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CLIMATE CHANGE NUISANCE LITIGATION: A GATHERING STORM?

The traditional nuisance theory of liability dates back to medieval England. Excessive noise, obnoxious odors, polluted rivers, blinding lights, dense smoke or dust that interferes with another's use and enjoyment of their property have been remedied by courts wielding the nuisance remedy.

Recently, a new variant on the traditional nuisance theory—the “carbon tort”—has been launched against industries emitting greenhouse gases (GHG) alleged to cause climate change.

Environmentalists, wealthy beach-front property owners, and even some states have now asserted that emitters of GHG have caused harm ranging from an intensified Hurricane Katrina, to the loss of an island, to other injuries and damages.

Two recent cases demonstrate that at least some courts are willing to wade into such murky waters and entertain such claims:

CONNECTICUT v AMERICAN ELECTRIC POWER

Eight states, New York City and three land trusts sued six electric utilities, alleging that their GHG emissions contributed to global warming and harmed human health and the environment. In September 2009, the Second Circuit Court of Appeals held that plaintiffs did have standing to seek an injunction against the claimed nuisance, and remanded the case for further proceedings.

COMER v MURPHY OIL

On October 22, 2009, the Fifth Circuit Court of Appeals reversed and remanded a climate change lawsuit that had been dismissed by the district court. Property owners along the Mississippi Gulf Coast brought a class action suit against major oil, chemical, and fuel companies based on public and

private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentations and civil conspiracy seeking property damage losses related to Hurricane Katrina. Plaintiffs claimed that major sources of GHG emissions contribute to global warming, which intensifies the power of hurricanes, thus causing plaintiffs' claimed damages. The appellate court held that the plaintiffs had standing to assert nuisance, trespass, and negligence claims, but dismissed the other claims for prudential standing reasons.

There are many defenses to traditional nuisance theories which have yet to be considered by these courts. For example, plaintiffs may fail to prove that their injury was, in fact, caused by a defendant's conduct. Still, companies should be aware that the GHG and climate change controversies will inevitably spill over into the courts and

at least some of the litigation ahead will involve so-called “nuisance” claims. Call the author or Ronald E. Baylor at 269.383.5849 if we can help.



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“Nuisance” is a common law tort defined, generally, as “activity which arises from unreasonable, unwarranted or unlawful use by a person of [their] own property, working obstruction or injury to the right of another, or to the public...”
Black's Law Dictionary

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