Global Warming Litigation and the Ghost of Mrs. Palsgraf: Why Carbon-Heavy Entities Should Be Scared of Both

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Any private entity with significant greenhouse gas (GHG) emissions could be identified in the next climate change lawsuit. Filed in 2004 by a coalition of states and land trusts, *Connecticut v. American Electric Power*[1] was the first major climate change lawsuit identifying private entities as defendants. On September 21, 2009, the U.S. Court of Appeals for the Second Circuit in *Connecticut* permitted plaintiffs to seek an order capping the carbon dioxide (CO_2) emissions of five electric utilities by certain percentages for at least 10 years. Less than a month later, the U.S. Court of Appeals for the Fifth Circuit in *Comer v. Murphy Oil*[2] held that a group of private-property owners could proceed with global warming claims against energy, fossil fuel, and chemical industries for causing Hurricane Katrina. The political question doctrine, which rescued the GHG-emitting defendants in the lower district courts, was rejected by both circuit courts, and may be dead. As a result, the ghost of Helen Palsgraf may have found some new defendants to haunt.

Helen Palsgraf's lawsuit in the early 1920s is one of the most famous American tort cases of all time.[3] A man was running late trying to catch a train. He was carrying a package when, in the process of trying to board the train, he lost his balance. A guard on the platform, trying to help, pushed him from behind. In the process, the man dropped the package, which contained fireworks, causing an explosion when it hit the tracks. The shock of the explosion caused some scales many feet away at the end of the platform to fall—one of which fell on Mrs. Palsgraf and injured her. In a 4-3 opinion, the court held that while the guard may have been negligent in relation to the man carrying the package, he owed no duty of care to Mrs. Palsgraf because she was outside the "zone of danger." Both *Connecticut* and *Comer* imply a significant expansion of the *Palsgraf* majority decision's "zone of danger" rule.

In *Connecticut*, eight states, the city of New York, and three land trusts seek to limit the CO_2 emissions from five fossil fuel-fired electricity suppliers on the grounds that such emissions constitute a public nuisance causing current and future harm to human health and property damage. Defendants argued that the causation requirement had not been met because many others contribute to global warming in a variety of ways, and plaintiffs could not identify which of their specific injuries were caused by what particular defendant. The Second Circuit disagreed, adopting the position that in order to survive standing, a plaintiff must merely show that a pollutant discharged by a defendant causes or contributes *to the kinds* of injuries alleged, as opposed to the *particular* injuries of the plaintiff. The Second Circuit found that under several different analyses, the plaintiffs each alleged specific harms under the federal common law of public nuisance.

In *Comer*, property owners are suing several oil and coal companies and chemical manufacturers for emitting GHGs that allegedly caused or contributed to the destruction of plaintiffs' property by rising sea levels and Hurricane Katrina. They seek monetary damages under various tort theories, including public and private nuisance, trespass, and negligence. Defendants argued that the causal links among GHG emissions, rising sea levels, and Hurricane Katrina were too attenuated and that their actions contributed minimally to plaintiffs' injuries, thereby foreclosing traceability and standing altogether. The Fifth Circuit rejected defendants' positions, accepting the causal link between industrial emissions and climate change, that Hurricane Katrina was arguably a result of this causation link, and that the kinds of injuries alleged in plaintiffs' complaint, e.g., beach erosion, rising sea levels, and storm damage, can be traced to GHG emissions.

The political question doctrine was unable to save the defendants in either climate change lawsuit. In *Connecticut* and *Comer*, the lower district courts dismissed both tort lawsuits on the grounds that climate change implicates complex policy considerations that are nonjusticiable under the politi-

1. No. 05-5104, 39 ELR 20215 (2d Cir. Sept. 21, 2009).
2. No. 07-60756, 39 ELR 20237 (5th Cir. Oct. 16, 2009).
3. Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928).

cal question doctrine. However, both the Second Circuit and the Fifth Circuit courts overturned those rulings on similar grounds. Judge Peter W. Hall wrote for the Second Circuit: "The question presented here is discreet, focusing on Defendants' alleged public nuisance and Plaintiffs' alleged injuries. As the States eloquently put it, '[t]hat Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contribution to that problem cannot be addressed through principled adjudication.'"[4]

Both *Connecticut* and *Comer*, especially the Fifth Circuit decision, might spur an increase in climate change lawsuit filings. Consider the reality of the *Comer* decision: Mississippi property owners dragging GHG-emitting companies from Virginia into court with a common-law nuisance claim for causing damage to their property. A Mississippi State courtroom then gets to decide the following: (1) whether the collective action of several companies caused or contributed to global warming; (2) whether global warming caused or contributed to the Gulf of Mexico waters getting warmer; (3) whether the warming of the Gulf of Mexico waters caused or contributed to the intensity of Hurricane Katrina; and (4) whether the increased intensity of Hurricane Katrina caused that particular owner's property damage. While the proximate cause considerations are daunting, assuming plaintiffs survive summary judgment, a climate change suit is a scary prospect for a GHG emitter. Hurricanes obviously never sit at the defense table across from a sympathetic homeowner who lost everything.

Poor Mrs. Palsgraf. In her case, the court made a policy determination regarding the proximate cause requirement, in that a defendant, even one who has acted negligently, cannot be automatically liable for *all* of the consequences of its actions. In *Connecticut* and *Comer*, the courts made a different policy determination with respect to causation: that all GHG emitters have a worldwide duty to reduce or eliminate their carbon emissions. To the extent their emissions can be linked to a natural disaster that results in damage to persons or property (whether foreseeable or not), a climate change lawsuit can go forward. As a result, it is difficult to see how anyone who has suffered injury linked to global warming would *not* have standing to file a nuisance claim against a GHG emitter.

As a corollary, how can a GHG emitter avoid being hauled into court in a climate change suit? While it is unknown whether plaintiffs in *Connecticut* or *Comer* will succeed on the merits of their respective claims, private entities that take measures to reduce their carbon output will be far less attractive defendants compared to those with heavy carbon footprints. The company or building that transitions to a low-carbon or carbon-neutral operation will minimize its risk of being identified in a climate change lawsuit down the road.

In sum, wary emitters should consult with knowledgeable counsel and environmental professionals to reduce or eliminate their carbon emissions. Halloween is over, but companies and buildings resistant to minimizing their carbon reliance may be haunted in the future by the size of their carbon footprint—as well as Mrs. Palsgraf.

4. No. 05-5104, at 30.