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Environmental Alert: The Second Circuit Reinstates Global Warming Federal Nuisance Claims against Utilities: Connecticut, et al. v. American Electric Power Co., Inc., et al.

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On September 21, 2009, in a 140-page opinion, the Second Circuit Court of Appeals reversed the district court's dismissal of global warming federal nuisance claims brought by eight states, the City of New York, and various environmental groups against six electric power companies in the case of *Connecticut, et al. v. American Electric Power Co., et al*.[1] The plaintiffs are seeking abatement of defendants' emissions of greenhouse gases that allegedly contribute to the public nuisance of global warming. In 2005, the district court held that the plaintiffs' claims presented a non-justiciable political question and dismissed the action.

New York Attorney General Andrew Cuomo released a statement: "This is a game-changing decision for New York and other states, reaffirming our right to take direct action against global warming pollution from power plants. Today's decision allows us to press this crucial case forward and address the dangers posed by these coal-burning power plants." California Attorney General Jerry Brown called the decision a "critical milestone."

The decision must be welcomed by the plaintiffs in another global warming suit, *Native Village of Kivalina v. Exxon Mobil Corporation, et al.*, pending in the Northern District of California, since motions to dismiss on federal nuisance claims are under advisement. Indeed, on September 23, 2009, the plaintiffs in *Kivalina* moved for leave to submit the recent decision of *American Electric Power*.

The *American Electric Power* decision may mark the beginning of a surge of climate-related litigation that some prognosticators have warned will be the "new asbestos" and could prompt administration officials, Congress, and industry and environmental groups to reach agreement to pass preemptive federal greenhouse gas legislation.

The Complaints

In 2004, eight states—California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin—and the City of New York brought suit in the Southern District of New York against American Electric Power Co., Inc., Southern Company, TVA, Xcel Energy, and Cinergy Corp. The complaint sought "abatement of defendants' ongoing contributions to a public nuisance" under federal common law and state law. It was asserted that defendants are "substantial contributors to elevated levels of carbon dioxide and global warming," as their annual emissions comprise "approximately one quarter of the U.S. electric power sector's carbon

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dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States." The states further contend that defendants have "practical, feasible and economically viable options for reducing emissions without significantly increasing the cost of electricity for their customers." The complaint alleges both present and future injuries, such as the reduction of California's mountain snow, decrease in average snowfall in New England, increased illnesses caused by intensified heat waves, increased smog, beach erosion, and accelerated sea level rise.[2] The environmental groups' complaint mirrors that of the states. Brought by three land trusts and the Audubon Society of New Hampshire, the plaintiffs allege special injuries to specific properties in which they have an interest due to defendants' contributions to global warming.[3]

The District Court's Decision

The district court (Preska, J.) dismissed the consolidated lawsuits, interpreting the defendants' argument that "separation-of-powers principles foreclosed recognition of the unprecedented nuisance action plaintiffs assert" as an argument that the case raised a non-justiciable political question. The Court decided that the causes of action were "impossible to decide without an initial policy determination of a kind clearly for nonjudicial discretion." In order to grant the relief requested—capping carbon dioxide emissions—the Court said that it would first need to impose by judicial fiat the kind of relief that Congress and the Executive Branch have refused to impose regarding the appropriate level at which to cap emissions, and the schedule to implement the reductions; and to balance such relief with the United States' ongoing climate change negotiations with foreign nations. All of this, the Court said, was an undertaking for the political branches, which were charged with the "identification and balancing of economic, environmental, foreign policy, and national security interests."[4]

The Second Circuit's Reversal

After considering Judge Preska's decision for three years, the Second Circuit, in a unanimous two-judge ruling, found that there is no need to defer to the political branches and refrain from hearing the cases.[5] In sum, the Court held that:

1. plaintiffs' claims do not present a non-justiciable political question
2. plaintiffs have standing
3. the complaints state claims under federal common law of nuisance
4. plaintiffs' claims are not displaced by federal statutory law.

In rejecting the non-justiciable political question argument, the Second Circuit looked carefully at the specific relief sought by the plaintiffs:

Nowhere in their complaints do plaintiffs ask the Court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. [footnote omitted] Instead, they seek to limit emissions from six domestic

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coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing, and will continue to cause them injury. A decision by a single federal Court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy (assuming that emissions caps are even put in place).[6]

The Court found that well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing plaintiffs' claims and the federal courts are competent to deal with such discrete issues.[7]

On the question of standing, the Court noted that states may bring suit in federal court on the basis of a proprietary right—much like a private party suffering from a direct, tangible injury, or on the basis of *parens patriae* in which states litigate to protect quasi-sovereign interests.[8] The Court noted that the states are not mere "nominal parties," but rather are seeking to safeguard public health and resources: "their quasi-sovereign interests involving their concern for the health and well–being—both physical and economic—of their residents in general [citation omitted] are classic examples of a state's quasi–sovereign interest."[9] The states, City of New York, and environmental groups also sufficiently alleged standing in their proprietary capacities by specific allegations of present and future injuries.[10]

In an extended discussion of the federal common law of nuisance, the Court rejected defendants' arguments that such actions exist only for "simple type" nuisances involving substances that cause immediate, localized harms directly traceable to out-of-state sources.[11] Relying on the Restatement (Second) of Torts § 821 definition of public nuisance, the Court held that it is sufficient to allege an "unreasonable interference" with "public rights." In the complaints, plaintiffs allege that the defendants' emissions constitute continuing conduct that may produce a permanent or long-lasting injury, and that defendants know or had reason to know that their emissions have a significant effect on a public right. The Court held that such allegations are sufficient to state a claim of public nuisance.[12]

On the question of displacement, the Court found that plaintiffs' public nuisance claims are not displaced by the Clean Air Act (CAA) and other environmental statutes. Defendants argued that federal regulations that require scientific research, technology development, and reporting of emission levels by electric utilities sufficiently address global warming and carbon dioxide emissions, such that the federal common law of nuisance has been displaced because Congress has "legislated on the subject."[13] Noting that the Supreme Court ruled, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the EPA has statutory authority to regulate greenhouse gases as a "pollutant" under the CAA, the Court cited to the fact that the CAA requires regulation *only if* the EPA determines that the emissions of greenhouse gases "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." At this time, the Court said, the EPA has not made any such findings.[14] The Court "cannot say, therefore, that the EPA's issuance of proposed findings suffices to regulate greenhouse gases in a way that speaks directly to plaintiffs' problems and thereby displaces plaintiffs' existing remedies under the federal common law."[15] Analyzing other environmental regulations, the Court found that neither Congress nor the EPA has regulated greenhouse gas emissions from stationary sources in such a way that federal nuisance claims are displaced.

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Within days, the Second Circuit's *American Electric Power* decision was trumpeted as "game-changing" and a "critical milestone" by the Attorneys General of New York and California. Many of the same issues are in play in the case of *Native Village of Kivalina*, where motions to dismiss have been briefed and are under advisement. The Court meticulously sets forth the legal basis of asserting global warming claims against domestic defendants. Whether such claims will survive discovery and trial remains to be seen. It has been suggested that climate change litigation might be the "new asbestos."[16] The *American Electric Power* decision may very well mark the beginning of a new era of litigation. The decision may prompt greenhouse gas legislation that will preempt *American Electric Power* and other cases. On September 22, 2009, White House climate coordinator Carol Browner said that the preference is for Congress, not the courts, to set emissions standards: "We need a unified set of rules for the country, we need to give businesses the kind of predictability and certainty so they can make the capital investments that are going to get us the kind of reductions we need. That is best done through legislation."[17]

If you would like to discuss *American Electric Power* or other matters concerning environmental or insurance law, please contact any of the attorneys listed to the left.

Endnotes

[1] *State of Connecticut, et al. v. American Electric Power Company, Inc.*, Nos. 05-5104-cv, 05-5119-cv, slip. op (2nd Cir. Sept. 21, 2009).

[2] *Id*. at 7-9.

[3] *Id*. at 10-11.

[4] *Id*. at 12-14.

[5] The decision was made by Judges Joseph M. McLaughlin and Peter W. Hall. Judge Hall wrote the opinion for the Court. Former Second Circuit Judge Sonia Sotomayor was on the panel that heard arguments but was elevated to the Supreme Court before the Court's decision.

[6] *Id*. at 22-23 (italics in original).

[7] *Id*. at 29-30.

[8] *Id*. at 38.

[9] *Id*. at 46.

[10] *Id*. at 64.

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[11] *Id*. at 102.

[12] *Id*. at 70-71.

[13] *Id.* at 108.

[14] *Id*. at 115.

[15] *Id*. at 116.

[16] "Will Climate Change Suits Be The 'New Asbestos'?," National Underwriter, June 8, 2009 (discussing The Globalization of Collective Redress: Consequences for the Insurance Industry, Swiss Re Focus Report, 2009).

[17] Daily news from *InsideEPA*, September 25, 2009.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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