

Second Circuit Decision Opens Door for Federal Tort Actions Seeking Greenhouse Gas Emissions Caps and Mandatory Reductions

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In a decision with potentially far-reaching implications, the Second Circuit recently ruled in *Connecticut v. American Electric Power Co., et al.*, that, in the absence of comprehensive federal legislation regulating greenhouse gas (GHG) emissions, states, municipalities and certain private organizations have standing to bring viable federal common law nuisance claims seeking to impose company-specific GHG emissions caps and mandatory reductions. This decision may very well provide the precedent and catalyst for additional climate change tort suits asking for GHG emission caps and mandatory reductions on industrial companies, particularly companies with significant GHG emissions.

The plaintiffs — eight states, New York City and three land trusts — sued five electric power corporations seeking injunctive relief that would impose immediate caps and subsequent mandatory reductions in their GHG emissions. The plaintiffs primarily based their claims on the federal common law of nuisance. The district court had dismissed the complaint, finding that the claims presented a nonjusticiable political question. The appeals court reversed, but in so doing did not limit its decision to the political law doctrine. Instead, it went on to find that the plaintiffs had standing and had asserted viable claims, and that existing federal legislation and regulations did not displace such claims.

The court found that the plaintiffs had standing to bring their claims and that their allegations were sufficient to constitute viable federal common law public nuisance claims. With respect to standing, the court held that the states had established *parens patriae* standing because they are more than “nominal” parties with interests in protecting public health and state resources distinct from the interests of private parties. Additionally, the court found that all plaintiffs satisfied the three-part test for organizational standing under Article III of the Constitution. First, the states met the injury-in-fact prong by alleging such current injuries as climatic changes resulting from GHG-caused temperature increases, and all plaintiffs satisfied this prong with their allegations of imminent future injuries (*e.g.*, GHG-caused sea level rises and resulting flooding and infrastructure destruction and permanent inundation of plaintiffs’ low-lying property) which the plaintiffs have alleged are “certain to occur.” Second, plaintiffs met the “fairly traceable” causation prong, which the court acknowledged is not equivalent to the tort causation requirement of proximate cause, by alleging that the defendants’ continued GHG emissions contribute to global warming and that global warming is and will continue to harm the plaintiffs. The court explained: “For purposes of Article III standing [plaintiffs] are not required to pinpoint which specific harms of the many injuries they assert are caused by particular defendants, nor are they required to show that defendants’ emissions alone cause their injuries. It is sufficient that they allege that defendants’ emissions contribute to their injuries.” Third, the court found that to meet the redressability factor, plaintiffs did not need to demonstrate that the requested relief would provide a complete remedy; rather, they “need only demonstrate that it would receive ‘at least some’

relief.” Consequently, plaintiffs satisfied this factor since limiting defendants’ GHG emissions would generally lessen plaintiffs’ injuries even if GHG emissions of non-parties around the world increased.

In rejecting the defendants’ assertion that the plaintiffs had failed to state valid claims under the federal common law of nuisance, the court found as sufficient the states’ allegations that: defendants’ emissions, by contributing to global warming, constitute a substantial and unreasonable interference with public rights; defendants’ emissions constitute continuing conduct; and defendants know or have reason to know of the significant effect on public rights. In so holding, the court expressly dismissed defendants’ arguments that (1) the challenged pollution must be directly traceable to defendants, (2) the plaintiffs must sue all contributing pollutant sources, and (3) the harm must be immediate and localized. For the same reasons, the court found that the municipal and trust plaintiffs had asserted valid federal common law nuisance claims and that such non-state entities were entitled to assert these federal claims in circumstances, such as those present in this case, which invoke “an overriding federal interest or where the controversy touches issues of federalism.”

The court further held that neither the political question doctrine nor displacement barred plaintiffs’ federal common law nuisance claims. In finding that the political question doctrine did not bar plaintiffs’ claims, the court reasoned: (1) any decision it rendered would not create national or international climate change policy or set emission standards for non-parties, because plaintiffs were not asking the court to create a comprehensive and far reaching global climate change solution but were requesting only that it grant injunctive relief limiting GHG emissions from the defendants’ plants; (2) since the case is based in common law tort for which there are clear and well settled rules that courts can easily rely on and apply, there are discoverable and manageable standards for resolving the case; (3) the lack of a remedy under the federal Clean Air Act (CAA) and other statutes relating to GHGs does not require plaintiffs to wait for an initial federal GHG policy decision before bringing their claim, rather, federal common law is meant to fill such regulatory gaps; and (4) a common law based decision would not contradict federal GHG policy and both Congress (via legislation) and the executive branch (via regulation) are free to later override any common law-based judicial decision.

Finally, in rejecting defendants’ argument that the CAA and five other statutes containing GHG research, technology development and emission reporting adequately addressed global climate change and thus displaced the federal common law of nuisance, the court held that, notwithstanding the Supreme Court’s decision in *Massachusetts v. EPA*, “[w]ith respect to the [GHG] emissions causing the alleged nuisance at issue in the instant case, . . . EPA has yet to make any determination that such emissions are subject to regulation under the CAA, much less endeavor *actually* to regulation emissions. . . . [A]t least until EPA makes the requisite findings, for purposes of our displacement analysis the CAA does not (1) regulate [GHG] emissions or (2) regulate such emissions from stationary sources. Accordingly, the problem of which plaintiffs complain certainly has not ‘been thoroughly addressed’ by the CAA.” Similarly, the court found that the GHG research and study provisions in the other statutes “touch” but do not “regulate” GHGs; thus, do not displace federal common law of nuisance.

The court’s decision is likely to prompt an increase in similar claims, both against the defendants in the case and against other companies that are significant emitters of GHGs. This latter category could be quite extensive, since the court accepted a broad definition of the causation requirement needed to bring a claim. As a result, there is no obvious lower limit in the court’s decision that would serve as a safe-harbor for defendants accused of contributing to global warming. Moreover, while the court suggested that the bar for establishing causation for purposes of standing is lower than that needed to establish liability under a public nuisance theory, this will likely provide little comfort to potential

defendants, since the court's analysis of the facts in the case makes it unlikely that defendants will be able to obtain dismissal on the merits at either the motion to dismiss or the summary judgment stage and, at a minimum, is likely to require extensive discovery before a case can be resolved.

If there proves to be a flood of new cases, it is possible that the defendants will consider the formation of a multidistrict litigation (MDL) proceeding as a means of keeping some control over these cases. This is particularly true if the defendants believe that the pending climate change legislation might provide an alternative to continued litigation. A judge in charge of an MDL proceeding, who is faced with managing and coordinating a large number of cases, is more likely to be interested in the type of global resolution that legislation could provide, and thus may be more willing to structure a process that allows for the legislative process to play out before engaging in extensive judicial proceedings.

If comprehensive GHG legislation does not pass, EPA will likely proceed with its efforts to cobble together a GHG regulatory program under the CAA. The use of the CAA (such as New Source Review permit requirements for new and modified plants), however, might not displace similar common law-based suits seeking the imposition of GHG emissions caps and reductions if the CAA-based GHG regulatory framework does not address completely the issues in the case — regulating and capping GHG emissions from existing plants. Consequently, until comprehensive federal GHG legislation is enacted, companies face the unpleasant prospect of a patchwork combination of EPA regulation under the CAA and court imposed injunctions.

Finally, we note that the other major threat raised by the court's decision is that the publicity it will bring to the issue will increase the number of plaintiffs' lawyers, perhaps working with states' attorneys general, who will try to develop damages theories of recovery. Such cases, while more challenging from the plaintiffs' perspective, are also far more lucrative, and would lead to a far broader range of cases, including likely class actions, than the current actions seeking only injunctive relief.

As companies evaluate their potential exposure to federal GHG tort actions and/or prepare defenses to any such actions in which they may become involved, we believe that companies should consider strategies and defenses which encompass both the ever changing and complex federal legislative and regulatory regimes relating to GHG emissions and the myriad procedural and substantive pretrial defenses and actions available to defendants in high-stakes tort cases.