Global Warming Tort Litigation: The Real “Public Nuisance”

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INTRODUCTION

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Climate change litigation is booming. The past five years have witnessed a proliferation of global warming lawsuits brought under an array of novel legal theories.

This article focuses on the subset of global warming cases involving “public nuisance” claims. In those cases, various plaintiffs (including state governments, environmental groups, Mississippi landowners, New Yorkers, and Alaskan villagers) have brought tort claims against members of the oil, automobile, and electric utility industries under the theory that the targeted defendants’ carbon dioxide (“CO₂”) emissions contribute to the public nuisance of global warming. To date, these lawsuits have proved uniformly unsuccessful. Four federal district courts have entertained such claims, and all four courts have dismissed for lack of justiciability.

This article argues that those courts got it right. Whatever one thinks about global warming and its causes, it cannot be denied that it is an issue of public and foreign policy fraught with scientific complexity, as well as profound political, social, and economic consequences. These exceedingly complex issues must be confronted at the national and international levels by Congress, expert federal agencies, and the President. They cannot rationally be addressed through piecemeal and ad hoc tort litigation seeking injunctive relief—or, even worse, billions of dollars in retroactive and future money damages—against targeted industries for engaging in lawful and comprehensively-regulated conduct. The “global warming public nuisance” litigation model is fundamentally flawed because, among other things, it (1) asks federal courts to make the type of policy judgments that are properly reserved in our system of government for the democratically-accountable branches; (2) lacks manageable standards for adjudication; and (3) purports to rely on a “federal common law” cause of action that simply does not exist.

This is not to say that the federal courts cannot play any role in addressing climate change. In Massachusetts v. EPA, 127 S.Ct. 1438 (2007), the Supreme Court established a clearly-defined framework for judicial review in this area, emphasizing that the political branches must make key policy choices concerning global warming in the first instance and that, to the extent any State is dissatisfied with those choices, the role of the judiciary is to review those choices via administrative challenges brought under the traditional “arbitrary and capricious” framework—not to allow litigants to sidestep this framework in its entirety through the guise of tort litigation.
I. OVERVIEW OF “GLOBAL WARMING PUBLIC NUISANCE” CASES.

A. American Electric Power Company, Inc.

In July 2004, the Attorneys General of eight states, partnered with certain other entities, filed the first “global warming public nuisance” lawsuit.¹

The plaintiffs’ theory of liability was that the defendants—five major electric utility companies that operate fossil-fuel burning power plants—produced CO₂ emissions that “unreasonabl[y]” interfered with the plaintiffs’ property and other rights; that those emissions contributed to the “public nuisance” of global warming; and that the plaintiffs had already suffered substantial harm from global warming and also faced future harm.² The American Electric Power Company (AEP) plaintiffs did not seek money damages, but instead sought an injunction requiring the defendants to reduce their future emissions “by a specified percentage each year for at least a decade.”³ The plaintiffs asserted both a “federal common law” public nuisance claim and various state-law public nuisance claims.

In September 2005, the district court (Judge Loretta A. Preska) granted the defendants’ motion to dismiss, concluding that the lawsuit was nonjusticiable under the political question doctrine. The court rejected the plaintiffs’ contention that “theirs is a simple nuisance claim of the kind courts have adjudicated in the past,” holding that “none of the pollution-as-private-nuisance cases . . . has touched on so many areas of national and international policy.”⁴ Emphasizing “the transcendentally legislative nature of this litigation,” the court held that resolving the plaintiffs’ claims would be “impossible without an ‘initial policy determination’ first having been made by the elected branches to which our system commits such policy decisions, viz., Congress and the President.”⁵ The court also deemed the plaintiffs’ demand for injunctive relief an improper attempt “to impose by judicial fiat” carbon dioxide emission limits that “Congress and the Executive . . . specifically refusal[ed] to impose.”⁶ Accordingly, the court dismissed the suit as raising a “patently political question.”⁷

The plaintiffs’ appeal to the Second Circuit (No. 05-5104) is pending.

³ Id. at 49.
⁵ Id.
⁶ Id. at 273–74.
⁷ Id. at 271 n.6.
B. Korsinsky

In January 2005, a pro se plaintiff filed suit against the Environmental Protection Agency (“EPA”) and certain other governmental agencies, alleging that the CO\textsubscript{2} emissions they produced had rendered him susceptible to certain physical injuries and had also caused him to suffer mental injuries.\textsuperscript{8} Alleging both “federal common law” and state-law public nuisance claims, Korsinsky sought an injunction barring the defendants from producing CO\textsubscript{2} emissions and requiring the defendants to use a scientific device that Korsinsky had invented.\textsuperscript{9}

In September 2005, the district court (Judge Naomi Reice Buchwald) dismissed for lack of justiciability, finding that Korinsky lacked standing because his alleged injuries were hypothetical and would not be redressed by the requested relief in any event.\textsuperscript{10}

In August 2006, the Second Circuit affirmed in an unpublished order.\textsuperscript{11}

C. Comer

In September 2005, a group of Mississippi landowners who incurred property damage during Hurricane Katrina filed the next “global warming public nuisance” lawsuit.\textsuperscript{12} They sued select members of the oil, coal, and chemical industries under the theory that the defendants’ greenhouse gas emissions had contributed to global warming; that global warming had caused the temperature of the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico to increase; and that these increased water temperatures had “fueled and intensified” Hurricane Katrina. In addition to asserting claims for public and private nuisance, the plaintiffs also asserted a hodgepodge of state-law causes of action, some of which hinged on allegations that the defendants had engaged in a purported “misinformation” campaign to “reposition global warming as theory rather than fact.”\textsuperscript{13} The plaintiffs sought both compensatory and punitive damages as well as unspecified equitable relief.\textsuperscript{14}

\textsuperscript{9} Id. at *2–3.
\textsuperscript{10} Id. at *5–11.
\textsuperscript{12} Comer v. Murphy Oil USA, Inc., No. 05-436 (S.D. Miss. dismissed Aug. 30, 2007).
\textsuperscript{13} Third Amended Complaint at 15, Comer, No. 05-436 (S.D. Miss. dismissed Aug. 30, 2007).
\textsuperscript{14} Id. at 20.
In a cursory order issued on August 20, 2007, the district court (Judge Louis Guirola, Jr.) dismissed, concluding that “[p]laintiffs’ claims are non-justiciable pursuant to the political question doctrine” and that “Plaintiffs do not have standing to assert claims against Defendants.”\(^\text{15}\)

The plaintiffs’ appeal to the Fifth Circuit (No. 07-60756) is pending.

D. General Motors Corporation

In September 2006, California Attorney General Bill Lockyer filed another “global warming public nuisance” lawsuit, again asserting both “federal common law” and state-law public nuisance claims.\(^\text{16}\) California chose to sue the six largest U.S. automakers, alleging that the automakers’ emissions contributed to global warming and that the State had suffered property and other damage as a result. California sought billions of dollars in money damages for past harm as well as a declaration of joint-and-several liability for future damages.

In September 2007, the district court (Judge Martin J. Jenkins) issued an order granting the automakers’ motion to dismiss. In a lengthy opinion, the court found that California’s lawsuit implicated three separate tests for nonjusticiability under the political question doctrine.\(^\text{17}\)

First, the court determined that the case would require “an initial decision as to what is unreasonable in the context of carbon dioxide emissions”—a policy determination of the type not suitable for judges and juries.\(^\text{18}\) The court held that such judicial policymaking was particularly unwarranted because “reductions in carbon dioxide emissions is an issue still under active consideration by those branches of government,” and emphasized that Massachusetts v. EPA “further underscore[d] the conclusion that policy decisions concerning the authority and standards for carbon dioxide emissions lie with the political branches of government, and not with the courts.”\(^\text{19}\)

Second, the court held that the case “would have an inextricable effect” on issues of “interstate commerce and foreign policy” that are “textual[ly] commit[ted] . . . to the political branches of government.”\(^\text{20}\) The court noted that awarding damages against the defendants for their “lawful worldwide sale of automobiles” “would likely have commerce implications in other States;” that imposing “mandatory unilateral restrictions on domestic manufacturers” could “impede” the political

\(^{15}\) Order Granting Motion to Dismiss, Comer, No. 05-436 (S.D. Miss. dismissed Aug. 30, 2007).
\(^{17}\) Id. at *18–48.
\(^{18}\) Id. at *23.
\(^{19}\) Id. at *24, *30.
\(^{20}\) Id. at *43, *39.
branches’ “diplomatic objective” of persuading “developing countries [to] make a reciprocal commitment;” and that such damages would, in any event, punish the automakers for lawful conduct outside the United States and thus “run headlong into nonjusticiable foreign policy issues.”

Third, the court concluded it lacked judicially manageable or discoverable standards for adjudicating California’s claim. The court acknowledged that, in a handful of “trans-boundary nuisance cases” largely decided during the late 1800s and early 1900s, the Supreme Court relied on the “federal common law” of public nuisance to order injunctive relief. But the court rejected California’s argument that these cases somehow provided a “well-established” legal framework for resolving its tort claim, finding the cases “legally, and factually, distinguishable in important respects.”

California’s appeal to the Ninth Circuit (No. 07-16908) is pending.

E. Kivalina

In February 2008, the residents of an Alaskan village filed the most recent “global warming public nuisance” lawsuit, alleging that “[g]lobal warming is destroying [their village] and the village thus must be relocated soon or be abandoned and cease to exist.” The Kivalina plaintiffs allege that the defendants—select members of the oil and electric utility industries—have “contributed to global warming through their large quantities of greenhouse gases” and that certain defendants have also “conspired to create a false scientific debate about global warming in order to deceive the public.” The Kivalina plaintiffs assert state and federal common law nuisance claims as well as a state-law civil conspiracy claim. They seek compensatory damages of as much as $400 million—the purported cost of relocating their village—as well as a declaration of joint-and-several liability for future damages.

II. THE LIMITATIONS OF THE PUBLIC NUISANCE LITIGATION MODEL IN ADDRESSING GLOBAL WARMING.

A. "Global Warming Public Nuisance” Lawsuits Improperly Ask the Federal Courts to Supplant Policy Judgments Made by
Elected Branches of Government.

There is no easy fix to the issue of global warming. Reducing domestic CO$_2$ emissions is an expensive endeavor, often imposing costs on American consumers and industry alike. And even if a domestic initiative to reduce such emissions were successful, it would, at best, only partially address—and, most likely, would be more than offset by—the rapid increase in emissions from developing countries such as China and India.

Cognizant of the complex, competing policy considerations that inhere in this topic, the political branches of the federal government have carefully studied and addressed the issue of global warming over the past three decades. Again and again, these democratically-accountable branches of government have chosen to engage in further study, analysis, voluntary programs, and diplomacy in lieu of enforcing a unilateral limitation on domestic CO$_2$ emissions. Indeed, the Bush Administration and the Clinton Administration—as well as the U.S. Senate—voiced opposition to the Kyoto Protocol precisely because it would have exempted developing nations and placed the full brunt of the cost of CO$_2$ reductions on developed nations such as the United States.

“Public nuisance global warming” lawsuits represent a naked and wholly improper attempt to override these policy judgments through the guise of tort litigation. At bottom, the complaint animating these lawsuits is that certain targeted industries (to date, the oil, electric utility, and automotive industries) are allowed to emit too much CO$_2$ and other greenhouse gases and should be required—by the federal courts through injunctive relief or the specter of multi-billion dollar tort liability—to reduce their emissions by some unspecified amount.

But federal courts possess neither the institutional expertise nor constitutional prerogative to make such complex policy determinations. To adjudicate a “public nuisance” claim based on global warming, the courts would be required to sort through and balance an array of competing interests—including environmental, industrial, commercial, foreign policy, security, and consumer choice concerns—and decide how much CO$_2$ and other greenhouse gases the targeted industries should be allowed to emit. It is simply not the role of the federal courts to engage in such policymaking, particularly when the political branches have already addressed these issues and made their own judgments.

B. There Are No Manageable Standards for Adjudicating “Global Warming Public Nuisance” Lawsuits.

The “global warming public nuisance” litigation model is also fatally flawed for practical reasons of manageability and administrability. This is particularly true in cases—such as GMC and Kivalina—where the plaintiffs seek to hold a few selected defendants jointly and severally liable, in money damages, for global warming. After all, the targeted defendants in these lawsuits are not the only sources of CO$_2$ emissions in the United States and around the world. Carbon dioxide—unlike the “pollutants” at issue in other types of nuisance litigation—is a naturally occurring substance that is emitted by other industries and manufacturers, by environmental events (such as volcanic explosions), and even by simple human activity (such as breathing).

Accordingly, for the targeted defendants in one industry (say, the six targeted automakers in GMC) to fend off a charge of joint-and-several liability, they would be forced to join as defendants all other automobile manufacturers and operators, plus the companies who provide the fossil fuels used in vehicles. Those entities would be forced to join the utility companies who use fossil fuels and electricity. Those companies would be forced to join the homebuilders who produce large homes that must be heated and cooled and the appliance makers whose products are powered by electricity. And so on and so on until every company, municipality, and individual who either creates products that use energy, utilizes those products, or simply breathes and exhales air were joined as a co-defendant. And after every man, woman, and child on the globe were so joined, the courts would then be asked to decide who is entitled to damages, who must pay them, and how to allocate the payments and receipts.

This is plainly a recipe for disaster. As the district court in GMC aptly put it, “the Court is left without a manageable method of discerning the entities that are creating and contributing to the alleged nuisance. In this case, there are multiple worldwide sources of atmospheric warming across myriad industries and multiple countries.”

C. The “Federal Common Law” of Public Nuisance Does Not Authorize a Claim for Global Warming

Finally, the “global warming public nuisance” litigation model is also doomed because it presupposes—incorrectly—the existence of a “federal common law” nuisance cause of action to sue for global warming. But, in

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Erie Railroad Co. v. Tompkins, the Supreme Court famously announced that “[t]here is no federal general common law.”\(^{29}\) As the Court explained, “no clause in the Constitution purports to confer . . . power upon the federal courts” to “declare substantive rules of common law . . . be they commercial law or a part of the law of torts.”\(^{30}\) Simply put, the notion that the “federal common law” somehow authorizes a multi-billion dollar tort remedy against U.S. manufacturers for lawful, closely-regulated conduct—conduct that Congress has affirmatively authorized in many cases—is contrary to everything that Erie stands for.

Moreover, even if the “federal common law” of public nuisance could theoretically be stretched to encompass such a claim, it would be displaced by the presence of multiple comprehensive regulatory frameworks—including the Clean Air Act\(^ {31}\) and the Energy Policy and Conservation Act\(^ {32}\)—for regulating CO\(_2\) and other greenhouse gas emissions. This forecloses the federal courts from creating or applying common law in this area altogether.\(^ {33}\)


In our system of government, it is not the role of the judiciary to displace or overrule the policy judgments of the democratically-accountable branches of government. This is particularly true when, as in the case of global warming, those policy judgments concern delicate issues of national and international commerce, security, and foreign policy that are textually committed by the Constitution to Congress and the President. The “global warming public nuisance” litigation model simply overlooks this bedrock separation-of-powers principle.

The Supreme Court’s decision in Massachusetts v. EPA confirms that the proper role of the federal courts in this area is to review regulatory decisions concerning CO\(_2\) emissions and global warming—not to make such policy decisions in the first instance via tort litigation.\(^ {34}\) Regardless of whether one agrees with Massachusetts’s standing analysis or its statutory analysis of the Clean Air Act, it is clear that Massachusetts provides a much better framework than the “public nuisance” model for obtaining judicial review of issues related to global warming. Under Massachusetts, policy determinations are made in the

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29. 304 U.S. 64, 78 (1938).
30. Id.
31. 42 U.S.C. § 7401 et seq.
32. 49 U.S.C. § 32901 et seq.
33. See, e.g., Milwaukee v. Illinois, 451 U.S. 304, 326 (1981) (holding that federal courts are not general common-law courts and do not possess a general power to develop and apply their own rules of decision).
34. See Massachusetts v. EPA, 127 S.Ct. 1438, 1459-63 (2007).
first instance by politically-accountable actors who possess the expertise, resources, and constitutional prerogative to make such decisions, while the federal courts’ role is limited to reviewing such decisions under the traditional “arbitrary and capricious” standard of review of agency action. As the district court correctly concluded in *GMC*, this is the congressionally-authorized “framework for judicial review” to resolve claims related to global warming—not “federal common law” tort litigation.

35. 2007 U.S. Dist. LEXIS 68557, at *33.