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Environmental Alert

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Supreme Court Will Decide Fate of Climate Change Nuisance Lawsuits

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The Decision

The Supreme Court will decide whether a lawsuit alleging that certain power companies' greenhouse gas (GHG) emissions constitute a public nuisance can proceed in the courts. The power companies hope that the Court will reverse the Second Circuit Court of Appeals which allowed that lawsuit, *Connecticut v. American Electric Power Co.* (*AEP)*, to proceed.

The Importance of the Decision

If the Court finds for the power companies, the decision would likely halt most, if not all, climate change nuisance litigation. But if the Court sides with the plaintiffs, similar lawsuits will move forward. One of those lawsuits is *Native Village of Kivalina v. ExxonMobil Corp.,*[1] in which the plaintiff seeks recovery of costs relating to rising sea levels. If the plaintiffs in these cases can overcome the challenges faced by the plaintiffs in the *AEP* litigation (standing, preemption, and justiciability), the costs to industry in the form of damages and costs of compliance with court orders enjoining GHG emissions deemed to constitute a nuisance could be enormous. The threat of spreading climate change litigation could prompt congressional action on some sort of federal climate change legislation despite the Republican mid-term election victories.

Legal Issues in Climate Change Nuisance Suits

Plaintiffs have historically used public nuisance lawsuits to combat pollution. *AEP* and related cases raise the question of whether this common law doctrine should be available to attack GHG emissions. In any public nuisance claim, plaintiffs must demonstrate "an unreasonable interference with a right common to the general public."[2] In *AEP,* the Supreme Court was not asked to decide the validity of the nuisance claim but whether the plaintiffs can even bring the lawsuit.

Climate change litigation defendants make three main arguments against courts hearing these cases. First, the defendants argue that the plaintiffs do not have standing because the alleged conduct of the defendants does not specially injure the plaintiffs, the alleged injury is not attributable to the defendants, and the injury is not likely to be redressed by a judicial decision. Second, defendants argue that the political question doctrine precludes the lawsuits. And third, defendants argue that the lawsuits have been preempted by Congress.

EPA action (or inaction) could affect the defendants' preemption arguments. Courts have found that climate change litigation is not preempted for individual pollutants not covered under the Clean Air Act. To date, the EPA has regulated GHG vehicle emissions[3] and, starting in 2011, will begin permitting requirements for certain large

GHG emitting stationary sources under the Tailoring Rule.[4] Thus, claims against would-be climate change litigation defendants covered by these or other rules could be preempted. The threat of spreading climate change litigation could prompt congressional action on federal legislation with broader preemptive effect.

If the Supreme Court decides for the plaintiffs in *AEP*, and this case moves forward, the plaintiffs must still prove that the defendants' contribution to global warming unreasonably interfered with a public right. The diffuse nature of GHGs will make it hard for plaintiffs to show that a specific defendant caused their injury and, even if they do prove causation, it will be even more difficult to apportion liability between defendants.

Related Legal Issues

If the Supreme Court decides for the plaintiffs, it could also spur other types of climate change litigation, including litigation alleging failures to disclose potential liabilities related to climate change. The Securities and Exchange Commission's (SEC) February 2010 guidance specified four climate change "triggers" requiring reporting: (1) legislation and regulation; (2) international accords; (3) indirect consequences of regulation or business trends; and (4) physical impacts of climate change.[5] New York's attorney general has subpoenaed and later entered into binding agreements with five energy companies requiring enhanced climate change disclosure.[6]

If climate change nuisance litigation moves forward, defendants should also worry whether their alleged liability is insured. In February, a Virginia court found that the insurer for one of the *Kivalina* defendants did not have a duty to defend or indemnify the defendant.[7]

If the Supreme Court decides that courts should not hear climate change litigation, other courts may be more hesitant to decide other types of climate change litigation. Because the Supreme Court decision could limit or ignite climate change litigation, and because increased litigation could spur legislative and executive action, the decision could greatly affect the climate change debate.

Endnotes

1 For a copy of the federal district court decision in *Native Village of Kivalina v. Exxon Mobil Corp. 663 F. Supp. 2d 863 (N.D. CA 2009)* see http://scholar.google.com/scholar_case?case=8475485648638796860&hl=en&as_sdt=2&as_vis=1&oi=scholarr. Plaintiffs appealed this decision to the Ninth Circuit where briefing is complete, but oral arguments have not yet been scheduled.

2 Restatement (Second) of Torts § 821B (1) (1979).

3 Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010); see, http://www.federalregister.gov/articles/2010/05/07/2010-8159/lightduty-vehicle-greenhouse-gas-emission-standards-and-corporate-average-fuel-economy-standards

4 By beginning to regulate GHGs under the light duty vehicle rule, the EPA triggered Clean Air Act permitting requirements under Prevention of Significant Deterioration (PSD) (applies to new or modified sources of a certain size) and Title V (operating permits with reporting requirements) programs. Because these programs addressed pollutants that exist at much smaller quantities than GHGs, the EPA had to "tailor" the rule to limit which facilities were required to obtain permits. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 1, 2010); see, http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480afaaf3

5 See http://www.sec.gov/rules/interp/2010/33-9106.pdf/

6 For an example of one of the settlements, see http://www.oag.state.ny.us/media_center/2009/nov/AES%20AOD%20Final%20fully%20executed.pdf.

7 See *Steadfast Ins. Co. v. AES Corp., No. 2008-058 (Va. Cir. Ct. February 5, 2010)* at http://www.insurancelawforum.com/uploads/file/Steadfast%20SJ%20Order%202-5-2010.pdf. For a copy of the complaint, see: http://www.globalclimatelaw.com/uploads/file/AES%20Complaint.pdf. The decision is being appealed to the Virginia Supreme Court. The briefs have been filed, but oral arguments have not yet been scheduled.

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