kivalina*. Petitions for en banc rehearings in *AEP* and *Comer* were due at or near when this article was submitted for publication in November 2009, while petitions for certiorari in those cases were due between mid-December 2009 and mid-January 2010. A notice of appeal in *Kivalina* was due in December 2009. Key appellate issues in these cases would include the application of *Baker* in assessing nonjusticiability under the political question doctrine, the application of *Powell-Duffryn* in analyzing proprietary standing, and whether

plaintiffs must satisfy both *Snapp* and *Lujan* to demonstrate *parens patriae* standing.

Legislative and Executive Action

For the first time in recent history, the U.S. government has taken steps to cap and reduce greenhouse gas emissions. Congress is considering the Waxman-Markey and Boxer-Kerry bills, the first national legislation to propose caps on corporate greenhouse gas emissions. The EPA has enacted final regulations requiring certain entities to report the source and quantity of greenhouse gas emissions and has issued a proposed finding that six greenhouse gases—including carbon dioxide—collectively constitute an “air pollutant” that endangers the public health and welfare under the Clean Air Act. And the Obama administration recently met with foreign representatives in Copenhagen to discuss the next iteration of the Kyoto Protocol.

Federal laws or regulations limiting greenhouse gas emissions would have a profound impact on pending and future climate change litigation. These laws or regulations could provide “manageable standards,” an “initial policy determination” and a “unified emissions policy” under the *Baker* test for justiciability. They may also make proprietary standing under *Powell-Duffryn* more attainable by provid-

Recent Developments

Climate change litigation is a rapidly evolving area of the law. The following events have occurred since this article was submitted for publication in November 2009:

- **November 5, 2009** Petition for *en banc* rehearing filed in *AEP*.
- **November 6, 2009** Notice of appeal to 9th Circuit filed in *Kivalina*.
- **November 27–30, 2009** Petitions for *en banc* rehearing filed in *Comer*.
- **December 7, 2009** EPA issues endangerment and cause or contribute findings labeling greenhouse gases as dangerous “air pollutants” under section 202(a) of the Clean Air Act.
- **December 14, 2009** Opposition to request for *en banc* rehearing filed in *Comer*.

ing discharge limits similar to those found in the Clean Water Act.

Federal laws or regulations limiting greenhouse gas emissions would also affect the availability of displacement as a defense in climate change litigation. In *AEP*, the Second Circuit held that the plaintiffs’ nuisance claims were not displaced by five statutes cited by the defendants as “touching on” greenhouse gases or climate change. The Second Circuit found that those statutes prescribed research, reports, technology, development and monitoring but in no way represented Congressional action addressing the impact of climate change on plaintiffs. In making this ruling, the

court clarified the standard for displacement, stating that the relevant question is whether legislation “actually regulates” the nuisance at issue. Thus, federal courts can apply federal common law unless and until Congress does more than pass a collection of nonregulatory statutes focused on studying emissions.

State Law Claims

Climate change litigation premised on state law also warrants monitoring. To date, no such claims have been filed in state court, and all but one federal court has refused to adjudicate state climate change causes of action. However, it is important to observe *Comer*’s evolution and to note new state law claims filed in state court, especially cases involving in-state defendants and in-state emissions.

Conclusions

Approximately five years after the first climate-change-as-public-nuisance lawsuit was filed, a flurry of decisions ruling on threshold defenses arrived in late 2009. The decisions conflict in substantive ways, making further appellate action possible—including Supreme Court review. Though other aspects of the decisions stand alone, ongoing legislative, administrative and judicial action may affect all the holdings. Defense counsel should keep abreast of these pertinent developments. 