

Re: Second Circuit Permits “Public Nuisance” Lawsuit to Address Climate Change

Date: September 23, 2009

This past Monday, the United States Court of Appeals for the Second Circuit finally released its decision in *Connecticut v. AEP*, a bellwether case involving whether carbon dioxide emissions from coal-fired power plants constitute a “public nuisance” subjecting emitters to common law tort liability. Assuming it holds up in the face of likely future legal proceedings, the decision is likely to have highly significant legal and economic consequences both for energy producing and consuming companies. With both former Vice President Al Gore and White House climate “czar” Carol Browner already weighing in on the implications of the decision for climate change legislation, the Second Circuit ruling may also have an immediate effect on the congressional debate on proper U.S. climate change policy and on EPA actions now unfolding to regulate greenhouse gases under the Clean Air Act (CAA).

The Decision

Filed in the United States District Court for the Southern District of New York in New York City, the lawsuit was brought by eight states (Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin), the City of New York and several environmental parties against five electric utilities (American Electric Power, Southern Company, Tennessee Valley Authority, Xcel Energy and Cinergy, now merged with Duke Energy). Modeled after similar “public nuisance” complaints to stop the sale of handguns, end tobacco use, and recover health costs associated with lead-based paint, the complaint in this case was very simple, containing only a nuisance count that alleged that the companies’ coal-fired plant emissions were a significant cause of global warming. Emissions from stations located in twenty states – conspicuously not including New York or any other Plaintiff State except Wisconsin – were at issue. Plaintiffs sought declaratory and injunctive relief requiring Defendants to cap and then reduce their emissions.

In 2005, the District Court dismissed the case, holding that the lawsuit presented a nonjusticiable “political question” involving important public policy questions that should be addressed by the Executive and Legislative Branches. This week, more than three years after oral argument, a two-judge panel reversed the District Court’s ruling. The panel consisted of one judge appointed by President George H.W. Bush and the other appointed by President George W. Bush, with the third panelist, Judge Sonia Sotomayor, not participating after her elevation to the Supreme Court.

According to the Second Circuit, the plaintiffs properly stated a cause of action for “public nuisance” and could proceed with their lawsuit to address climate change. After reviewing the scope of the CAA, and the remedy sought by the Plaintiffs, the Second Circuit rejected the District Court’s main holding that climate change was a “political question” not

appropriate for judicial interpretation. The Second Circuit also rejected other arguments raised by Defendants, including standing, failure to state a cause of action under nuisance law, and displacement of the cause of action by the CAA.

The District Court's discussion of the displacement doctrine offered one possible ray of hope for the Defendants and other companies subject to similar lawsuits. Under the displacement doctrine, a comprehensive statutory regime displaces federal common law. In rejecting Defendants' argument that CAA regulation of greenhouse gases displaced Plaintiffs' federal common law nuisance claims, the Court relied on the fact that EPA has not yet regulated but has only made a proposed endangerment finding. According to the Court, "[u]ntil EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act" would displace Plaintiffs' particular claims.

Under one reading of the Court's decision, once EPA adopts actual regulations, the displacement doctrine might apply to prevent public nuisance lawsuits under federal common law. On the other hand, without prejudging the question, the Court also noted that the CAA does not appear to be as comprehensive in scope as the version of the Clean Water Act that was at issue in the so-called *Milwaukee II* case. In that case, the Supreme Court ruled that the Clean Water Act displaced federal common law. According to the *Connecticut v. AEP* Court, the CAA appears to be more like the earlier version of the Clean Water Act that was at issue in the so-called *Milwaukee I* case, in which the Supreme Court ruled that the statute was not sufficiently comprehensive to displace federal common law.

Context

The *Connecticut v. AEP* case was the first of four "global warming" cases brought under common law tort theories. In both *Comer v. Murphy Oil* in the Southern District of Mississippi and *California v. General Motors Corp.* in the Northern District of California, the District Courts dismissed the cases on political question and other grounds. *Comer* involved a suit for damages against numerous energy companies arising out of Hurricane Katrina and is now on appeal in the Fifth Circuit. *General Motors* involved a suit for damages by the California Attorney General against automakers and was on appeal to the Ninth Circuit but has now been dismissed after a settlement. The fourth case, *Native Village of Kivilina v. ExxonMobil Corp.*, involving a suit for damages by an Alaskan native village against major energy companies, is currently pending in federal District Court in San Francisco.

Undoubtedly, the Defendants in *Connecticut v. AEP* will pursue further legal avenues, including potentially a request for panel and/or en banc rehearing and a petition for certiorari to the Supreme Court. Our view is that the decision is flatly wrong and could be vulnerable if the full Second Circuit accepts an en banc appeal or if the Supreme Court grants certiorari. Ultimate Supreme Court disposition of the case, assuming the high court accepts certiorari, could be affected by the fact that Justice Sotomayor may have to recuse herself given her role in the case below.

It is not known when *Comer* will be decided; oral argument was held on November 7, 2009. The Fifth Circuit is obviously not bound by the Second Circuit decision and could produce a conflicting decision, which would make it more likely that the Supreme Court would agree to hear an appeal. At the same time, both *Comer* and *Kivilina* could be affected by the Second Circuit's decision.

Implications

Even as the *Connecticut v. AEP* Defendants consider and prosecute further appeals, the decision is going to have a number of major ramifications.

First, the decision could open the flood gates on further climate change tort lawsuits against virtually any significant greenhouse gas emitter. The *Connecticut v. AEP* Defendants together were alleged to emit only 2.5 percent of the world's carbon dioxide emissions, yet the Court ruled that Plaintiffs' alleged climate change injury was "fairly traceable" to those emissions for purposes of standing. Under that standard, almost any emitter could be sued for the tort of climate change, since obviously no one emitter or small group of emitters is responsible for all or most of the world's greenhouse gas emissions.

Second, the decision raises highly troubling questions about the role of the judiciary in creating emission control standards. Because the decision allows public nuisance litigants to demand controls for climate change and greenhouse gases, if such suits are successful, the courts will be forced to employ equity to develop remedies and determine an appropriate level of emission controls. For many, the "flexibility" of equitable actions will transform the highly regulated area of air quality and highly complex climate change policy issues into a legal free-for-all.

Third, the decision will almost certainly prompt Plaintiffs' trial lawyers to bring actions against energy companies and other emitters for money damages. *Connecticut v. AEP* began as largely a policy lawsuit designed to increase pressure on the utility industry to come to the table on climate change regulation. The suit was brought by attorneys general and environmental organizations seeking injunctive relief. The Plaintiffs' bar soon realized, however, that global warming lawsuits could be the next lucrative target for mass tort lawsuits seeking money damages. For example, the Plaintiffs in the *Comer* lawsuit are represented by well-known Plaintiffs' tort lawyers seeking money damages. *Connecticut v. AEP* may fuel even more of these damage suits.

In this regard, the Plaintiffs' bar will embrace the Court's rejection of Defendants' argument that only states have standing to sue to under federal common law nuisance theories and its finding that individuals may sue as well. The number of potential targets for these lawsuits and the amount of potential money damages from global warming is staggering. Of course, there are valid defenses to any global warming tort lawsuits, and Plaintiffs face high hurdles in prevailing on the merits in these cases, particularly in proving that any specific weather event on which their suit is based resulted from climate change. We do not think that ultimately these lawsuits will be successful if brought to trial. Moreover, the prospect that

Congress could adopt comprehensive climate legislation explicitly or effectively preventing common law nuisance suits might deter some lawsuits. Nevertheless, given the large sums of money involved, the Second Circuit decision gives tort lawyers every reason to try, including the prospect that they may be able to exert significant settlement pressure on defendant companies, particularly publicly-traded ones.

Finally, given its wide ranging implications and the explicit legal direction, *Connecticut v. AEP* also will likely influence political and regulatory discussions of climate change. Any effort by energy companies and other potential litigation targets to obtain congressional legislation to preempt these lawsuits will be met with demands for concessions on enactment of an overall climate bill such as the Waxman-Markey legislation or something similar to it. Similarly, given the possibility that comprehensive EPA regulation could displace federal common law nuisance suits, industry may find itself considering whether such regulation might on balance be beneficial to it. In any event, the additional pressure on industry from this type of litigation undoubtedly increases environmental interest group leverage on the climate change issue and ramps up the pressure on industry.

Conclusion

With its virtually limitless applicability to organizations of all types and its reliance on equity to steer climate change law in the U.S., *Connecticut v. AEP* now becomes, along with the Supreme Court's 2007 decision in *Massachusetts v. EPA*, the seminal climate change case. On the other hand, "it ain't over till it's over," and there is surely more to come both on further appeal of the decision and from the Fifth Circuit in *Comer*.