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Supreme Court Halts Federal Greenhouse Gas Nuisance Claims

The United States Supreme Court recently held that federal common law claims relating to greenhouse gas emissions from large power plants were displaced by the EPA's authority to regulate greenhouse gases under the Clean Air Act. *American Electric Power Company, Inc. v. Connecticut, No. 10-174, Slip Op.* (June 20, 2011) ("*AEP*"). Reversing the Second Circuit's 2009 decision allowing such claims to move forward, the Supreme Court's ruling bars reliance upon federal common law as the catalyst for climate change nuisance lawsuits. However, the Supreme Court's decision leaves ajar the possibility of further litigation under state laws and also heightens the profile of the United States Environmental Protection Agency's ongoing Clean Air Act regulatory initiatives.

Background

In July 2004, eight states (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin), the city of New York, and three private land trusts (the Open Space Institute, the Open Space Conservancy, and the Audubon Society of New Hampshire) filed separate complaints against six large electric utility companies (American Electric Power Company, Inc., American Electric Power Service Corp., Southern Company, Tennessee Valley Authority, Xcel Energy, and Cinergy Corp.) in the United States District Court for the Southern District of New York. These plaintiffs asserted that greenhouse gas emissions from the defendants' fossil-fuel fired operations constituted a public nuisance under the federal common law of nuisance and, alternatively, state nuisance laws.

The plaintiffs sought to enforce an end to the defendants' claimed ongoing contributions to global warming. The equitable relief requested included the permanent enjoining of the defendants' continuous emissions through the imposition of a cap on carbon dioxide emissions and a mandated reduction in emissions by a specified percentage each year over at least 10 years. The defendants moved to dismiss both complaints on a variety of grounds, asserting that: (1) separation of powers precluded the court from adjudicating the complaints; (2) the plaintiffs lacked standing to bring the claims; (3) the plaintiffs failed to state a claim because there is no recognized federal common law cause of action to abate greenhouse gas emissions that allegedly contribute to global warming; and (4) Congress has displaced any federal common law cause of action as it relates to the issue of global warming.

In 2005, the District Court granted the defendants' motions to dismiss, ruling that the complaints raised "non-justiciable" political questions for the executive and legislative branches of government. *State of Connecticut, et al. v. American Electric Power Company Inc., et al.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). On September 21, 2009, the Second Circuit vacated and remanded the complaints for further proceedings, holding that "'[i]t 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 comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance' by greenhouse gases." *State of Connecticut, et al. v. American Electric Power Company Inc., et al.*, 582, F.3d 309, 330 (2d Cir. 2009) (citing *Ill. v. Milwaukee*, 406 U.S. 91, 107 (1972)).

Finding that there was a justiciable political question, the Second Circuit concluded that plaintiffs' global warming claims presented legal issues that could be adjudicated and resolved by the courts without contravening any political decision or decision-making authority. According to the Second Circuit, the states, New York City, and the land trusts sufficiently alleged injury-in-fact (both current and future). In so ruling, the Second Circuit held that the Clean Air Act did not "displace" the plaintiffs' federal common law public nuisance claims. The Court did not review the applicability of the state laws of nuisance.

The Supreme Court Reverses on the Merits

On the fundamental question of jurisdiction to hear the plaintiffs' claims, four members of the Supreme Court concluded that at least one of the plaintiffs possessed Article III standing under *Massachusetts v. EPA*, 549 U.S. 497 (2007). With Justice Sotomayor having recused herself because she was a member of the Second Circuit at the time it heard arguments below, the remaining four justices found that none of the plaintiffs had standing to pursue their claims. Because the justices were equally divided, the Supreme Court affirmed the Second Circuit's exercise of jurisdiction.

Proceeding to the merits, the Supreme Court then unanimously (8-0) reversed the Second Circuit's ruling that the Clean Air Act did not "displace" claims that greenhouse gas emissions created a public nuisance under federal common law. In a decision written by Justice Ginsburg, the Supreme Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *AEP*, *Slip Op*. at 10. In reaching its decision, the Court explained that the test for whether legislation such as the Clean Air Act displaces federal common law "is simply whether the statute 'speak[s] directly to [the] question' at issue." *Id.* Noting that its decision in *Massachusetts* "made plain" that carbon dioxide emissions are subject to regulation under the Clean Air Act, the Court stated that it is "equally plain" that the Clean Air Act "speaks directly" to carbon dioxide emissions from fossil-fuel fired power plants. *Id.* Since the EPA is currently engaged in a rulemaking to set standards for greenhouse gas emission from such power plants and since the EPA's ultimate exercise of its rulemaking authority is reviewable in federal court, the Supreme Court concluded that the Clean Air Act "provides a means to seek limits on emissions of carbon dioxide from domestic power plants - the same relief that the plaintiffs seek by invoking federal common law. We see no room for a parallel track." *Id.* at 11.

The Supreme Court rejected the plaintiffs' argument that federal common law is not displaced until the "EPA actually exercises its regulatory authority[.]" *Id.* at 12. To the contrary, the Court found that actual promulgation of regulation is not necessary. Rather "[t]he critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." *Id.* As a result, even if EPA ultimately were to decline to regulate greenhouse gas emissions, "the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination." *Id.* In this regard, the Court observed that, the expertise of EPA is better suited to serve as the "primary regulator of greenhouse gas emissions" than "individual district court judges issuing ad hoc, case-by-case injunctions." *Id.* at 14.

Significantly, while holding that the Clean Air Act displaces federal common law nuisance claims stemming from greenhouse gas emissions, the Supreme Court did not close the door on state law nuisance claims. Noting that the Second Circuit did not reach this issue because it concluded that federal common law governed, the Supreme Court stated that the right to maintain such claims will turn on the preemptive effect of the Clean Air Act. As this issue had not been briefed at the Second Circuit, the Supreme Court left this issue "open for consideration on remand." *Id.* at 16.

Going Forward

While it is likely that another visible climate change action based on federal common law, *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009), will eventually be dismissed based on the Supreme Court's decision, the

Supreme Court's ruling does not appear to be the end of climate change related litigation. In pursuing such claims, plaintiffs, however, will continue to face standing, political question, and statutory preemption issues.

A copy of the decision is available **here**.