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Client Alert

Climate Change Task Force

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Supreme Court Issues Decision in *American Electric Power Co. v. Connecticut* *Clean Air Act Displaces Federal Common Law Claims Concerning Climate Change*

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Today, the Supreme Court issued a decision rejecting an attempt to hold private companies liable in tort for greenhouse gas emissions alleged to contribute to global climate change. In an 8-0 decision, the Court held that federal common law nuisance claims for climate change impacts are displaced by the Clean Air Act's delegation of authority to EPA to decide whether and how to regulate greenhouse gas emissions. The Court remanded the question of whether a state law-based nuisance action could proceed. Climate change-related tort litigation under nuisance was dealt a significant blow leaving open the question whether state law nuisance remedies can support these unwieldy and unprecedented claims.

Background

In this case, several states, the City of New York, and two private land trusts sued five utility companies and the Tennessee Valley Authority on the theory that greenhouse gas emissions from the utilities' power plants contribute to climate change and therefore constitute a public nuisance under federal common law or, alternatively, state common law. The plaintiffs sought an order capping the defendants' emissions and requiring further emissions reductions "by a specified percentage each year for at least ten years." Dismissing the lawsuit, the district court held that it could not adjudicate the plaintiffs' claims because they presented non-justiciable political questions, involving the "balancing of economic, environmental, foreign policy, and national security interests," that the political branches of government, not the courts, are empowered to perform.

On appeal, the Second Circuit reversed. It concluded that (1) the political question doctrine does not apply; (2) the plaintiffs had standing because the states were suing in a *parens patraie* role and because all plaintiffs alleged that the defendants' emissions had contributed to their claimed injuries; (3) the plaintiffs had stated a claim for federal common law nuisance in light of Supreme Court precedent holding that states may maintain suits to abate pollution produced by other states or out-of-state industry; and (4) the Clean Air Act did not "displace" the plaintiffs' federal claim because EPA had not yet promulgated final regulations controlling greenhouse gas emissions.

Today's Decision

The Supreme Court's decision first addressed the jurisdictional question and, on that issue, affirmed by an equally divided Court (with Justice Sotomayor recused). Delivering the Court's opinion, Justice Ginsburg noted that "[f]our members of the Court would hold that at least some plaintiffs have Article III standing" under *Massachusetts v. EPA*, 549 U.S. 497 (2007), and "that no other threshold obstacle bars review," while four members of the Court, "adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing."

On the merits, the Court unanimously concluded that, even assuming an action for nuisance might exist as a matter of federal common law, it is displaced by the Clean Air Act. The Court squarely rejected the argument, accepted by the Second Circuit, that federal common law is not displaced until EPA sets standards governing emissions. Instead, the Court emphasized that the relevant inquiry for purposes of displacement is "whether the field has been occupied, not whether it has been occupied in a particular manner." Because Congress had enacted the Clean Air Act, delegating authority to EPA to decide whether and how to regulate greenhouse gas emissions, the appropriate avenue for seeking relief in the federal courts from alleged greenhouse gas-related injury is not through a federal common law nuisance suit, but rather through a petition for review to the D.C. Circuit challenging EPA's eventual rulemaking decisions.

The Court nonetheless left open the possibility that the plaintiffs might be able to proceed with state law tort claims, noting that, upon remand, a threshold issue to be resolved is whether the Clean Air Act has preemptive effect with respect to state law claims. Because the parties had not briefed preemption or otherwise addressed the viability of the plaintiffs' state law nuisance claims, the Court left the matter to be resolved by the lower courts on remand.

The Court's decision leaves unanswered several significant questions relevant to utilities and other significant sources of greenhouse gas emissions. Although the Court has eliminated the specter of a federal common law nuisance action, going forward, parties involved in greenhouse gas tort cases will have to consider the following matters (among others):

- **Standing.** The Court's decision does not address the question of standing in the context of cases in which no state is a plaintiff. That the standing issue was decided by an equally divided Court suggests that, from the perspective of at least one of the Justices, the presence of a state as a plaintiff was dispositive. The Court's decision thus supports a conclusion that five or more Justices would dismiss on standing grounds any climate change-related tort action brought entirely by non-state plaintiffs.

- **Viability of Political Question Defense.** The Court's decision also did not squarely address the political question doctrine, except to suggest that at least four Justices do not believe that it poses a bar to judicial review. It thus remains to be seen whether courts outside the Second Circuit might be receptive to arguments that climate change nuisance suits are barred by the political question doctrine.

- **Choice of Defendants.** Going forward, federal jurisdiction will almost assuredly require complete diversity of the parties. Plaintiffs, knowing that they cannot proceed with federal common law claims, may selectively sue emitters to have state law claims adjudicated in strategically chosen state courts.

- **Preemption.** The Court's focus on the preemption issue presents a new challenge; whereas the law has a presumption in favor of "displacement" of federal common law, a presumption exists *against* preemption of state law claims. Parties can expect the next round of the climate change nuisance tort wars to shift to state court remedies and the question of whether state courts are any more suited than federal courts to establish GHG limits.

King & Spalding represents parties in climate change-related tort lawsuits. We also represent parties in regulatory and administrative proceedings regarding regulation of GHG emissions. Please contact us to discuss the *AEP* decision or any other climate change issues you may be facing.