Client Alert.

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Future of Climate Change Tort Litigation in the Hands of U.S. Supreme Court

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On Monday, December 6, 2010, the Supreme Court granted certiorari in *American Electric Power v. Connecticut*, a case examining whether the electric utility industry may be held accountable in court for its alleged contributions to harms arising from climate change. The implications of the Court's decision will not only affect the utilities industry, but will likely have wide-reaching impacts on other economic sectors—including automakers, agricultural and manufacturing interests, extractive industries, and chemical companies—which may find themselves embroiled in future legal battles over their greenhouse gas ("GHG") emission outputs. Moreover, the case will set precedent for the standing of states and private parties that seek to regulate GHG emissions through common law tort actions, and the potential costs of compensating for the impact of climate change effects would likely be unprecedented.

In *American Electric Power*, utility companies American Electric Power, Duke Energy, Southern Co., Xcel Energy, and the Tennessee Valley Authority are challenging a U.S. Court of Appeals for the Second Circuit decision that enabled states and environmental groups to pursue a public nuisance lawsuit seeking to force power generators to slash their GHG emissions. A public nuisance is defined as an unreasonable interference with the public's right to property, including conduct that interferes with public health and safety—in this case, carbon dioxide emissions that contribute to injury arising from climate change. Eight states, New York City, and environmental groups filed the initial lawsuit in 2004, asking a federal judge to order cuts in power plant emissions in 20 states. The district court initially dismissed the case, but last year the Second Circuit ruled that the case could proceed.

That the Supreme Court has decided to review the lower court's decision may signal a potential reversal and a victory for the electric utilities. They argue that the states lack standing to bring public nuisance lawsuits targeting power plants and that the alleged damages are not redressable by targeting individual sources of GHGs. They further argue that such common law tort actions are preempted by the U.S. Environmental Protection Agency's ("EPA") regulations under the Clean Air Act ("CAA"). Attorneys for the Obama administration also petitioned the Court to vacate the Second Circuit's ruling, claiming that the executive branch and the EPA are already working on GHG emission reductions and suggesting that nuisance claims are better handled by regulation and legislation than by the judiciary. The utilities argue that such initial policy determinations are a political issue in the first instance, and that until such decisions are made, the courts lack discoverable and manageable standards to adjudicate a nuisance action.

A Supreme Court decision upholding the lower court will potentially open the door to the states' and environmental groups' claims—a move that could have major implications for future GHG litigation. In its ruling, the Second Circuit relied on Supreme Court precedent concerning states' rights to relief from interstate air and water pollution. Specifically, it held that federal courts have the authority to limit the annual 650 million tons of industry GHG emissions unless and until the EPA actually begins regulating emissions from existing power plants. The EPA is mandated to issue performance standards to reduce GHG emissions from existing power plants but has yet to act. The EPA's Best Available Control

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Technology ("BACT") requirements scheduled to take effect next month limit *increases* in carbon emissions from new and expanded sources, but do not reduce emissions from existing power plants. Petitioners argue that Congress's delay in passing climate change legislation and the current lack of EPA regulations underscore the need for federal courts to assume a leading role in the reduction of industry GHG emissions until and unless the federal government sets CAA standards to limit emissions from current power plants.

The outcome of *American Electric Power* will have major implications on businesses beyond the utilities sector. Trade groups representing oil, mining and chemical companies, automakers, farmers, and manufacturers already filed briefs imploring Supreme Court intervention, claiming that such industries may face similar lawsuits should the lower court's decision stand. Moreover, trade groups insist that public nuisance law would be an unpredictable, economically untenable, and administratively complicated addition to the existing utility regulatory process.

It is expected that the case will be briefed, argued, and decided by next June. Justice Sonia Sotomayor did not take part in Monday's decision since she served on the Second Circuit panel. Her recusal creates the possibility of a 4-4 deadlock—a result that would leave the Second Circuit's decision in effect. In the absence of national climate change legislation, the appeals court's ruling set an important precedent by giving citizens the ability to take action against big businesses for their carbon dioxide emissions and alleged contributions to climate change. Industry, state and federal governments, and environmental groups are now waiting to see to what extent, if any, the Supreme Court's decision will impact the current federal and state approaches to tackling climate change.

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