The Future of Climate Change Litigation after AEP v. Connecticut

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HENRY N. BUTLER: Okay, good afternoon. We’re ready to continue with the next panel, which is titled “The Future of Climate Change Litigation after AEP v. Connecticut.” I think we’re going to actually talk about a little bit more than climate change; but, it’s a big picture discussion related to public nuisance, and how that can be used, and whether there have been any changes on the ability to use public nuisance litigation as a result of the Supreme Court decision.

We have a great panel here for us, Eric Lasker from Hollingsworth, it’s the firm that was here earlier, will lead us off; Mike Myers from State of New York Attorney General’s office will go next; Rick Faulk from the Gardere firm in Houston; and then, Amanda Leiter from Catholic University here in the Washington area will close out the panel.

Each speaker has ten to twelve minutes, and then we’ll have some discussion on the panel, then it will be thrown open for questions. Please welcome the panel.

ERIC LASKER: Thank you all. I’m going to start our presentation today by giving you an overview of the public nuisance doctrine. And, in particular, how that doctrine has developed or efforts to expand that doctrine over the past ten to fifteen years, to the point where we are today where a climate change case involving global warming for the entire country, or even the entire world, could be brought in one lawsuit against individual defendants.

Now traditionally, public nuisance dealt with an interference with a public right and has existed for over 400 years. The remedy generally was an abatement action. You had a single source that was causing harm to the public at large and you wanted to stop that. That’s the way many of us think about public nuisance and many of you may have dealt with public nuisance, a single source that’s polluting a stream, a strip club perhaps that’s polluting a neighborhood; and, that has been what public nuisance traditionally has been.

But, what happened, starting about fifteen years ago, was that public nuisance expanded to start covering issues that were societal issues, societal wrongs where the idea was that if something is bad for society by some definition, then that is a public nuisance. And, all of these images that are popping up on your screen are industries and areas of our economy that have been tagged by either public officials or private payer attorneys as
public nuisances. And, litigation has been brought against those industries arguing that they should pay for their impacts against society.

So, the first of these, sort of the granddaddy of the new public nuisance is the tobacco litigation, which many of you are familiar with. These lawsuits were filed by the federal government and by forty different state governments. And, the argument there was that the tobacco industry, by providing this product, had imposed Medicaid costs on various states. These public expenditures on public health were a public nuisance that had an impact on the public at large and should be remedied as a public nuisance liability.

That did two things. First of all, it funded what has now been ten or fifteen years of attempts to create the next tobacco model of a public nuisance lawsuit. Secondly, it created this new model of what a public nuisance lawsuit could be.

So, the next area of society that was targeted was handguns. In the '80s and '90s, and some still today, the cost of handgun violence in inner cities became a burden on the public, one could argue, by increasing costs for the police force, and increasing costs for healthcare. And again, the industry, under this argument, has created this public nuisance, this societal bad, and they should be required to pay for that. And municipalities and states across the country brought lawsuits against gun manufacturers arguing public nuisance theory.

Again, the litigation was not going particularly well for the plaintiffs, as far as courts accepting that theory. And then, Congress got involved with gun rights advocates. They passed a statute saying that this litigation was unlawful; you couldn’t even bring these lawsuits. So, that put an end to that avenue.

The next industry that was targeted was the lead paint industry, or the former lead paint industry, manufacturers that had sold lead paint in the early part of the 1900s. The argument here is that by manufacturing this product and selling this product, although it was perfectly lawful at the time, the industry had put lead paint on walls. That lead paint had deteriorated, was now turning into chips, started being eaten by children, and causing all sorts of public health problems. So, the lead paint industry had created this public health crisis again, thus creating a public nuisance theory.

What you also had here, and you had this to a certain extent as well in the tobacco industry, is this marriage between public government officials and the plaintiff's bar, that is, the private plaintiff's bar. Ronald Motley is a plaintiff’s attorney, and he sort of famously announced at the beginning of this litigation that he was going to bring the industry to its knees. And, the goal here now was to get a lot of money for the private plaintiff attorneys. And, that was driving this litigation, it was actually marketed by private plaintiff firms and they went out to the municipalities and sort of sold this business model.
There was one relatively short lived success for the plaintiffs in Rhode Island where they won in front of a jury; and, they moved to the damages phase, which would’ve been about $2.5 billion judgment before that case was reversed by the Rhode Island Supreme Court. All the other courts have rejected this theory except for one; in the California court system litigation is still ongoing.

Prescription drug manufacturers have been targeted in a fairly narrow area for prescription drugs that could be misused as holistic drugs. We’re talking about Oxycodone and methamphetamines; but, the theory is the same. By manufacturing this product, you have contributed to a societal problem of illegal drug use, and therefore, you’ve created a public nuisance and you should be held liable for that public nuisance.

Again, there were some small, relatively small, if you count $10 million as small, settlements; but, the litigation otherwise has not been successful. Once the courts were faced with ruling on the issue, they rejected the theory.

Poultry litter, for those of you in farming communities, is a little bit closer to the traditional model, but the argument here was that large farming companies, by not manufacturing the chicken litter but rather, marketing the chicken litter for its many marketable uses, is causing a public health crisis. And, there’s a regulatory scheme that’s set up for this chicken litter and the legislatures and the regulators have said, “Yes, this is a product, it’s a useful product, and this is how it should be done.”

But, other public officials decided that they didn’t like the regulatory scheme and they decided to bring the industry to court and there was a very long lawsuit, a bench trial that was finished about a year and a half ago. The Court is still noodling over the public nuisance aspect of that case, and deciding whether they will allow that to continue.

If you’ve been following along, over the last three or four or five years, what’s caused the most problem in our society, what’s caused a societal impact? Well, the subprime mortgage crisis brought our economy to its knees. That is a societal bad under this new public nuisance theory. That is now a lawsuit. The City of Cleveland brought a lawsuit saying that the mortgage companies, by creating these subprime mortgages, have caused the city’s economy to crumble, and therefore, they should be held responsible for that in the courtroom, in a single court, under a public nuisance theory. That argument was also rejected.

That brings us to climate change and global warming. The first lawsuits were brought against an automobile manufacturer, like General Motors. The case was dismissed on political question grounds at the district court; and then the EPA regulated specifically in that area, which sort of ended that litigation.

And then, the target went to the power companies and the electrical utilities. And, there’s a series of cases that I know my co-panelists will be talking about in more detail, including the *Kivalina*² case, which is pending
before the Ninth Circuit and oral arguments are going to be in a couple of weeks, and of course, *AEP v. Connecticut*. In the Supreme Court, the Court ruled that the federal common law claims, at least, were displaced by the EPA’s regulatory authority.

So, that’s sort of a very quick journey through public nuisance over the past ten to fifteen years. The question I think that’s particularly important for this audience to consider is what’s going on? Why are we facing this expansive theory in our courts, and should we be worried about this, is this something that’s appropriate for me to be resolving as a court, and why am I facing cases that bring these sort of societal problems into my courthouse?

Well, I think the initial impetus of the new public nuisance doctrine is what Robert Reich coined as a phrase, “regulation through litigation,” which is descriptive of how public officials had tried to get their views enacted through law or through regulation and who were unsuccessful, and decided “look, there’s a third branch of government that if I can’t get it passed in law, I’m going to try and sue my way to get the societal change that I think is appropriate.” There are lots of issues of separation of powers and balance of powers there that give concern, I think it’s not only to me, and I think it should give concern to judges who are protecting the constitutional framework. And, that’s part of the responsibility that I would submit that the judiciary has.

The second issue, which I talked about briefly before, is the marriage between the private plaintiff’s bar and state attorneys general. And, the argument there is that the states don’t have the funding to be able to bring these lawsuits because of all the state budget deficits and the limited funds that they have. Now, I’d argue that states still have a lot of money if the lawsuit is worthwhile; but, private plaintiff’s attorneys who made huge amounts of money in the tobacco litigation are trying to get that one more silver bullet. They only need one, if they win one, they could bring twenty-five or thirty cases, it’s been a successful business model for them.

They’ve joined together and the problem, from my perspective, is a due process one because private plaintiff’s attorneys, appropriately for them, have their own monetary interest in mind. But, that’s not what a public government official should be driven by in making a decision to bring a public nuisance lawsuit. That sort of distortion of the decision making is a problem.

There is one case I would commend to your attention in this area, which is *New Mexico v. General Electric*. It arose in a somewhat unique context of a CERCLA action and a natural resource damages claim under CERCLA. But, in that case, the Tenth Circuit held that having a private plaintiff’s attorney help fund the state attorney general’s claim under natural resource damages was inappropriate because the money that would be recovered wouldn’t go to restore the natural resources, it would go to the plaintiff’s attorney. And that’s not the purpose of this type of litigation.
The final thing I'd point to is this issue of standardless liability because what is really happening in these cases is that plaintiff's attorneys and public officials are saying, "If we're suing over societal harm, then we don't have to show individualized fault, individualized liability, or proximate causation." You don't have to have an individual defendant who took an individual action that hurt an individual plaintiff. You now just have to have an industry that in some way contributed to something that seems to be a societal harm. And, if you frame the question that way, your burden of proof all of a sudden becomes much easier to meet. The stakes are a lot higher, financial stakes are a lot higher, and your burden of proof is a lot lower.

The fact that you have this disconnect, I think also highlights one of the problems with the new public nuisance doctrine. So, with that I'm going to hand the microphone over to Mike, who I think is going to have some different views on some of the issues.

Mike Myers: I think it's fair to say we'll have some slightly different views on—Good afternoon everybody. I'm Mike Myers from the New York Attorney General's office. I was one of the attorneys who wrote the brief on behalf of the state plaintiff respondents in the AEP case before the Supreme Court.

Very quickly, in terms of background, to give you a sense of what we were concerned about. We're looking at a range of different injuries that are either occurring or that we think are likely to occur as a result of global warming and focused on some of the New York specific injuries that we were concerned about. They included a mix of public health impacts: more heat related deaths and illnesses due to the elevated temperatures we expect to see, more respiratory illness because the conditions for the formation of smog are going to be enhanced under global warming, and also, threats to infrastructure, low lying areas, coastal areas (New York City in particular), the subway system, as you can imagine, could be vulnerable to those types of effects.

I was actually interested to see a news report a couple of months ago, where the City of Norfolk in Virginia is confronting these problems now, given how close they are to sea level in terms of planning for what the future of that city is going to be.

So, I think the regulatory context was quite important and, just reading from Justice Ginsburg's opinion in the AEP case she said, "The lawsuits we consider here began well before the EPA initiated the efforts to regulate greenhouse gases." When we filed the lawsuit, which was back in 2004, it was a much different time. It was still the first term of the Bush Administration.

At that point, the EPA was taking the position that they didn't have the authority under the Clean Air Act to regulate greenhouse gas emissions from power plants and automobiles. And, the alternative, if they had the
authority to do so, they were going to use their discretion at that point not to do so.

A lot of people try and make the AEP case out to be some crazy case that had no basis in law. But, really, I think it was fairly simple in terms of our theory and that is, if there's no available statutory remedy, but you have harm, common law nuisance has often filled the void to enable the government, and in some instances, private parties, to abate that pollution. There is a long line of Supreme Court cases that support that.

So, the lawsuit itself, as I mentioned, was filed in 2004 by eight states, three land trusts in the Southern District alleging public nuisance. And, we asserted a federal common law nuisance and the alternative state common law nuisance, from harms caused by climate change. We sued the five largest power plant companies in the country, in terms of their contribution to global warming. They own collectively about 200 fossil fuel burning plants, which emit on the order of about 10% of all the U.S. emissions, or 2.5% of worldwide emissions.

I think, importantly for the discussion today, the remedy that we sought there was a strictly injunctive remedy. It wasn't a damages remedy. It was trying to get a court order to require these defendants to abate their contribution to the public nuisance and specifically, we sought an order requiring them to cap and then reduce their emissions each year for at least a decade.

The defendants moved to dismiss under 12(b)(6), that resulted in a district court decision in 2005 which dismissed the case on grounds that it presented a non-judiciable political question. We appealed to the Second Circuit and in a ruling that was issued three years later, or three years after the oral argument, in 2009, the Court found by a 2–0 ruling, issued by Judges McLaughlin and Hall, that the district court had erred in applying the political question doctrine and finding that our case was not fit for review by the courts.

The Court went on to also consider three other issues that the parties had briefed that also had touched on the issue of subject matter jurisdiction. And those included, standing, whether or not we had stated a claim of federal common law nuisance, and also, the issue of displacement; in other words, whether or not either the statute or EPA actions had displaced what our common law remedy would have been. I'm not going to spend the time to go through each of these slides due to the time we have.

But, I will stop at standing just to make the point that this was a tort case, so some of the judges in the audience may be saying, "Why were they talking about standing in a tort case?" This is a good question. Typically, tort cases you don't think of a type of case where a court would have to deal with arguments that the plaintiff lacks standing.

I mean, you think of the standing law jurisprudence in this country that was developed in response to public law cases that were filed concerning government laws or government actions. The idea with standing was to
make sure that the plaintiff bringing the case had a direct stake in the outcome. Whereas, in tort cases and other similar common law types of cases, proving injury is part of your case. You don’t need that separate analysis of standing. But, because it was an argument that was raised by the defendants, we briefed it and the Court addressed it. So, I think one of the interesting things about this case is thinking about whether or not standing principles have any place in a case at all, with respect to a tort case. Maybe they do in some cases, maybe they don’t at all; but, that was one interesting feature.

So, of the four legal issues that I was referring to, all four were granted cert. The private party defendants petitioned for cert, TVA was a federal defendant that filed a brief in support of the cert petition, and cert was granted. In addition to the four issues that I mentioned, the Solicitor General also invited the Court to take up the issue of prudential standing; arguing that because global warming harms are so far ranging, they present generalized grievances that the courts cannot handle. So, that was essentially another issue that got folded in.

After oral argument, the Court issued its opinion in June 2011, ruling 8–0, with Justice Sotomayor recused. Justice Sotomayor was on our panel before the Second Circuit. She participated in the oral arguments. She was actually the presiding justice at the oral argument. But, by the time the Second Circuit’s decision came out, she had been elevated to the Supreme Court. So, she, for obvious reasons, decided to recuse herself.

Most of the decision, Justice Ginsburg’s decision, focuses on the issue of displacement. But, I think, one of the important pieces of the decision that could get overlooked because it’s such a small part, is some of these threshold issues. With respect to standing, the Court, by an evenly divided court, upheld the Second Circuit’s ruling that at least some of the plaintiffs have standing specifically under the Massachusetts v. EPA case, which was a 2007 Supreme Court case that was brought by Massachusetts, New York, and some other plaintiffs under the Clean Air Act alleging that the EPA was required under the Clean Air Act to regulate greenhouse gas emissions from cars. So, the Supreme Court, four of the justices, found that, that decision applied here as well, and that had the effect of affirming the Second Circuit’s ruling on standing.

The other thing to mention is that the Court said that “No other threshold obstacle bars our review here,” and they dropped the footnote then, which is footnote six of the decision where they specifically identified what they were talking about in terms of threshold obstacles. And, in that footnote, you’ll see a reference to the prudential standing issue that the Solicitor General raised and also the political question argument that had been raised and that the district court relied upon; so again, affirming the Second Circuit’s ruling. So, we were two for two so far, which was a good start, but unfortunately didn’t last.
With respect to the third issue, and that was whether or not the plain-
tiff’s had stated a claim for public nuisance, Justice Ginsburg set out the
issue, I think, in terms of framing what the two sides’ arguments were, em-
phasizing obviously, that the Court does not like to get into the develop-
ment of federal common law, but at the same time, recognizing that there
had been a tradition of common law suits in the area where one state is try-
ing to abate pollution coming from another state. While acknowledging the
two sides of the argument, she then went on to say, “We don’t have to ad-
dress that in this case because we hold that even if the plaintiffs had met the
requirements for pleading a federal common law nuisance claim, we would
find that they were displaced.”

In terms of the displacement analysis, I think the most important lan-
guage is in the third bullet there where the Court says, “The Clean Air Act
and the EPA actions it authorizes displace any federal common law right to
seek abatement of carbon dioxide emissions from [defendants’] plants.”
The Court pointed to a couple of provisions, the one that it found most rele-
vant was Section 111(d) of the Act, which is the new source performance
standards which require the EPA to set emissions standards for categories
of sources; in this case, we’re talking about power plants in the category.

Once the EPA sets standards for new and modified sources, they then
have to issue emission guidelines that states then use to apply to existing
sources. The Court pointed out that EPA had committed to go forward with
rule making under the Section 111(d) provision of the Act next year and
that, frankly, was an event that overtook us during the seven years that this
case took to get to the Supreme Court.

There was an issue of preemption because I did mention we did bring
a state common law nuisance claiming the alternative that the Court did not
address because the parties had not briefed it below. So, that was some-
thing that was mentioned in the opinion, but the Court did not deal with.

One of the cases that Eric mentioned was the Kivalina case, which will
be argued later this month before the Ninth Circuit. That’s a damages
case. It’s not a case where they’re seeking injunctive relief. Kivalina is a
village in Alaska that is being threatened by the rising seas and by increas-
ing severity of storms. They believe, they’ve alleged in their complaint,
that they can trace that harm back to the results of climate change. So,
they’re seeking damages for relocation of their village.

I think, obviously, the Court’s going to confront whether or not AEP
controls that case. And, I think the plaintiffs have a good argument that it
does not. If you look at some of the language that the Court used in its de-
cision, highlighted in these bullets, for example, the Second bullet, the Se-
cond Circuit erred in ruling that federal judges may set limits on greenhouse
gas emissions in the face of a law empowering the EPA to set the same
limits.

Well, you don’t have that with a damages action. The EPA has no au-
thority to assess damages from alleged harms from global warming. So, I
think the plaintiffs have a pretty good argument that *AEP* does not control in that case.

I have one other thing just to quickly wrap up before I turn it over to Rick. One of the things that the Court’s decision stands for, certainly emphasized, I think, is the ball is now in the EPA’s court when it comes to dealing with emissions from the largest sources of emissions for greenhouse gases in the country, and that’s power plants. So, we’ll be watching closely to see what the role is potentially in the future for federal or state common law nuisance based on what the Agency does with respect to those sources. And, I’m happy to take your questions later.

**HENRY N. BUTLER:** Thank you Mike. Rick Faulk.

**RICK FAULK:** I represent a number of organizations, and have been involved in all three of the major cases including the case that arose out of Hurricane Katrina in the Fifth Circuit, the case that was before the Supreme Court, the *American Electric Power* case, and the *Kivalina* case in the Ninth Circuit. There’s been some mention by Michael that the thought in these cases is that where the government has not specifically addressed certain issues by way of statute or regulation, the common law is free to create and invent, and that judges have the unbridled creativity to look at situations and creatively design remedies and procedures by which they can address what they believe to be unreasonable types of conduct.

Well, the Supreme Court laid that to rest in the *AEP v. Connecticut* case because they explicitly found that there was no void to fill. They found that the courts had no business dealing with the regulation of how much emissions of greenhouse gas is going into the environment, and whether the amount was unreasonable or reasonable. Those were not things that courts were prescribed to do. As a matter of fact, Justice Ginsburg was very explicit about it in saying that judges simply don’t have the resources. They don’t have the skills available to them. They cannot commission studies and send people out to do their bidding to report back to them on facts. They do not have the ability to sit through days, and months, and years of hearings while warring parties decide and report back to them. And then, decide what is reasonable on a national basis, indeed a global basis, for any particular emitters to emit into the environment from certain types of facilities.

Let’s face it. Do judges have that time, first of all? Because let’s look at it. Every district judge, every trial judge that has faced this particular issue, whether it be in California, Mississippi, New York, has said, “Kings X, not in my courtroom.” It has said “Kings X” not because it’s hard, but because it is impossible to set these standards in a coherent way to determine whether any particular person at any particular time has contributed sufficient amounts of emissions into the environment, and to actually trace
any cause of a particular injury to any particular person. And, that is what the real problem has been.

Now, it may be, as Michael said, that that issue of standing, because that’s what we’re talking about is standing, that issue of whether anyone has suffered an injury caused by any particular defendant’s conduct has not been decided by the Supreme Court. The truth is that four judges of the Supreme Court thought there was a serious problem there and four justices decided that perhaps the case could go forward with respect to other parties. What’s that? That’s a tie vote.

Do we know what Justice Sotomayor is going to decide when that issue comes from the Kivalina case in the Ninth Circuit? I would suggest not. Do we know what’s going to happen when the re-filed Comer case comes up from the district court in Mississippi in the Fifth Circuit? Do we know what the facts of those cases are going to hold with respect to those cases? I suggest to you that the issue of tracing an injury to any person’s conduct, whether it be Exxon Mobil’s, whether it be from my lawn mower, whether it be from the cows that emit methane gas at my ranch every day, whether I’m responsible for that and to what degree is not a judicial decision.

It is not a judiciable decision, and believe me I’m mindful of the fact that I’m standing here in front of America on record saying, “You can’t do that.” Because most of the time when I tell judges that they can’t do that, I usually get a lot of push back. But, I’m telling you, in these situations, when you’re dealing with a global phenomenon, how can you determine whether the livestock in China are contributing to this event such that they were the cause of the injury as opposed to the emissions from the American Electric Power Plant in Texas?

These are matters that are best decided by the political branches of government. That’s why we have these particular devices available to us. That’s why we have Bismarck, back in the old days saying, “You really don’t want to know how sausage is made, do you?” You really don’t want to know how the legislative process goes because there are compromises that are made in that process that are impossible within a court of law.

You, as judges, have to set down your reasons for why you’re making these decisions and they have to be based upon facts in the record that are examined and reviewed all the way up to the United States Supreme Court. These sorts of decisions, the setting of standards by which people are to be judged on a global basis is not something that’s appropriate for a district court sitting in any particular community in the United States. And, I’m not the only one that said that, every single trial judge that has faced this issue has said exactly that and four justices of the Supreme Court of the United States have said exactly that.

So, before we rush ahead into a new brand of litigation and try to solve the problems of the world in our local courthouses, maybe we should think and maybe we should sit back, chew on it a little bit longer and say to the
Congress of the United States, "This is your job." To say to the American Environmental Protection Agency, "This is your job. You have the resources to do this because this is something that in my courtroom where I have to deal with individual problems, that preoccupy my time from individual people and individual businesses. This is not the scope of a controversy that I want to address."

That sets the stage for what is coming and we'll talk about that amongst ourselves. What's coming? What's the future of this litigation? What's going to happen in Kivalina? I have some ideas about it and we'll talk about it in a minute; but, that is the stage setting I wanted to give you from the defense side as to where we look at these sorts of cases, with all due respect to you guys. Thanks.

HENRY N. BUTLER: Thank you Rick.

AMANDA LEITER: Hi, so I'm Amanda Leiter. I'm actually at American University's Washington College of Law where I teach administrative law, environment law, and torts. I filed an amicus brief in the AEP v. Connecticut case on the side of the states. So, it's no accident that I'm on the left of your panel.

I wanted to start by reemphasizing that these injuries that the states alleged in AEP v. Connecticut are real. You hear regularly about sea levels rising, about loss of coastline, about increasing severity of heat waves, and other extreme weather events. I wanted to personalize it a little bit by telling you what New York is facing and is concerned about. I wanted to tell you a little bit about what the City of Chicago is doing just to make this concrete.

The City of Chicago expects that by the end of this century, its climate will be akin to that of Baton Rouge. They expect 35% more precipitation in winter and spring, 20% less in summer and fall; they expect a drastic increase in heat related deaths, increased storm intensity as I talked about. Also, in a concrete sense, no pun intended, they expect a higher cost of road and building construction and maintenance because of increased freeze-thaw cycles as climate change heats up, so to speak.

One striking fact is that city planners in Chicago no longer plant the state tree, the white oak. They have replaced it with Deep South species, like the swamp oak because that is the Chicago that they expect by the end of this century. So, these are real problems and the plaintiffs are looking for real solutions.

Now, that said, I think the plaintiffs in the case, one of whom is here, so he can speak for himself, but my guess is that they would be the first to say that pursuing these cases through the courts is not their first choice avenue. They have been pushing the EPA to act under the Clean Air Act. They have been pushing Congress to act to give us a better, broader, more
comprehensive, more balanced statutory approach to regulating these kinds of problems.

But, in the absence of those solutions, I think it is historically very much the court’s role to give solutions, to give remedies to private parties that are injured by other private parties’ actions in situations in which the legislature has not acted. And, that is the situation in which *AEP v. Connecticut* was first filed. The Clean Air Act was on the books, but the EPA, at that point, not only hadn’t acted under the Clean Air Act, but in fact took the position, prior to *Massachusetts v. EPA*, that it lacked authority to act under the Clean Air Act. So, that was the position in which New York found itself and Connecticut found itself when this case was first filed.

All right, with that as my personal take on these cases, I want to give you a background on where climate litigation stands in the U.S. and I’m going to step back and take a slightly broader lens than the other panelists. There are some 430 climate cases pending in the United States at this time, of which only the three or four that you’ve heard about actually pose these climate nuisance arguments. One hundred and nineteen of the lawsuits are industry-filed challenges to federal action regulating greenhouse gases. So, the very same industry defendants that are defending climate litigation on the ground, saying that really this is the EPA’s job and the EPA should be doing its job, are suing the EPA right and left every time that the EPA tries to act in this area.

The first of those rules was a light duty vehicle rule that went into effect January of this year. That rule and several other EPA actions in this regard have been challenged in the D.C. Circuit and the court will hear all of those cases in a combined two day ordeal, for lack of a better word, at the end of February. So, for those of you who are in the area February 28th and 29th of next year, they will hear two days’ worth of argument challenging all of the EPA’s actions under the Clean Air Act; actions to date under the Clean Air Act to regulate greenhouse gases.

In addition to those 119 cases, there are about thirty challenges, again by the industry to progressive state regulations in this area, principally to the various actions California has taken to try to regulate greenhouse gases in California. There are close to 100 challenges, now mostly on the other side of the aisle, filed against coal-fired power plants in the country. So, the development of new coal-fired power plants has been brought virtually to a standstill by some combination of those lawsuits, the low price of natural gas right now, and the economy.

There are eighty pending lawsuits over the degree to which state and federal environmental impact statements must consider climate change effects of a federal or state project. And then, finally of course, there are these pending common law nuisance suits and I wanted to say a little bit about where I think those will go in the aftermath of *AEP v. Connecticut*.

The Supreme Court, as you heard, only resolved the federal common law nuisance suits and they did that specifically by saying that the Clean
Air Act and the EPA’s action under the Clean Air Act displaces federal public nuisance law in this area. Those are two important points because first, it’s a political bargaining chip now in Congress, which is working hard to overturn the EPA’s authority under the Clean Air Act.

It is fairly clear from the narrow drafting of the *AEP v. Connecticut* decision that if the EPA’s authority under the Clean Air Act is withdrawn, the federal nuisance suits could be reinstated. Now, of course, that only raises a bunch of additional issues about whether federal nuisance can be proven, etc., but that’s at least one potential bargaining chip that’s out there.

A second point though, is that the state common law nuisance claims are still potentially viable. And, I have no inside information about what’s going to happen with those claims, but my best guess is that the plaintiffs are going to wait and see what the EPA does with respect to regulating greenhouse gases and potentially re-file state common law nuisance claims. There’s a precedent on point, *International Paper Company v. Ouellette* that suggests that there is state common law in these kinds of cases under the common law of the source state, so AEP’s home state, etc. And so, there’s a possibility that these same claims could be pursued under state common law of nuisance.

The second case you’ve already heard a little bit about is *Native Village of Kivalina v. Exxon Mobil*. That was dismissed by the district court as raising a political question, but the Ninth Circuit is going to hear oral argument in that case later this month, November 28th. And the Ninth Circuit asked for briefing by the parties in that case as to whether *AEP v. Connecticut* resolves all of the issues in that case or not. You’ve already heard from Mike Myers, his view that because that suit raises a damages claim, the native village has a reasonably good argument that their lawsuit is not squarely addressed by the *AEP v. Connecticut* decision.

In particular, the Clean Air Act does regulate the emissions of the defendant power plants, but it does nothing to remedy the injury to the village of Kivalina, which is that the village will soon be underwater. They have been told by the Army Corps of Engineers that they have to relocate to the tune of something like $90 to $400 million and they are seeking relocation costs from the fifteen largest emitters of greenhouse gases in the country.

One other interesting point that hasn’t been made yet about *Kivalina*, the Virginia Supreme Court resolved a case just this September in which the American Electric Power Company sued its insurer, Steadfast Insurance Company, claiming that Steadfast has a responsibility under their corporate general liability policy to protect AEP. This protection is to defend AEP, first of all, and then pay any liability that AEP found itself confronted with. The Virginia Supreme Court said no, that climate change is not an occurrence within the meaning of the corporate general liability policy that AEP purchased from Steadfast.

I actually think that development is the most interesting one in this area because the insurance companies nationwide and globally are becoming
increasingly concerned about the exposure they have to climate injuries. I think we may see policy driven in this area principally by changes in insurance company policies and rates, etc., even ahead of whatever Congress and the EPA do.

The last case that remains out there in the climate nuisance area is this *Comer* case, which you’ve already heard a little bit about. This was a case filed by some victims of the Katrina Hurricane against Murphy Oil and a set of other energy companies that they said contributed to climate change, which in turn contributed to the increased intensity of Hurricane Katrina. Obviously, some tricky causation issues were involved in that case, but the court didn’t even get there.

The district court in Texas dismissed that case again on political question grounds. That ground for dismissing the case now probably no longer stands under *AEP v. Connecticut*. It has a sort of complicated history in the Fifth Circuit; a bizarre history in the Fifth Circuit, frankly. As a result of which there is no appellate decision and the case has now been re-filed in the district court and is pending in the district court.

So, I think the short answer for the future of climate change litigation is watch this space. There’s a lot going on, a lot of more issues to be resolved, and I particularly think that the insurance angle on all of this is likely to be where there’s a lot of activity over the next couple of years.

**Henry N. Butler**: Thank you very much. Well, I think we’ve got a lot to talk about here. We’ll start off and just work our way down the, down the line here. And each person will have two minutes to comment and we’ll then see where we go from there.

**Eric Lasker**: Thank you Henry. The issue in the *Kivalina* case is interesting. The argument that because in *Kivalina* the plaintiffs are seeking damages, as opposed to the injunctive relief, is the argument that makes *Kivalina* a more suitable case for public nuisance theory. Think back to my opening slide. Traditionally when, at least a public plaintiff brings a public nuisance action, the only remedy was abatement; there wasn’t a damages action aspect of that. And the argument now is being made that because there’s no damages remedy available under the EPA regulations; therefore, there must be a damages remedy available under common law. But, that has not been the traditional view of the public nuisance doctrine, at least as brought by a public official. So, I think that’s one argument against that theory.

The second argument goes back to one of the other issues I mentioned, which is the marriage of the plaintiffs’ bar and the public officials, which is an issue in *Kivalina*. The Supreme Court’s ruling in the *Cipollone* case, which is that damages remedies can drive public policy, and, in this area—particularly with the magnitude of the damages that could be sought—the particular interest of the plaintiffs’ bar has sort of pushed those theories. A
damages remedy has an equal legislative or regulatory policy effect, potentially as injunctive action. So, I don’t think that argument works for that reason as well.

MIKE MYERS: One of the things I didn’t get a chance to focus on Rick reminded me of it based on his remarks. The real theme before the Supreme Court, both at the cert stage and then at the merit stage, is that if you allow this case to go forward, life as we know it will end. I’m exaggerating slightly, but I mean, it really was a “sky is falling” type of an attitude that really cannot be squared with the cases that have been filed so far.

I mean, there’ve been three or four cases filed and, public nuisance cases are typically brought by the government, by states. And, states neither have the resources nor the interest to bring a lot of public nuisance cases. I think the sort of theme that if the plaintiffs are allowed to go forward and try and prove their case, it’s going to bring down the whole U.S. economy, just isn’t believable.

I just pulled out a quote here from Justice Easterbrook from the Seventh Circuit during a case, where he said “Skepticism about a plaintiff’s ability to prove its claims is not a reason to dismiss a pleading, however, at most, [it’s] a reason to hold a hearing and require the plaintiff to pony up the proof.” So, I mean, I think that was our attitude in terms of this area of cases. Courts have dealt with these issues in the past. This one is more complex than others that have come before it, but it’s not beyond the ability of the judiciary in terms of deciding whether or not these largest sources of greenhouse gas emissions in the country are contributing to global warming.

HENRY N. BUTLER: Mike, I just want to follow up with a quick question about your point about the states and not having the resources to bring these cases—one of the points that Eric had made earlier was about the use of the private contingency fee attorneys. Does that at all change your thinking about whether the states have the resources to bring these things or not? I know a number of the states have been relying on the private attorneys to carry the weight.

MIKE MYERS: Well, I mean, it’s not something obviously we did in this case. So, I really, I mean, my experience in bringing public nuisance cases has really been limited to this case and also, bringing them within my state, so I can’t really comment beyond that.

HENRY N. BUTLER: Okay, and I think Rick can help us out on this as we transition over to him because I know that in the Kivalina case Susman Godfrey has been taking the lead. But, they’re not owned by half of the state I guess.
RICK FAULK: I can talk a little bit about that; the idea that the sky is falling and that this is a looming, impending terrible catastrophe. I can only go back to the fact that several years ago I was sitting in a CLA meeting at lunch in Houston, at the Houston Bar Association Environment Group. And, one of the lead counsel for the City of Kivalina was speaking and the comment was, “I missed out on tobacco litigation. I’m not going to miss out on climate change.”

So, when you think about it, what’s the old saying, “You’re not paranoid if they’re really out to get you?” That’s what is going on here, there is an immense interest here, obviously, and there’s nothing wrong with contingency fee lawyers. I’m not going to get into that, but there is an intense interest here and the interest is certainly in the interest of justice, but there are also huge sums of money involved in these situations. So, we can’t, whatever that means to anyone who hears that should make their own judgment.

I would want to, I do want to challenge one thing that Amanda brought up, the fact that these injuries are real and that global warming and climate change are real phenomena. It is one thing to say that here, it is one thing to say that anywhere; but, when you walk into a court of law, whether those injuries are real, whether global warming and climate change are real and whether mankind has anything to do with it, has yet to be determined. And, that will not be determined until, if ever, we have the mother of all Daubert hearings, which will unquestionably consume innumerable days, months, perhaps years in courtrooms. And then, who knows how long in the appellate courts to determine whether, in fact, all of this is really true from a legal point of view.

As a matter of fact, where we are right now, there are about five steps of where we are right now. Right now, we’re just trying to decide who’s going to make that determination. That issue has not even been decided. We’re also trying to decide, after that, who’s responsible for global climate change? And, after that, we then have to decide who’s responsible for the particular injury that the person who’s claiming damages in the lawsuit; who’s going to pay for that? I guess after that, we then have to decide what in the world are we going to do to determine the degree to which any particular person is responsible for this situation?

In other words, in a comparative responsibility world, that’s exactly where the law is, who in the world is going to decide what percentage is going to be assigned to whom? And, what about all these people out there who are contributing to this situation who aren’t before the court? What are we going to do about those sorts of situations? And, I guess finally, once all that comes down, some jury, perhaps many juries somewhere, perhaps 100s of juries, 1,000s of juries, are going to have to decide whether, in fact, someone gets damages in this situation. And then, appellate courts are going to have to weigh in.
And then, somehow, does anyone believe that that patchwork quilt of jurisprudence is going to really answer the question? Is it really going to solve the question? Or, is it simply an exercise in financial enterprise translated into jurisprudence? Is that really what we’re talking about?

And, we’re talking about here, in the final analysis, people’s lives certainly, businesses certainly, and is this something that we want to transform our judicial system into? I won’t make that decision. I’m an advocate folks. You will make that decision. And, believe me, I understand that that’s going to be a very difficult thing for you folks to decide. I don’t minimize it. I thank you for hiring on to do it.

HENRY N. BUTLER: Amanda?

AMANDA LEITER: So, I have a couple of thoughts. One is that I do sense, and this is, this is my close reading of AEP v. Connecticut rather than my personal view. I sense some reluctance on the part of Justice Kennedy, at the very least, perhaps the whole Court, to recognize standing in anyone other than a state. So, my guess is that, after a period of years when some more cases make their way back up there, this is a cause of action that will be more clearly limited to state plaintiffs; in part because the state, of course, is representing the interests of their citizens, as opposed to individualized interest.

I think the “sky is falling” rhetoric is overblown. Courts are very capable of dealing with this. They have very handily thrown out all of the cases that have been filed thus far. If one makes it through and makes it all the way it will be because probably, it’s a state plaintiff, it’s a narrow set of injuries that are easily proven, and the range of defendants that is sued will be a range that sort of adequately represents a high enough percentage of the greenhouse gas emitters in this country; that we do have some sense that you’ve sued the right defendants, the folks who are substantially contributing to the harm. Courts have been resolving these issues in other contexts for centuries and this is just another case in a slightly different context.

Now, that said, I don’t like the notion of a patchwork solution to climate change. I don’t think that that’s the best way to get to any sort of comprehensive, reasonable, and well balanced solution here. We all contribute. I drove here to this meeting today and that’s one of the concerns that I know the courts have, that everyone is a potential victim and everyone is also a potential perpetrator. We need a legislative solution.

The last point I would make is that the states, I think we’re very aware that one thing they were doing in filing this suit is creating a few more poker chips for use in the legislative bargaining, right? That is, that the defendants on the other side of this lawsuit probably would also rather have a legislative solution than face endless and endless series’ of lawsuits.
HENRY N. BUTLER: Does anyone else want to comment on any of these comments on this panel? I’m ready to go for some questions now.

AUDIENCE MEMBER: This is a question for the defense bar. Is this a problem because of public plaintiffs? Or, is this a problem because the litigation is over climate change? Because for years, I’ve heard folks from the defense side say that this whole regulatory state is really illegitimate because it displaced the public nuisance litigation approach that had been in place and adequately resolving the allegation that smoke stacks cause injury to my health and my property. That was considered adequate for a long time.

RICK FAULK: Let me try to answer your question this way, and Eric touched on it in his opening slides. Professional James Henderson, who is the drafter of the third Restatement of Torts, has written a series of comments, and it’s pretty interesting. His concern is that when we get into a situation that involves a cause of action, which has no standards to govern its resolution, other than those that are ad hoc, creatively designed, and administered by the courts; then, you have a form of standardless liability. And, that is really not even a lawful situation. He calls that, “A lawless situation” because you’re retrospectively imposing liability on the basis of standards that didn’t even exist at the time the party was engaging in the conduct. And that is a serious problem.

One of the problems is raised by the political question doctrine. In other words, there have to be standards and rules by which liability is going to be determined. And, it’s one thing to say, “Oh, public nuisance is an ancient tort.” But, the specific standards that would be applied in this sort of a case would be creatively designed and administered ad hoc by judges throughout the country. I just don’t see that that is a judiciable situation. That’s where I come from in this situation.

It is one thing to have a set of regulations, and you violated a set of regulations. It is one thing to have a whole set of standards out there that you can be judged by. But, to have it sprung on you in retrospect is simply not fair.

ERIC LASKER: Let me just add to another aspect of what your question was, which is the concerns certainly that I have with the new public nuisance doctrine; it’s not that there was a factory that polluted the groundwater underneath a particular property and caused damage. Depending on the facts of the case, that’s a perfectly appropriate lawsuit.

What’s happened in the sort of the new public nuisance doctrine is you have a problem with society at large and there are certainly people you could point to who may have contributed to that, but, you can’t say that they caused the problem at large, they’re just in the chain somewhere. And you can’t say that what they did linked up to the individual damage of the
individual plaintiff. That’s where we get to this sort of standardless liability where you don’t have sort of that traditional model that all of you are much more comfortable with.

Maybe, I’m not, as we’re going through quoting on the private plaintiff attorneys, saying “You don’t need a regulatory state,” but, that, the distinction between that individual factory, individual property owner situation, and this sort of global public nuisance theory is where I have my biggest problem and where the standardless liability issues come to the fore.

MIKE MYERS: If I could just take that up for a minute or two?

HENRY N. BUTLER: Is this a defense perspective?

MIKE MYERS: No, no, you wouldn’t want to leave the panel unbalanced. I think, first of all, I come at this from a totally different perspective from Eric. I mean, I come at this from a perspective of, states beginning in the 1800s were using public nuisance to deal with pollution, not just from one factory, but from multiple factories. So, the question, the problem of multiple defendants who contribute to a single harm is not anything new.

There have been references to standardless liability, but we have, over time, developed things such as the Restatement of Torts, which is based on cases that have evolved over the last several hundred years where the courts have come up with principles. And, things such as, how do you deal with a situation where you have multiple defendants who are contributing to a harm? So, those are the types of things that we would have pointed the court to if we had gone forward with the case under federal public common law nuisance. I guess I’ll leave it there for now.

AMANDA LEITER: I want to say one more thing too, which is, you can’t lump all of these cases together; even just putting on my torts professor hat for a minute. There’s a very big difference between the Comer case, where the plaintiffs are alleging that the particular circumstances of Hurricane Katrina were caused by particular emissions from the defendant power plants.

That’s obviously a much harder causation argument to make than New York’s argument or Connecticut’s argument in AEP v. Connecticut that we face an increased risk of a series of climate injuries as a result of, what I think is a well proven causation link. You may need a Daubert hearing, but just about every expert willing to testify would say there was causation between the emissions of the defendants in AEP v. Connecticut and the future harms that New York anticipates.

HENRY N. BUTLER: Okay, next?
AUDIENCE MEMBER: My question is more mundane, but it goes to the point that Professor Leiter finished her presentation with, and that is the role of the insurance companies. And, perhaps especially, Mr. Myers, I know this isn’t going to interest you that much, but in terms of, pardon the expression, seeing which way the wind is blowing, are the carriers picking up now, and especially the excess carriers in saying, “We’re with you on products liability guys, but forget this public nuisance. We’re not going to cover you on that.” Because that seems to me would foreclose a great deal of this.

HENRY N. BUTLER: Amanda, you want to talk about it?

AMANDA LEITER: Foreclose?

AUDIENCE MEMBER: If there’s no insurance there—I’m leaving aside the self-insured obviously and the large deductible companies, I’m not talking about that, I’m just talking about the deep pocket, which is obviously the insurance carrier in many cases—are they stepping in now to try to tighten their policies?

AMANDA LEITER: Well, they’re certainly stepping in. I mean, this Virginia case was the first climate insurance case to be resolved. So, we don’t know which way the wind is blowing, but it very squarely held that—and it’s the Virginia Supreme Court, so it’s the end of the case—under the comprehensive general liability policy that that AEP held, Steadfast was not obligated either to defend or to cover any climate liability that AEP may have.

I question whether that forecloses the lawsuits frankly because I question the premise that a lot of this is being driven by the plaintiffs’ bar. I think if you look at where the economic incentives lie with respect to climate change, they are very much on the other side.

ERIC LASKER: I guess, the one thing I’d say is about foreclosing the litigation also is I don’t think the fact that Exxon may not have insurance coverage is going to really discourage a plaintiffs’ attorney, who has a financial interest.

RICK FAULK: One of the problems though, I mean, let’s just be honest about this, there is a sense, and maybe people disagree with this, there is a sense that when it comes to a situation where physical harm has been sustained, when a problem can be solved by money and there’s money available to solve it, then there’s not a problem. And, that’s just not true. That, to me, is personally nonsensical. Just because someone can create a mass controversy doesn’t mean that people should pay millions, and millions,
and millions of dollars just to get rid of it so they can go on and do their business.

Surely, there has to be some rational, realizable, standard, governed procedure by which all of us can come to an intellectual resolution and to home and feel comfortable that justice has been done. Justice is not just a transfer of wealth between insurance company and insured to injured party. It's a lot more complicated than that and I know all of you guys know that.

But, for those of us who have been raised in this system and have practiced in it and done all this for all these years, there's got to be more to this situation than a transfer of wealth. To me, there is an underlying current somewhere going and I don't know who's pushing it. I don't want to put blame on anybody, but that current is wrong. And, that is what I stand against here. I want a rational reason for making a decision to give relief or to deny relief, not one that is simply expedient. And, I think that's it.

**AMANDA LEITER:** I want to jump in and say I filed my amicus brief pro bono, just—

**RICK FAULK:** Good for you.

**AMANDA LEITER:** One sort of interesting intellectual point on the insurance question is one that the Comer case now raises, as a complaint, the fact that the plaintiffs in Louisiana are finding it very difficult to obtain personal homeowner insurance, flood insurance, etc., because of the risk of climate change. Insurance companies are making it far more expensive to obtain insurance against events, weather events like Katrina, because of climate change. And so, that actually now is increasing the requests on the plaintiffs side, as opposed to the reverse.

**RICK FAULK:** Well, I guess, to one extent that it points out there's no such thing as a free lunch here, right?

**AMANDA LEITER:** Right.

**RICK FAULK:** And this litigation is going to have tremendous consequences. And, the wealth transfer story is one that we need to really think through as well. We're taking money, I mean the simple story, we're taking money from large utilities and we're going to pay the money to states or are we going to pay it to individual claimants? And, I imagine the first people in line as individual claimants could be, "Hey, I own this nice island in the Florida Keys, personally. I'm a billionaire and I'm—that's going to become worthless. Now, I'm first in line. That's the first one under water."

So, it's not like when you start taking wealth distribution into account, you got to really start identifying who the parties are, who's been harmed, as opposed to a real aggregation, a big chunk of wealth from one group to
another group. As you pointed out, a lot of people are on both sides of this equation. So, it’s got a lot of misallocated effects of this. And, I don’t know of any economists who could figure it out, but maybe our judges can. Next question?

Audiencemember: This may be a question from reality T.V. If the power companies are polluting and we’re breathing that air, power companies are allowed to have a certain return on their investments and operations. We, as consumers, pay rates that provide a profit for those companies. So, we basically will be paying so that we can breathe cleaner air.

Rick Faulk: That’s a part of the economic analysis. I mean, when someone fixes rates, they get a rate of return that’s decided by the citizens themselves typically in a public utility commission situation. But, whether in fact, the air you’re breathing is actually polluted as a result of your local power company or by the one in China when the wind is blowing around the earth at hundreds of miles an hour, who knows?

Eric Lasker: Just another thing I’d throw in here because I think it bears repeating; the fact that there are harms in society doesn’t mean that the judiciary is the branch that’s supposed to address those harms. There are certainly harms that, if the state legislature was to come in, in a slip and fall case and pass a statute saying the plaintiff wins, I think you’d all have problems with that. That’s the role of the judges. There’re roles of the legislature, and the regulatory, and the executive to help society. Now, people may argue that lately they haven’t been doing a great job at that, but that’s their role and that’s the way our system is set up; to have different branches of government addressing different types of problems. And so, it may be that, you want to have a carbon tax, you want to have some sort of extra fee to address a societal issue. But, that doesn’t mean that a court is going to impose that tax or is the proper body to impose that tax.

Mike Myers: Well, and I think one of the interesting things that came out of the Supreme Court’s opinion was you didn’t have the majority of justices who took that view. If you’re going to get rid of the case on a threshold basis, be it standing, political question doctrine, there were certainly plenty of very well written briefs on the defense side articulating why that should happen. Yet, that only commanded the view of four of the justices in the case. It was the actual merits—I mean, merits in the motion to dismiss context, but, nonetheless, the merits in terms of whether or not the federal common law claim had been displaced—which was the one that got eight votes.

Henry N. Butler: Please join me in thanking the panelists—that thank you very much.
RICK FAULK: The flogging will continue after a twenty minute break.

HENRY N. BUTLER: Thanks.

AMANDA LEITER: Thank you.

ERIC LASKER: Thank you, all right.

2 Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir. 2011).
10 Id.
13 The speaker is paraphrasing Justice Ginsburg. See id. at 2537.
14 Id.
17 Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009).
19 Kivalina, 663 F. Supp. 2d 863, appeal docketed, No. 09-17490 (9th Cir. Nov. 28, 2011).
20 131 S. Ct. at 2537.
21 585 F.3d 855.
28 Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009).
Alliant Energy Corp. v. Bie, 277 F.3d 916, 920 (7th Cir. 2002).