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Second Circuit Revives Climate Change Public Nuisance Lawsuit Against Electric Power Companies

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On September 21, 2009, the United States Court of Appeals for the Second Circuit issued its long-awaited decision in *Connecticut v. American Electric Power Co.*, Nos. 05-5104, 05-5119 (2d Cir. Sept. 21, 2009) ("*AEP*"). The decision reinstates a lawsuit seeking an injunction that would force five private electric power companies and the Tennessee Valley Authority ("TVA") to cap their emissions of carbon dioxide and other greenhouse gases ("GHGs") and then reduce emissions by a specified percentage each year for a minimum of ten years. The lawsuit was filed by eight states, New York City, and three land trusts.

The Second Circuit's decision is the first to allow plaintiffs to pursue claims for judicial limitations on the release of GHG emissions. Other similar claims have been dismissed at the pleading stage. The Second Circuit decision could breathe new life into plaintiffs' efforts to use courts adjudicating individual tort actions to establish GHG emissions policy in the United States. Two private tort actions seeking monetary relief for weather-related property damage allegedly caused by GHG emissions were already pending in other venues when the Second Circuit's decision was issued. If the panel's decision survives rehearing, it could spark a raft of copycat lawsuits seeking to hold a variety of different types and sizes of GHG emitters monetarily liable for the alleged effects of climate change. The Second Circuit's endorsement of judicial regulation of GHG emissions also could have broader ramifications for GHG regulatory policy in the United

States.

Background of the *AEP* Lawsuit

In July of 2004, two groups of plaintiffs — one composed of the states of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin ("States"), along with the city of New York, and the other composed of the Open Space Institute, the Open Space Conservancy, and the Audubon Society of New Hampshire ("Trusts") — separately sued American Electric Power Co., Inc, American Electric Power Service Corp., Southern Company, TVA, Xcel Energy, and Cinergy Corp. in the U.S. District Court for the Southern District of New York. The plaintiffs asserted that global warming constitutes a "public nuisance" because it harms human health and natural resources, and that defendants contribute to that public nuisance through GHG emissions from their fossil-fuel-fired power plants. In 2005, the district court dismissed the plaintiffs' complaints, holding that their claims presented a non-justiciable "political question," because it required courts to make policy determinations concerning the appropriate level of GHG emissions that only the political branches can make. *See Conn. v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272-74 (S.D.N.Y. 2005). The Second Circuit panel heard oral argument in June of 2006.

The Second Circuit's Decision

Although the district court dismissed the complaint solely on political question grounds, defendants on appeal argued that the complaint was flawed for additional reasons as well. Not only did the complaint require adjudication of a political question, defendants argued, but plaintiffs lacked standing to pursue their claims, the complaint did not state a cognizable public nuisance claim under federal common law, and the Clean Air Act and its accompanying regulations displaced any potential federal common law claim.

The Second Circuit panel rejected all these arguments in a 2-0 decision written by Judge Hall and joined by Judge McLaughlin. Then-Judge Sotomayor sat on the panel that heard argument, but the decision was issued after she was elevated to the Supreme Court, and her vote is unknown.

Political Question. The Second Circuit held that plaintiffs' global warming "public nuisance" tort theory did not implicate a non-justiciable political question because the court would not be required to formulate a global policy solution to climate change. According to the panel, a "decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy." *AEP,* slip op. at 23. "Nor could a court set across-the-board domestic

emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit." *Id.*

Standing. The defendants argued that plaintiffs lacked standing because of the highly attenuated chain of connection between the defendants' own GHG emissions and the injuries to real property asserted by plaintiffs. The Second Circuit, however, emphasized "the lowered bar for standing at the pleading stage," such that plaintiffs were not required to "present scientific evidence to prove they face future injury or increased risk of injury, that Defendants' emissions caused their injuries, or that the remedy they seek will redress those injuries." *Id*. at 37. It was enough for standing, the court concluded, that plaintiffs alleged future injury from the effects of a rise in sea levels on property, public health, wildlife habitats, and hydropower production and the effects of warmer temperatures on agriculture, and that defendants emissions "contributed" to those injuries.

Federal Common Law of Nuisance. The Second Circuit held that plaintiffs alleged a cognizable theory of public nuisance under federal common law, relying on the Restatement (Second) of Torts' definition of public nuisance as "an unreasonable interference with a right common to the general public." *Id*. at 67. The court held that the Restatement standard was a workable standard that had been used in other federal public nuisance cases involving water and air pollution. *Id*. at 69.

Displacement of Federal Common Law. Finally, the Second Circuit rejected defendants' submission that a federal common law public nuisance claim, even if cognizable in theory, had been displaced by the Clean Air Act ("CAA"), which establishes a comprehensive legislative scheme concerning GHG emissions. The court held that until the Environmental Protection Agency ("EPA") makes GHG-related findings required by the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the CAA does not actually regulate GHGs. Slip op. at 119. The court also rejected defendants' argument that because Congress has enacted five statutes "touching" upon GHG emissions and climate change in some way, Congress has "legislated on the subject" and therefore the plaintiffs' claims are displaced. *Id*. at 126-127. Finally, the court held that plaintiffs' claims were not displaced by the President's constitutional authority over the conduct of foreign affairs.

Questions Raised By The Second Circuit's Decision

As noted above, the Second Circuit's decision is the first judicial decision allowing plaintiffs to pursue a tort recovery — albeit only in equity — for property damage allegedly caused by the effect of individual defendants' GHG emissions on the worldwide climate. The decision raises important questions for any GHG emitter concerned about exposure to potential liability. For example:

- *Will the decision lead to copycat lawsuits?* The Second Circuit's decision

may well spark new interest among plaintiffs' lawyers in climate-change tort suits, which have not gained much traction in courts to date. That said, there are daunting obstacles to ultimate recovery, which likely will give many lawyers pause before making a major investment in a tort action.

- *Will the Second Circuit's reasoning apply in tort actions for monetary relief?* The plaintiffs in AEP seek only equitable relief – i.e., judicially mandated caps on GHG emissions and similar relief. In another pending action, *Inc. Kivalina v. Exxon Mobil Corp.* (motion to dismiss pending in Northern District of California), the plaintiffs are seeking monetary damages for weather-related injuries to real and personal property. It remains to be seen whether the court in that case will be similarly lax about allegations of causation, especially given that plaintiffs, to prove individual monetary liability for specific property damage, must connect their property losses to defendants' specific emissions. A similar action, *Comer v. Murphy Oil USA,* was dismissed on appeal by the Fifth Circuit on May 28, 2010, on the unusual grounds that the court lacked a quorum due to the recusal of half of its sixteen judges. The result of the decision is that the district court's earlier dismissal of the action now stands, although the court noted that the plaintiffs have the right to petition the Supreme Court for certiorari.
- *How will plaintiffs prove their case and can they do so?* The Second Circuit's decision rests heavily on the pleading-stage nature of the case. Plaintiffs have not yet been required to prove up their allegations. Not only will their case, if it goes forward, require intensely complicated scientific inquiry into the degree, nature, and causes of climate change, but it will require plaintiffs to articulate a clear, judicially manageable theory of which emissions are "unreasonable" and why. Plaintiffs will also have to prove that these particular defendants' emissions contributed to climate change in some meaningful way, i.e., that climate change would have somehow been different or less substantial absent their emissions. And plaintiffs will have to prove that their proposed remedy, limited to these defendants, will actually abate the nuisance by eliminating or mitigating worldwide climate change. These will be substantial evidentiary hurdles, to say the least.

O'Melveny's attorneys are already involved in the *Kivalina* and *Comer* actions, as well as other public nuisance environmental cases raising novel theories of recovery. If you have any questions about the *AEP* decision, other climate change cases, or other public nuisance actions, please contact any of the attorneys listed on this alert.