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Item Type	Article
Authors	Stamas, Maria
Publisher	UC Berkeley School of Law
Rights	With permission of the license/copyright holder
Download date	2026-11-09 04:47:46
Link to Item	http://hdl.handle.net/20.500.12424/175832

Comer v. Murphy: The Fifth Circuit Grapples with Its Role in Hearing Climate Change Tort Claims

INTRODUCTION

In *Comer v. Murphy Oil USA*, the Fifth Circuit ruled that certain private citizens had standing to assert common law public and private nuisance, trespass, and negligence claims for injuries incurred as a result of climate change.[1] In contrast to a series of federal district court opinions, the court further ruled that these claims did not present a nonjusticiable political question.[2]

Plaintiffs still have a long way to go before establishing their case. While the court found plaintiffs' claims sufficiently traceable to defendants' actions, a necessary element for Article III standing, it made clear that it had not ruled as to whether plaintiffs had alleged facts sufficient to establish causation at the pleading stage, let alone facts sufficient to establish proximate cause at the trial stage.[3]

Perhaps in anticipation of the precedent this case could set by allowing private citizens to claim tort damage awards, defendants continue to argue that the case presents a nonjusticiable political question: the court would have to create standards that are not judicially

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1. Comer v. Murphy Oil USA (*Comer II*), 585 F.3d 855, 860 (5th Cir. 2009). The fourteen plaintiffs own land and property along the Mississippi Gulf coast. Plaintiffs charged 147 insurance, electric, fossil fuel, and chemical corporations as defendants. Fourth Amended Class Action Complaint at 1–16, *Comer II*, 585 F.3d 855 (No. 07-60756).

2. *Comer II,* 585 F.3d at 860. Four district courts have ruled that climate-based torts claims present nonjusticiable political questions, including California v. Gen. Motors, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2009), *appeal withdrawn*; Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009); Comer v. Murphy Oil USA (*Comer I*), No. 07-60756, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009).

3. *Comer II,* 585 F.3d at 880. In *Comer II*, Judge Davis specially concurred, stating that he would have affirmed the district court decision on alternative grounds: because plaintiffs had "failed to allege facts that could establish that the defendant's actions were a proximate cause of the plaintiffs' alleged injuries." *Id*. This may be an issue the Fifth Circuit panel analyzes in its rehearing en banc. In contrast, in *American Electric Power*, the court specifically found that plaintiffs had adequately stated their public and private nuisance claims. 582 F.3d at 315.

discoverable and that would require an initial policy determination to resolve the case.[4] Yet making this decision before the discovery stage would unnecessarily—and unconstitutionally—prevent plaintiffs from accessing the judicial process.[5] The Fifth Circuit's holding was correct. Courts should not anticipate the implication of a favorable ruling at the pleading stage, especially when they could limit the scope of a favorable decision through a well-crafted holding and appropriate damages.

I. THE *COMER* CASE

In *Comer*, fourteen private citizens filed a class action law suit against over 140 oil, chemical, power, and insurance companies doing business in Mississippi, for their contribution to the destruction of plaintiffs' private property and nearby public property.[6] Plaintiffs alleged that by emitting greenhouse gases, defendants contributed to increased sea levels and Hurricane Katrina's increased ferocity, which in turn damaged the property in question.[7]

Seeking only punitive and compensatory damages, plaintiffs specifically charged defendants with Mississippi common law tort claims of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.[8] Defendants moved to dismiss plaintiffs' claims, arguing that plaintiffs failed to establish standing under Article III of the U.S. Constitution and that the claims presented nonjusticiable political questions.[9] The district court granted defendants' motion to dismiss, and the Fifth Circuit reversed in part, holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims.[10] Further, the Fifth Circuit found that these claims did not present a nonjusticiable political question.[11] On February 26, 2010, the court granted en banc review.[12]

4. *See* Petition for Rehearing En Banc of Defendants-Appellees Murphy Oil USA at 7–10, Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. Nov. 30, 2009). Requiring the court to create standards that are not judicially discoverable and that would require an initial policy determination are two of the six formulations outlined by the Supreme Court in *Baker v. Carr,* 369 U.S. 186, 217 (1962). At least one of the formulations must be present to dismiss a case on nonjusticiable political question grounds. *Id.*

5. U.S. CONST. art. III, § 2. (in pertinent part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies between Citizens of different States . . . .").

6. Fourth Amended Class Action Complaint at 1–16, *Comer II*, 585 F.3d 855 (No. 07-60756).

7. *Comer II*, 585 F.3d at 859.

8. *Id*. at 859–60.

9. *Id*. at 860.

10. *Id*.

11. *Id*.

12. *Comer I*, No. 07-60756, 2010 WL 685796, at *1 (5th Cir. Feb. 26, 2010).

II. ESTABLISHING STANDING

Federal standing under Article III of the U.S. Constitution is an "irreducible constitutional minimum," which requires plaintiffs to establish that their claims represent a "case or controversy."[13] To meet this requirement, plaintiffs must show that: (1) they have suffered an injury in fact that is concrete and particularized; (2) their injury is fairly traceable to the challenged conduct; and (3) the injury will likely "be redressed by a favorable decision."[14] The claimant bears the burden of establishing standing, and each element must be supported in the manner and with the degree of evidence required at successive stages of the litigation.[15]

Federal standing also encompasses prudential standing, which requires plaintiffs to satisfy three factors: (1) the general prohibition on a litigant's raising another person's legal rights; (2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches; and (3) the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.[16]

The court found that plaintiffs' common law public and private nuisance, trespass, and negligence claims satisfied both Article III standing and prudential standing.[17] Yet, it declined to entertain plaintiffs' claims of unjust enrichment, fraudulent misrepresentation, and civil conspiracy, based on prudential standing requirements.[18]

III. EVALUATING ARTICLE III STANDING AND THE TRACEABILITY STANDARD

The court held that plaintiffs' public and private nuisance, trespass, and negligence claims satisfied the first and third constitutional minimum standing requirements since they alleged actual, concrete injury to their lands and property that could be redressed through compensatory and punitive damages.[19] Defendants did not contest these arguments.[20] The court next found plaintiffs had stated claims that were "fairly traceable to the defendant's actions."[21] It noted that by contesting traceability, defendants were asking the court to evaluate the merits of plaintiffs'

13. U.S. CONST. art. III, § 2.
14. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
15. *Id*. at 561.
16. Allen v. Wright, 468 U.S. 737, 751 (1984).
17. *Comer II*, 585 F.3d 855, 862 (5th Cir. 2009).
18. *Id.* at 867–68.
19. *Id*.
20. *Id*. at 864.
21. *Id*.

causes of action, which is not appropriate at the pleading stage.[22] Quoting a recent Third Circuit opinion stating that "an indirect relationship will suffice," the court also emphasized that the Article III traceability requirement need not be as fleshed out as the proximate causation element of the torts claim.[23]

The court spent a great amount of its analysis analogizing to the Supreme Court's recent decision in *Massachusetts v. EPA*, which granted Massachusetts standing to challenge EPA's decision not to regulate greenhouse gas emissions.[24] The court used the decision to support its claim that injuries may be fairly traceable to actions that contribute to, rather than solely cause, greenhouse gas emissions.[25] In further support of its claim, the court cited a string of appellate authority.[26] By focusing on the *Massachusetts* "contribution" claim, the court opened itself up to attack from defendants.[27] In their petition for rehearing en banc, defendants not only distinguished *Massachusetts* because of the claims and parties involved, but they noted that the contribution standard would "effectively give any person allegedly harmed by global warming standing to sue virtually anyone in the world."[28] Plaintiffs responded that the court's finding applies in particular to plaintiffs that "sustained serious, substantial and concrete injuries," against defendants, who are "some of the world's largest greenhouse gas emitters."[29]

The court found that plaintiffs' second set of claims—unjust enrichment, fraudulent misrepresentation, and civil conspiracy—did not satisfy federal prudential standing requirements.[30] It reasoned that the claims presented generalized grievances that are more properly dealt with by the representative branches and are common to all consumers of petrochemicals and the American public.[31] In other words, plaintiffs did

22. *Id*.

23. *Id*. (citing Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 142 (3d Cir. 2009)).

24. Massachusetts v. EPA, 549 U.S. 497 (2007); *Comer II*, 585 F.3d at 865–66.

25. *Comer II*, 585 F.3d at 865–66.

26. *Id*. at 866–87; *accord* Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 543 (6th Cir. 2004); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000) (en banc); Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1247 (11th Cir. 1998).

27. *See Comer II*, 585 F.3d at 865-66.

28. Petition for Rehearing En Banc, *supra* note 4, at vii. In particular, defendants distinguished *Massachusetts* because of its statutory basis, "existence of a statutory authorization to sue is of critical importance to the standing inquiry," and because Massachusetts was a "sovereign state" and not a private citizen. *Id*. at 13–14.

29. Response to Defendant-Appellees' Petition for Rehearing En Banc at 3, Comer v. Murphy Oil USA, No. 07-60756.

30. *Comer II*, 585 F.3d at 867–68. These claims were an attempt to copy successful tobacco legislation strategy. *See* Stephan Faris, *Conspiracy Theory*, ATLANTIC., June 2008.

31. *Comer II*, 585 F.3d at 868.

not identify a particularized injury that affected them in a "personal and individual way."[32]

IV. THE NONJUSTICIABLE POLITICAL QUESTION DOCTRINE

A nonjusticiable political question arises when a case is constitutionally incapable of being decided by a federal court.[33] In *Baker v. Carr*, the Supreme Court outlined six formulations of the doctrine, at least one of which must be present to dismiss a case on nonjusticiable political question grounds.[34] These formulations include: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[35]

Since *Baker*, the Supreme Court has only dismissed two cases as presenting nonjusticiable political questions, both of which involved issues that were textually committed to another branch of government.[36] Many cases have held that tort claims seeking monetary damages are always justiciable.[37] The Supreme Court has also suggested that the first factors are most important,[38] and binding authority in the Fifth Circuit has found that tort claims for injunctive relief should be permitted to take shape before broad conclusions are drawn as to their manageability.[39]

V. THE REASONING BEHIND THE NONJUSTICIABLE POLITICAL QUESTION

After establishing standing for plaintiffs' public and private nuisance, trespass, and negligence claims, the court next found that these claims did

32. *Id*. at 868–69 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

33. Baker v. Carr, 369 U.S. 186, 210 (1962).

34. *Id*. at 217.

35. *Id*.

36. *See* Nixon v. United States, 506 U.S. 224, 226, 250–51 (1993); Gilligan v. Morgan, 413 U.S. 1, 5–6, 11–12 (1973).

37. *See, e.g.*, Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998); Koohi v. United States, 976 F.2d 1328, 1332 (9th Cir. 1992); Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 685 (E.D. La. 2006).

38. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (plurality opinion).

39. *See Gordon*, 153 F.3d at 193–94 (acknowledging that injunctive relief claims are prone to political question problems, but concluding that they should be permitted to develop).

not present a nonjusticiable political question, emphasizing that the judicial branch cannot decline a case because of its complexity or partisan nature.[40]

Following the traditional view of the political question doctrine set out in *Marbury v. Madison* and the trend for courts to find nonjusticiable cases based on the first *Baker* factor, the court primarily focused on whether the Constitution or other laws had textually committed climate change harms to the political or executive branch.[41] Finding no such commitment, it then cursorily evaluated the remaining *Baker* factors.[42] It noted that defendants had not shown the absence of judicially discoverable or manageable standards with which to decide the case since Mississippi and other states' common law tort rules provide long-established standards for adjudicating nuisance, trespass, and negligence claims.[43]

Based on the purpose of the political question doctrine in maintaining separation of power, the court justifiably focused on whether Congress had textually committed the issue to other branches of government.[44] Yet, to reach its conclusion, the court did not have to question the necessity of evaluating the remaining five Baker formulations, all of which support its conclusion.[45] In doing so, it left a gap for defendants to attack, and made the rest of its decision more susceptible to questioning.

40. *Comer II*, 585 F.3d 855, 869–70 (5th Cir. 2009).

41. *Id*. at 870–76. *Marbury v. Madison* established the concept of judicial review in the United States while also recognizing the limits of judicial power. 5 U.S. (1 Cranch) 137 (1803). The political question doctrine presents one such limit, and the Court's classical conception of the doctrine has a strong textual basis, depending on whether the Constitution or laws commit the issue to another branch of government. *Id*. at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."); *see also* Shawn M. LaTourette, *Global Climate Change: A Political Question*, 40 RUTGERS L.J. 219, 224–28 (2008).

42. *Comer II*, 585 F.3d at 875–76.

43. *Id*. at 876–79. The court also faulted the trial level decisions in *American Electric Power* and *General Motors* and defendants' reliance on these decisions. Namely, it did not agree with the unsupported assumption that adjudication of plaintiffs' claims would require the district court to fix and impose future emission standards on defendants and all other emitters. It also found the conclusion defendants draw from this assertion—that it would be "impossible" for a court to perform such an obviously legislative or regulatory task—faulty. The court distinguished this case from the prior two because it involves private parties suing under state tort law, seeking only monetary damages. *Comer II*, 585 F.3d at 876–79.

44. *See id*. at 874.

45. The court's problematic statements include: "the application of the *Baker* formulations is not necessary or properly useful in this case," *id*. at 875, and "[c]onsequently, if a party moving to dismiss under the political question doctrine is unable to identify a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch, the issue is clearly justiciable and the motion should be denied without applying the *Baker* formulations." *Id*. at 872.

VI. TORTS, CLIMATE CHANGE, AND THE RELATIONSHIP WITH FEDERAL LEGISLATION

Appellate and district courts have ruled on a variety of climate change tort claims in recent years. In *Connecticut v. American Electric Power (Conn. v. AEP)*, plaintiffs brought public nuisance claims and sought an injunction limiting the level of greenhouse gases power companies could emit in the future.[46] The Second Circuit reversed the district court's opinion, and held that plaintiffs—eight states—had standing to assert their public nuisance claims against electric power companies and that these claims did not present nonjusticiable political questions.[47]

In contrast, district courts have generally found tort claims based on climate change nonjusticiable. Aside from the lower court rulings in *Comer* and *Conn. v. AEP*, the Northern District of California court twice held that public nuisance claims based on global warming presented nonjusticiable political questions.[48] In *California v. General Motors*, California filed federal and state public nuisance claims against private car companies, and the court denied the state from demanding damages and a declaratory motion.[49] Although plaintiffs in *Kivalina v. Exxon* demanded only damages, the court similarly denied their federal common law public nuisance claims, holding that the claims presented a nonjusticiable political question and that plaintiffs lacked standing under Article III of the Constitution.[50] Plaintiffs are seeking an appeal.[51]

While environmental law is generally based on federal legislation, tort law has historically been used to fill in the gaps. For example, prior to the enactment of the Clean Water Act, the Court, exercising its original jurisdiction to hear disputes between states, used the common law of nuisance to require New York City to stop dumping its garbage into the ocean, and required the City of Chicago to treat its sewage to reduce the amount of water it needed from Lake Michigan to flush the effluent away.[52] Later, in *City of Milwaukee v. Illinois*, the Court found that although the 1972 amendments to the Clean Water Act preempted

46. Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *rev'g* 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

47. *Id*. at 332, 339.

48. California v. Gen. Motors, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2009); Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).

49. *Gen. Motors*, 2007 WL 2726871, at *16.

50. *Native Village of Kivalina*, 663 F. Supp. 2d at 863.

51. Civil Appeals Docketing Statement of Petitioner-Appellants, *Native Village of Kivalina*, 663 F. Supp. 2d 863 (No. 09-17490).

52. New York v. New Jersey, 256 U.S. 296 (1921).

federal common law nuisance claims, the Act preserved state common law nuisance claims.[53]

The recent string of climate change cases presents the question of whether climate change is sufficiently unique to warrant a change in the judiciary's willingness to apply tort law. It would seem a stretch to answer in the affirmative when the rules of tort law are well established and courts have historically applied these rules before Congress passed comprehensive environmental legislation.[54] It is true that climate change's complexity—both in terms of scale, amount and diversity of contributors, and time frame—merits comprehensive legislation and planning.[55] Yet until this happens, the court can apply tort law, and it can even adjust compensation schemes specifically for climate change-related tort damages.[56] In turn, Congress can override any illogical or unreasonable court decisions by passing legislation.

CONCLUSION

The court's ruling was appropriate at this early pleading stage. Access to the judicial process should trump concerns of a positive verdict's future implications for two main reasons. First, it is early in the process. Plaintiffs' claims likely will not make it past a motion for summary judgment based on lack of evidence.[57] It will be difficult for plaintiffs to establish the intent element of trespass, the unreasonableness element for private and public nuisance, and causation for the cause-in-fact and proximate cause elements of negligence.[58] Plaintiffs do, however, deserve access to discovery to help establish their claims. Second, even if plaintiffs eventually prevail, the implications could be limited.[59] For

53. City of Milwaukee v. Illinois, 451 U.S. 304, 305 (1981).

54. *See* WILLIAM H. RODGERS, ENVIRONMENTAL LAW 113 (2d ed. 1994).

55. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

56. LaTourette, *supra* note 41, at 264.

57. On February 26, 2010, the Appellate Court granted en banc review. Comer v. Murphy Oil USA, No. 07-60756, 2010 WL 685796, at *1 (5th Cir. Feb. 26, 2010). The Supreme Court's recent ruling in *Twombly* indicates that a complaint must state a plausible claim for relief to survive a motion to dismiss. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). For a complaint to be plausible, it must allow the court to draw a reasonable inference that the defendant is liable. *Id*.

58. In their complaint, plaintiffs also plead in the alternative, "[i]f Defendants' activity did not directly cause increase in sea surface temperatures which fueled hurricane Katrina, their actions nevertheless increased and will continue to increase risk of more intense tropical cyclones and other storms, as well as sea level rise . . . . These activities put Plaintiffs' property at greater risk of flood and storm damage, and dramatically increase Plaintiffs' insurance costs." Fourth Amended Class Action Complaint at ¶63, *Comer II*, 585 F.3d 855 (5th Cir. 2006) (No. 07-60756).

59. LaTourette, *supra* note 41, at 264 ("For example, a variant of market share liability that advances a formula for apportioning damages in proportion to defendants' greenhouse gas emissions has been proposed."); *see also* Daniel J. Grimm, *Global Warming and Market Share*

instance, the district court could craft its holding to apply only to victims of Hurricane Katrina. Alternatively, it might only award nominal or strictly proportional damages, in which case, even if every Katrina victim filed a claim, the net result would not significantly impact defendants' profits.[60] A multidistrict litigation proceeding could help keep the amount of cases manageable or courts could adjust tort compensation schemes for climate change rulings.[61] Further, no decision the court might issue would prevent Congress from preempting it, for example, by creating legislation with a standard level of emissions below which companies could not be held liable.

Should this ruling last the court's en banc review and perhaps even Supreme Court scrutiny, it would grant private citizens standing to engage in the discovery process based on global warming tort claims against private corporations.[62] Simply allowing discovery to occur will add to the costs and risks of emitting large amounts of greenhouse gases for corporations, perhaps prompting them to take mitigating actions. If the costs and risks are great enough, it might even prompt Congress to pass national legislation.

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Liability: A Proposed Model for Allocating Torts Damages Among CO2 Producers, 32 COLUM. J. ENVTL. L. 209, 225 (2007).

60. See LaTourette, *supra* note 41, at 264 for details on strictly proportional damages.

61. *Id.*

62. A panel of nine judges is scheduled to rehear the case beginning the week of May 24, 2010. On Petition for Rehearing En Banc, *Comer II*, 585 F.3d 855 (5th Cir. 2009) (No. 07-60756).

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.