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Client Alert

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Second Circuit Revives Federal Common Law Nuisance Suits Against Greenhouse Gas Emitters in *Connecticut v. American Electric Power*

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Introduction

On September 21, 2009, in a groundbreaking ruling, the US Court of Appeals for the Second Circuit became the first court to allow federal common law nuisance claims to proceed which allege harms to human health and real property resulting from greenhouse gas (GHG) emissions and impacts associated with global climate change, overruling the trial court's grant of defendants' motions to dismiss two related lawsuits.

In *State of Connecticut, et al. v. American Electric Power Company Inc., et al.* (*AEP*), eight states, the City of New York and three land trusts filed federal common law nuisance suits against six electric power corporations that own and operate fossil fuel-fired power plants in 20 states.[1] More than four years after the suit was dismissed by the US District Court for the Southern District of New York in September 2005, the Second Circuit overturned the decision, finding that plaintiffs: (1) have Article III standing and (2) asserted claims that are cognizable federal common law nuisance claims which are neither hindered by the political question doctrine nor displaced by federal statutory law.

The ruling exerts additional pressure on Congress (which is currently debating unprecedented federal climate legislation) and the EPA (which is currently considering rules to regulate GHG emitters under the Clean Air Act) to act, because federal courts may step into the breach to regulate GHG emissions. This conclusion is bolstered by a recent Fifth Circuit ruling in *Ned Comer, et al. v. Murphy Oil USA, et al.* which followed within a month of the AEP decision, overturning a trial court's dismissal of a climate change related state common law nuisance case, finding plaintiffs had standing and that the political question doctrine presents no obstacle to the tort.[2]

The next circuit to rule on the issue is likely to be the Ninth Circuit, as a Northern District of California trial court just dismissed claims by native villagers claiming damages due to climate change in *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp., et al.* Contrary to the two circuits' decisions, the California trial court concluded that the villagers lacked standing and that their claim was a nonjusticiable political question.[3] Although none of these cases has yet been heard on the merits, and thus no

plaintiff has had to prove proximate causation—the link between plaintiffs' GHG emissions and the defendants' injuries (allegedly due to the impacts of global climate change)—the *AEP* and *Comer* rulings send a strong message to Congress and the EPA that if they do not regulate GHG emissions, the federal courts may.

Background

The plaintiffs filed suit under the federal common law of nuisance, or in the alternative, under state nuisance law, and sought to force the defendants to first cap and then to reduce, over a 10 year period, their GHG emissions. According to the complaint, defendants (six electric power corporations) are the five largest emitters of GHGs in the United States, collectively emitting 650 million tons per year of GHGs, or approximately 10 percent of total US GHG emissions. Plaintiffs further allege that the defendants' emissions are contributing and will continue to contribute to global climate change.

Plaintiffs allege specific current injuries such as the reduction of California mountain snowpack (and consequent effects on California's water supply) and changes in weather patterns, but the bulk of alleged damages have not yet occurred, including numerous ecological, public health and property impacts including respiratory problems, beach erosion, increased wildfire incidences, and salinization of marshes and water supplies. The district court dismissed the claims, finding that the plaintiffs lacked standing and that the matter involved a nonjusticiable political question.

Summary of the Opinion

The Second Circuit reversed. As to standing, the Second Circuit unequivocally found the state plaintiffs to have Article III *parens patriae* standing—standing to file the suit to protect their "quasi-sovereign" interests, such as the state's concern for the health and well-being (both physical and economic) of their residents in general. The Second Circuit also found all plaintiffs to have proprietary standing—standing under which they can assert that they have suffered or will suffer direct, tangible injuries to their property under the US Supreme Court's test from *Lujan v. Defenders of Wildlife*.

As for *Lujan's* injury-in-fact requirement, the Second Circuit found the alleged property damage to be "concrete," pointing to the melting of the California snowpack and associated flooding and property damage, the alleged distinct harms befalling California to be "particularized," and the injury to be "actual or imminent" since the alleged harms have already occurred and will continue to occur. Acknowledging that many of the allegations in the suit involve projections of future injuries resulting from future increases in temperature, the Second Circuit also rejected the *AEP* defendants' claim that the alleged future harms are not "imminent" enough to satisfy the "injury-in-fact" requirement. Rather, in the Second Circuit's view, there exists no strict temporal requirement that injury occur within some particular time of the offending conduct, and the *Lujan* requirement that injury be "actual or imminent" is satisfied if the GHG emissions had already begun and the allegations assert that the complained of injury will occur at some point.

As for *Lujan's* "traceability" requirement, the Second Circuit concluded that despite their inability either to pinpoint which alleged harms are attributable to the defendants or to show that the defendants' actions are by themselves responsible for the alleged harms, plaintiffs' allegations that defendants' emissions contribute to the harms was sufficient to satisfy the "traceability" prong. Specifically, the court concluded that "the size of injury is not germane to the standing analysis."[4]

On the redressibility issue, the Second Circuit looked to the Supreme Court's decision in *Massachusetts v. EPA* to support the proposition that an allegation that the requested remedy would slow or reduce global climate change relative to a hypothetical world in which no remedy is granted is sufficient to establish redressibility.[5] Plaintiffs' allegations met this test.

The Second Circuit's analysis of the political question doctrine characterized the case as one merely concerning emissions from six coal-fired power plants (and applying "in only the most tangential and attenuated way to the expansive domestic and foreign policy issues raised" by the defendants).[6] The Second Circuit rejected defendants' argument that the complexity of the claims in *AEP* is unmanageable, finding that past public nuisance cases have been similarly complex. The Second Circuit also rejected defendants' argument that a national GHG emissions policy must be set before a claim against emitters can be heard, instead noting that, "if regulatory gaps exist, common law fills those interstices."[7] Classifying *AEP* as an "ordinary tort suit," the Second Circuit ruled that no nonjudicial discretion is required to decide the case.[8] Finally, since no national GHG emissions policy presently exists, there is no risk of a ruling conveying a lack of respect for, or causing embarrassment related to, the pronouncements of the political branches of government.

The Second Circuit also rejected defendants' displacement argument—that federal statutory law should be used to resolve a dispute instead of federal common law. The Second Circuit reasoned that "neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to 'speak directly' to the 'particular issue' raised by Plaintiffs"—namely, the alleged need to curtail plaintiffs' GHG emissions.[9]

Applying the Restatement Section 821B's definition of the elements of a federal common law nuisance claim, the Second Circuit concluded that plaintiffs did, in fact, allege sufficient facts to state a claim. The Second Circuit rejected defendants' attempt to limit nuisance claims to tangible, poisonous, immediate and localized nuisances that are directly traceable to the defendant. Instead, the Second Circuit found plaintiffs' allegations sufficient, pointing to allegations of impacts on public health, safety, comfort and peace; the continuing nature and long-lasting impact of the conduct; and the reasonable foreseeability of the injuries.

Finally, although the Second Circuit concluded that all the *AEP* plaintiffs had standing to make a claim and adequately plead nuisance due to defendants' GHG emissions, the opinion suggests limits to the individuals or entities who could bring a federal common law nuisance claim. Specifically, although entities other than states can bring federal common law nuisance claims when an overriding federal interest exists or the controversy touches basic interests of federalism, the Second Circuit suggests that not all citizens may bring a public nuisance claim, noting that "a line must be drawn between the many who suffer from a public nuisance and those who may properly bring an action."[10]

The Second Circuit's analysis emphasizes the Restatement of Torts Section 821C's requirements that, to maintain a claim, private parties generally "must allege that they have suffered a harm different from that suffered by other members of the public, and that they suffered that harm when exercising a public right with which the [defendant] interfered."[11] The court interpreted a "public right" broadly to include interferences with the public health, safety, peace or comfort and finds that the trust plaintiffs adequately alleged an interference with the public

right in protecting natural resources. Although the opinion does not detail just how "different" the harm to a private plaintiff must be (relative to the harm suffered by the general public) in order for a private party to successfully state a claim, the Second Circuit found the land trust plaintiffs to have suffered "different" harms due in part to the fact that the trusts own large swaths of land which they have opened to the public and have a legally recognized mission to preserve.

Analysis

Although the *AEP* ruling may establish some limits as to the types of plaintiffs that can bring a federal common law nuisance claim, after this groundbreaking ruling, courts are likely to see a number of new federal common law nuisance suits brought by various plaintiffs alleging past and future harms due to global climate change that request a broad range of injunctive and monetary remedies.

Ultimately, the *AEP* case sends a strong message to both Congress and the EPA that in the absence of federal legislation or regulation that displace or pre-empt these common law claims, the federal courts stand willing to step in to regulate GHG emissions through federal common law nuisance suits. As the court stated: "It may happen that new federal laws and new 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."

Conclusion

As precedential as it is, *AEP* is by no means the final piece of the climate tort puzzle. With the Fifth Circuit having recently handed down its own climate tort decision, and with the Northern District of California having expressed its strong disagreement with *AEP*, this area of law is far from settled. As the climate debate percolates in Congress and the EPA explores GHG regulation under the Clean Air Act, new developments can be expected soon.

Endnotes

1 *State of Connecticut, et al. v. American Electric Power Company Inc., et al.*, Nos. 05-5104-cv and 05-5119-cv (2d. Cir. Sept. 21, 2009).

2 *Client Alert* No. 954—"Fifth Circuit joins Second Circuit in Allowing Climate Tort Claims, but Northern District of California Disagrees"

3 *Id.*

4 *AEP* at *60, quoting *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 at 72, n.8 (3d Cir. 1990)

5 *Client Alert* No. 583—" Supreme Court Rules that EPA Can Regulate Greenhouse Gases under the Clean Air Act"

6 *AEP* at *23.

7 *Id.* at *32.

8 *Id.* at *33.

9 *Id.* at *130.

10 *Id.* at *97.

11 *Id.* at *95.

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