



## U.S. Supreme Court Curtails Claims against Carbon-Dioxide Emitters

By Elizabeth Hamrick and Sid Trant

In a case last year, the United States Supreme Court held that plaintiffs *cannot* maintain nuisance claims against carbon-dioxide emitters based on federal common law, curtailing claims that may be brought against power companies and other emitters of greenhouse gases. The Court, however, did not decide whether plaintiffs can maintain nuisance actions against carbon-dioxide emitters based on state law, leaving that question open for consideration.

In *American Electric Power v. Connecticut*, 131 S.Ct. 2527 (2011), eight states, New York City, and three private land trusts sued four private power companies and TVA. The plaintiffs alleged that the defendants were the “five largest emitters of carbon dioxide in the United States.” Because the defendants allegedly contributed to global warming, the plaintiffs asserted that their carbon-dioxide emissions constituted a “nuisance” under federal common law. As such, the plaintiffs sought a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.

The Court, however, held that the Clean Air Act (CAA) and EPA action the CAA authorizes “displace[d] any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.” The Court noted that “[t]he critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.” Therefore, the CAA displaced federal common law *even before the EPA actually exercised its regulatory authority* under the Act—or even if the EPA declined to regulate carbon-dioxide emissions altogether at the conclusion of its rulemaking.

The Court did note that none of the parties had briefed the issue of whether the CAA preempted the *state law* claims and left the matter open for consideration on remand—an important legal question whose resolution may have far-reaching implications for entities that emit greenhouse gases and one that we will be watching closely. Corporations and entities facing potential claims related to the CAA may wish to contact Sid Trant or another member of the Environmental & Toxic Tort Practice Group at Bradley Arant Boult Cummings LLP.

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