Climate Change Litigation Update: Second Circuit Rules Public Nuisance Lawsuit Against Power Companies May Proceed

October 2, 2009

On September 21, 2009, in a long-awaited decision the U.S. Court of Appeals for the Second Circuit held that eight States,[1] New York City, and three land trusts (collectively "Plaintiffs") have standing to file suit against six electric power corporations (collectively "Defendants")[2] for their contribution to the alleged public nuisance of climate change, and that the court's jurisdiction over such a lawsuit is not barred by the political question doctrine. Connecticut v. American Electric Power Co., No. 05-5104 (2d Cir. Sept. 21, 2009). Up until the release of the Second Circuit's opinion, standing and the political question doctrine presented the two most significant obstacles confronting states and environmental groups seeking to impose nuisance (common law) liability on utilities and other major emitters of greenhouse gases. For utilities, the Second Circuit's decision on these issues likely has the potential to have significant implications arising from both future climate change lawsuits, together with the ultimate resolution of those already pending, such as Comer v. Murphy Oil (pending on appeal in the U.S. Court of Appeals for the Fifth Circuit from a dismissal by the district court based upon standing and political question grounds) and Kivalina v. ExxonMobil Corp. (pending on the defendants' motion to dismiss based upon standing and political question grounds in the U.S. District Court for the Northern District of California).

The Facts

In July 2004, Plaintiffs filed two separate suits against the Defendants that sought "abatement of Defendants' ongoing contributions to a public nuisance" under federal and state common law based on Defendants' responsibility for approximately 10 percent of all carbon dioxide emissions from human activities in the United States. Citing to international and domestic scientific reports for support, Plaintiffs' complaints alleged a causal link between heightened greenhouse gas emissions and global warming. The complaints detailed current injuries (e.g., decrease in average snowfall) and future potential harms (e.g., reduced drinking water) caused by global warming faced by each plaintiff. In their complaints, Plaintiffs sought and continue to seek to hold Defendants jointly and severally liable and obtain a permanent injunction that would cap and reduce the Defendants' carbon dioxide

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[1] The eight states that were plaintiffs in this case were Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin.
[2] Defendants in this case were American Electric Power Company Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation.

emissions by a specified target each year for at least the next ten years.

On September 15, 2005, on a motion by the Defendants, the U.S. District Court for the Southern District of New York dismissed the complaints against the Plaintiffs on grounds that the case raised a non-justiciable political question.[3] Specifically, the District Court reasoned that the Plaintiffs' claims would require an initial policy determination that would weigh reducing pollution against advancing economic interests and take into consideration international negotiations, renewable energy resources, and the appropriate level at which to cap carbon dioxide emissions. The court viewed a decision on such considerations as being well outside the role of the judiciary. The District Court decision further elaborated that if the judiciary were to weigh in on such considerations in the absence of action on the part of the executive or legislative branches of government, it would amount to impermissible "judicial fiat." The Plaintiffs subsequently appealed the decision to the U.S. Court of Appeals for the Second Circuit, which heard arguments on the appeal on June 7, 2006.

The Second Circuit's Decision

On September 21, 2009, more than four years after the District Court's dismissal of the Plaintiffs' claims, and in a sprawling 139-page opinion, the Second Circuit overturned the District Court's decision. In doing so, the court held that the Plaintiffs' claims do not present a non-justiciable political question because such non-justiciable political questions only are found in rare instances, such as the manner in which to organize and arm the National Guard and the ability of Congress to impeach the President. Additionally, the court held that the claims were not non-justiciable political questions because it found that the issues before the court were not particularly complex and consisted only of ordinary tort actions. The court did not provide much support for its reasoning on this point. Instead, it reasoned that judicial action in an area where the legislature has failed to act does not amount to judicial fiat because the federal courts have in several instances ruled that environmental harms constitute public nuisances despite Congress's failure to act on that particular environmental issue. These instances include the case of Illinois v. City of Milwaukee, where as explained by the Second Circuit, the United States Supreme Court held that if "statutes governing water pollution do not cover a plaintiff’s claims and provide a remedy, a plaintiff is free to bring its claim under the federal common law of nuisance; a plaintiff is not obliged to await the fashioning of a comprehensive approach to domestic water pollution before it can bring an action to invoke the remedy it seeks."

The Second Circuit also addressed the issue of the Plaintiffs' standing to bring a public nuisance claim. Traditionally, standing has been a major impediment for plaintiffs seeking to bring climate change related lawsuits. Nevertheless, the Second Circuit found that the Plaintiffs had

[3] Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

satisfied the traditional test, namely that: (1) Plaintiffs suffered an injury in fact that is actual or imminent; (2) a causal connection existed between the injury and the Defendants' conduct; and (3) the injury was redressable by the court.

In holding that the Plaintiffs had met the first part of this test, the Second Circuit found that the Plaintiffs had demonstrated the three components of an injury in fact: (1) a concrete; (2) particularized; and (3) actual or imminent injury. In particular, the court focused on the third requirement, that the injury must be actual or imminent, and found that the Plaintiffs had alleged injuries that were both current actual injuries and imminent future injuries. The court found that the current loss of declining water supplies in California and coastal erosion in Massachusetts constituted current injuries and that severe flooding of coastal areas predicted to occur in the next 10 to 100 years was sufficiently imminent for purposes of standing analysis. In doing so, the court relied upon the Supreme Court's reasoning in Massachusetts v. EPA that "the risk of catastrophic harm, though remote, is nevertheless real."

In holding that the Plaintiffs had met the second part of the standing test, the Second Circuit found that the Plaintiffs had shown that their injuries were "fairly traceable to the actions of the defendant." The court stressed that although the Plaintiffs demonstrated that their injuries were "fairly traceable" to the Defendants, such demonstration was not the same as actually proving causation—something that will be required on remand to the trial court. Nevertheless, in finding the harm "fairly traceable" to the Defendants, the court stated that there was a "substantial likelihood" that the harm was caused by the Defendants.

Lastly, the court held that its ability to place restrictions on the emissions of the Defendants is sufficient to demonstrate redressability and satisfy the third prong of the standing test. The court reasoned that its ability to do so would slow the magnitude of the Plaintiffs' injuries regardless of whether greenhouse gas emissions increased elsewhere in the world. Stated differently, because the court has the ability and authority to slow the pace of the Defendant's emissions, the Plaintiffs' injuries were likewise redressable.

Observations

- **Reassertion of the Threat of Climate Change Litigation.** The claims made in Connecticut v. American Electric Power Co. are very similar to other actions currently pending at both the federal trial and appellate court levels. Over the past year, climate change litigation appeared to be taking a backseat to legislative and regulatory developments initiated by the Obama administration and the current Congress. The Second Circuit's decision, particularly with respect to its discussion of the political question doctrine, is a reminder to regulators, legislators, environmental

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groups, and industry that the judiciary may require action on the regulation of carbon dioxide and other greenhouse gas emissions if politicians and regulators fail to take action.

- **Application of the Standing Analysis of Massachusetts v. EPA.** In 2007, the Supreme Court issued its landmark decision in Massachusetts v. EPA, in which it recognized for the first time the phenomenon of global warming and that a state could have standing to bring suit because it demonstrated a "concrete and particularized injury" (e.g., a rise in sea levels allegedly caused by emissions from automobiles could result in a loss of the state's coastal property). The Second Circuit relied almost exclusively on Massachusetts v. EPA in its standing analysis in Connecticut v. American Electric Power Co. While it is not a surprise that the Second Circuit applied U.S. Supreme Court precedent, the Second Circuit extended the Supreme Court's linkage between global warming and the entire automobile industry to a discrete group of utilities. Finally, while the Second Circuit's opinion has the real potential to spark a trend among pending climate change litigation, plaintiffs pursuing actions against utilities may still face obstacles in the future, particularly in light of the decision by the U.S. Court of Appeals for the D.C. Circuit earlier this year in Center for Biological Diversity v. U.S. Department of Interior (decided April 17, 2009), adopting a much more narrow view of standing after Massachusetts v. EPA.

- **Climate Change as a Non-Justiciable Political Question.** The District Court's decision in Connecticut v. American Electric Power Co. had many utilities hopeful that courts would steer clear of creating and imposing greenhouse gas emission limitations. Such hope was furthered by similar precedents in both the Fifth and Ninth Circuits. With the Second Circuit's decision, however, it is now apparent that courts may not only require agencies to act with respect to their administrative obligations to develop climate change regulations under federal laws (e.g., Massachusetts v. EPA) but also may be willing to impose emission limitations directly on industry regardless of whether the courts possess the technical wherewithal to determine what emission reductions are actually necessary to redress the injuries being alleged.

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