Sustainability & Climate Change Reporter

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Posted at 1:27 PM on June 1, 2010 by Mike Nesteroff

A Non-Decision Decision on Climate Change Litigation

The U.S. Fifth Circuit Court of Appeals on May 28th issued a decision (PDF) that will warm the heart of an appellate lawyer, but leave the rest of us scratching our heads. On Friday, the court dismissed the appeal in the *Comer* climate change lawsuit, but not on the merits of whether the courts should hear lawsuits challenging companies' contributions to climate change. Instead, the dismissal was based on the intricacies of procedural rules for en banc review and quorums. The result eliminates one of the two landmark climate change appellate decisions, leaving only the Second Circuit's decision in *Connecticut v. AEP* to allow such lawsuits and a question whether the Supreme Court will consider the issue.

Background

In *Comer* the plaintiffs alleged that energy companies' greenhouse gas emissions had caused greater damage from Hurricane Katrina. The plaintiffs asserted claims for nuisance, trespass and negligence. The district court dismissed the case on grounds that the plaintiffs lacked standing and the claims involved political questions to be resolved by the executive and legislative branches. Last October, a three-judge panel of the Fifth Circuit reversed and reinstated the claims. In so doing, the Fifth Circuit joined with the Second Circuit in allowing climate change claims to proceed in the trial courts. In late February, however, the Fifth Circuit granted rehearing en banc, signaling a potential reversal and, if so, setting up a classic "conflict of the circuits" primed for U.S. Supreme Court review.

Majority Decision

Between the time the court voted for en banc rehearing and the May 28th decision, one of the six judges who had voted for rehearing declared herself recused, which meant that fewer than a majority of the 17 active judges of the Fifth Circuit were left to hear the case.

In a short four-page decision, five of the remaining eight judges said there was no quorum and, therefore, the court had no option other than to dismiss the appeal. Because a local rule vacates

the original panel decision upon acceptance of en banc rehearing, the original district court dismissal decision remains intact.

In their ruling, the majority outlined five options it considered and rejected:

- Ask the Chief Judge to appoint a judge from another circuit -- the court said that it was precluded by its own case law and statute from doing this.
- Declare a quorum under Fed.R.App.P. 35(a) -- the court said a quorum is a majority of the 17 regularly active judges in the circuit, not just as a body of non-recused judges. Eight of the 17 immediately recused themselves from voting on the en banc request, leaving a bare majority of the court. When one of the remaining nine recused herself, there was no quorum of the full court, even though there still would have been a quorum of the non-recused judges.
- Adopt a rule of necessity and allow disqualified judges to sit-- the court said there are no rules for doing this and it was not appropriate since the case might end up in the Supreme Court.
- "Dis-enbanc" the case, reinstate the panel order and issue a mandate -- the court said the case had been properly voted en banc, but now was without a quorum to conduct any judicial business and no authority to rewrite established circuit rules.
- Hold case in abeyance until composition of the court changes -- the court said there was no way to know when the current vacancy would be filled or if that judge would be recused and, in any event, decision should be made as promptly as possible.

Davis Dissent

Judge W. Eugene Davis wrote a dissent, in which Judge Carl Stewart joined. Judge Davis argued that the local rule the majority relied on for vacating the panel decision was not intended to apply in a situation where the court, after voting a case en banc, loses its quorum and does not consider the merits of the appeal. According to Judge Davis, the rule is intended only to alert practitioners and the courts that a panel opinion is not precedential pending consideration by the en banc court.

Judge Davis asserted that a judge from another circuit could have been appointed because the Acting Chief Judge was willing to request the Chief Judge designate a temporary judge if a majority of the eight en banc judges asked for it.

Dennis Dissent

Judge James Dennis wrote a lengthy separate dissent. He referred to the majority decision as "shockingly unwarranted," "drastic," "precipitous" and "contrary to law and Supreme Court precedents." He said in a footnote: "If we lack a quorum, then the group of judges who are purporting to issue the order of dismissal cannot issue such an order any more than a single circuit judge can dismiss a case on behalf of a three-judge panel."

Judge Dennis said the majority interpretation concerning the statutory definition of an en banc quorum was "implausible" and contrary to the established rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." He also argued that it is contrary to common sense and fairness, as well as "injudiciously mechanistic and arbitrary," to dismiss the appeal with the apparent intention to reinstate the district court's order dismissing the case even though a panel had already held the district court erred.

What's Next

The majority in the dismissal decision said that the parties still had a right to petition the Supreme Court for review. One of the primary, but not only, bases for certiorari is to have a court of appeals decision that is in "conflict with a decision of another United States court of appeals." This case, however, is not a clear-cut conflict. The dismissal in *Comer* was on procedural, not substantive grounds, and there is no decision on the merits by the Fifth Circuit that conflicts with the Second Circuit *AEP* decision. It appears that the result here may have created a more difficult hurdle to overcome for the appellants in *Comer* to obtain Supreme Court review of the district court decision.

That still leaves the *AEP* case as a potential for bringing the issue to the Supreme Court, but there has yet to be a petition for cert filed in that case. The petition for cert was due June 8, but now has been extended by a month.

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