

**Second Circuit Rules that Climate Change Nuisance Action
May Proceed Under “Federal Common Law”**

October 2, 2009

On September 21, the U.S. Court of Appeals for the Second Circuit reinstated two lawsuits filed by eight states, New York City, and three environmental groups that allege that the carbon dioxide emissions from six electric power generation companies contribute to climate change and constitute a public nuisance under federal common law. In *State of Connecticut, et al. v. American Electric Power Company Inc., et al.*, No. 05-5104, 05-5119 (Sept. 21, 2009), the appeals court vacated the district court decision that dismissed the lawsuits on the grounds that the plaintiffs’ public nuisance claims were nonjustifiable under the political question doctrine. The ruling represents a novel and potentially far-reaching expansion of the law, and could spur new climate change claims and lawsuits.

Background

In 2004, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and New York City sued six electric power generation companies (including a company that provides management and professional services to its affiliated generation company) that own and operate fossil fuel-fired power plants in 20 states. Three land trusts also filed a parallel lawsuit against the companies, which was consolidated with the states’ action. The plaintiffs allege that the ongoing carbon dioxide emissions from the companies’ power plants contribute to global warming, and have caused and will continue to cause serious harm to human health and the environment. Relying on the federal common law of public nuisance, the plaintiffs seek injunctive relief to compel the defendants to cap and reduce their carbon dioxide emissions.

In 2005, the district court dismissed the lawsuits, holding that the claims asserted in the complaints were barred under the political question doctrine. As the U.S. Supreme Court has explained, the political question doctrine “excludes from judicial review those controversies which revolve around policy choices and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” The district court concluded that, before the court could adjudicate a climate change nuisance claim, the elected branches of government must make an “initial policy determination” on climate change and greenhouse gas (GHG) emissions, primarily because only the political branches of government are empowered to balance the relevant environmental, economic, and national security interests associated with climate change.

The Second Circuit's Decision

On appeal, the Second Circuit held that the district court erred in dismissing the lawsuits under the political question doctrine. Acknowledging that a judicial decision imposing limits on GHG emissions may have political implications, the court nevertheless concluded that, given what it characterized as an absence of national policy on climate change and GHG emissions, a public nuisance suit could appropriately proceed. In support of its conclusion, the court noted that federal courts have often adjudicated public nuisance claims in the absence of policy actions by the political branches, including in the environmental context. Furthermore, the court stated that federal courts are well equipped to assess complex scientific evidence and render a decision, even on an issue as novel and complex as climate change. In doing so, the court gave little weight to the role the Executive Branch plays in negotiating international aspects of climate change controls or to the fact that Congress has so far declined to adopt sweeping GHG emission limitations.

The Second Circuit also held that all of the plaintiffs have standing to maintain their public nuisance actions, and that the plaintiffs asserted a cognizable claim under the federal common law of nuisance. The Restatement (Second) of Torts, upon which the court relied to supply the legal framework to analyze the plaintiffs' claims, defines a public nuisance as the "unreasonable interference with a right common to the general public."

The court also rejected the defendants' argument that plaintiffs' common law public nuisance claim is "displaced" by the Clean Air Act and other environmental statutes that already address global climate change and carbon dioxide emissions. Instead, the court concluded that "neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to 'speak directly'" to the plaintiffs' allegations. Nonetheless, in its lengthy discussion of the displacement standard, the court made it clear that plaintiffs' public nuisance claims may well be preempted in the future, should either Congress decide to legislate or EPA decide to regulate carbon dioxide emissions. Although it did not indicate how extensive regulation would need to be in order to create such preemption, in the concluding paragraph to its 139-page decision, the court opined: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by greenhouse gases."

Impact of the Second Circuit's Decision

Although the Second Circuit's decision directly addresses only the claims against the specific electric power generation companies named as defendants in the lawsuits, the decision may have far-reaching implications on the energy industry and regulated community in general. The court's decision to allow climate change litigation to proceed based on a common law public nuisance theory may prompt environmental organizations and state and local public entities to pursue similar actions against additional fossil fuel-fired power generators and other GHG-emitting industries. To ultimately prevail, plaintiffs still have significant hurdles to overcome, such as showing causation between the emissions and their particular injuries and in justifying any particular set of limits. If they remain successful in getting past the threshold pleading stage and into discovery, however, the cost of defending against such claims will expand exponentially. So, while we are a long way from a final judgment on such claims, we can nevertheless expect the Second Circuit's decision to be frequently cited, and it will likely embolden at least some plaintiffs to file new, similar actions.

Additionally, the court's decision may also influence congressional and agency debate on whether, and how, to act with respect to pending climate change legislative proposals. This decision will likely be cited by some as a further indication of the need for legislative action. In the absence of such legislative change, EPA will likely cite the court's statement that traditional regulation may preempt such tort suits as a further justification for EPA using its traditional Clean Air Act authorities to regulate greenhouse gases.

The legal landscape with respect to climate change is rapidly evolving. Litigation motivated by climate change is intensifying, as environmental and citizen organizations increasingly challenge permits for operations that emit GHGs. On the regulatory front, EPA recently finalized its mandatory GHG reporting rule, and the agency has proposed and is developing regulatory programs that may cause carbon dioxide and other GHGs to be regulated under the Clean Air Act, including the Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR) programs.

Morgan Lewis lawyers are at the center of these issues and can help you navigate through the developing climate change requirements and develop strategies to address the challenges they present.

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