

## Supreme Climate Change Battle

December 13, 2010

Setting the stage for what promises to be a blockbuster environmental case, the U.S. Supreme Court on December 6 agreed to hear a challenge to a Second Circuit decision allowing plaintiffs to maintain a public nuisance lawsuit against energy companies who operate fossil-fuel-fired electric generating plants, based on the companies' alleged emissions of greenhouse gases that are claimed to contribute to climate change. The Supreme Court's decision in this closely watched case could have a dramatic impact on the energy industry and ripple through other major industries as well.

The defendants in the *American Electric Power v. Connecticut* are major energy companies that provide electricity to millions of individuals and enterprises in 20 states. The plaintiffs include eight states, three nonprofit land trusts, and a municipality. The district court initially dismissed their suit, noting that even under the plaintiffs' own theory, climate change is a global phenomenon attributable to greenhouse gas emissions coming from innumerable sources both within and outside the United States. Thus, the district court concluded that resolving the question of whether those emissions constituted a tort because they were excessive or unreasonable would require the court to involve itself in assessing wide-ranging policy issues such as what level of global or national emissions would be excessive, whether the defendants alone should bear the consequences of certain court-determined reductions, what impact such limitations would have in terms of the country's energy independence, and what impact a decision might have on various foreign policy-related issues connected to U.S. participation in setting global emission limits. The district court regarded this analysis as requiring the kinds of complicated trade-offs and judgments that properly belong to Congress, not the courts, and it therefore dismissed the case.

The Second Circuit reversed and reinstated the lawsuit. As an initial matter, it held that the plaintiffs had standing to assert their claims, and concluded that they had adequately stated a claim under the federal common law of public nuisance. The court of appeals did not reach the issue of whether the defendants must be held liable, but returned the case to the district court for further proceedings.

The defendants then sought Supreme Court review, which was granted. (Justice Sotomayor is recused because she was a member of the Second Circuit panel that heard argument, although she did not participate in the final opinion due to her promotion to the Supreme Court) The Supreme Court has agreed to take up the following three issues:

- 1) Whether states and private parties may seek emissions caps on utilities for their alleged contribution to global climate change.

- 2) Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law.
- 3) Whether claims seeking to cap carbon dioxide emissions based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion" (under *Baker v. Carr*, 369 U.S. 186 (1962)).

### **Other Greenhouse Gas Nuisance Case**

Waiting in the wings for a decision in *American Electric Power Co.* are two other greenhouse gas cases brought under similar common-law theories—*Native Village of Kivalina v. ExxonMobil Corp.* (*Kivalina*) and *Comer v. Murphy Oil USA* (*Comer*).

In *Kivalina*, the governing bodies of an Alaskan tribal village brought suit against oil and gas, energy, and utility companies under a federal common-law nuisance claim. The plaintiffs claim that climate change has contributed to the erosion of the Arctic sea ice, thereby requiring the relocation of the village. The plaintiffs are seeking money damages in the form of compensation for costs to be incurred in relocating. The district court granted the defendants' motion to dismiss, finding that the claims presented nonjusticiable political questions and that plaintiffs lacked standing. The plaintiffs appealed, and the case is pending in the Ninth Circuit.

The plaintiffs in *Comer* are Mississippi residents and property owners that are seeking compensatory and punitive damages from oil, coal, chemical, and utility companies for alleged damages to the plaintiffs' properties attributable to Hurricane Katrina. The plaintiffs claim that climate change—specifically higher temperatures—intensified the hurricane and the resulting damage, and that the defendants contributed to climate change because their facilities emit greenhouse gases. Here, too, the district court granted defendants' motion to dismiss. A three-judge Fifth Circuit panel initially reversed that decision. The full Fifth Circuit then vacated the panel decision, agreeing to hear the matter en banc. The en banc court subsequently lost its quorum due to a recusal, and, as a result, the district court's decision is currently the controlling decision on the case. In August 2010, plaintiffs petitioned the Supreme Court for a writ of mandamus ordering the Fifth Circuit to reinstate the case. That request remains pending.

### **Greenhouse Gas Litigation and the Supreme Court**

*American Electric Power* will be the Supreme Court's second major foray into climate-change-related litigation. In 2007, the Court reviewed another greenhouse gas case, *Massachusetts v. EPA*, stemming from the EPA's refusal to regulate automobile greenhouse gas emissions. That case tested the scope of EPA's regulatory authority. Justice Stevens wrote for the majority, holding, in part, that the Clean Air Act was sufficiently expansive to allow the EPA to regulate tailpipe emissions of greenhouse gases. The Court did not address greenhouse gas emissions and climate change in the context of federal nuisance law.

Briefing and argument in *American Electric Power* will occur in the spring of 2011, with a decision expected by the end of June. The case will be closely watched not only by the energy industry, but also by other industries likely to be targeted due to greenhouse gas emissions, past or future. That range of industries is broad indeed, given that greenhouse gases intermingle globally with no direct line between

specific emissions and the effects such emissions are alleged to cause. Given the wide-ranging nature of greenhouse gas emissions and the many industrial, manufacturing, and commercial facilities that produce such emissions, a decision that allows the case to go forward could dramatically expand the range of defendants targeted for such suits and encourage additional litigation from those frustrated with their inability to secure greater legislative and regulatory action from Congress and the U.S. Environmental Protection Agency (EPA). The Supreme Court's decision in *American Electric Power* is likely to strongly influence, and perhaps directly control, whether the several other similar cases currently pending in the courts of appeals can proceed at all, and, if so, under what governing standards.

## Webinar Preview

Morgan Lewis will present a webinar further discussing the issues in the case on Monday, December 20, at 12:30 p.m. EST. For more information, or to register, please visit <http://www.morganlewis.com/events/SupremeClimateChangeBattle>.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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