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CLIMATE CHANGE LITIGATION IN THE U.S.

THEORIES OF LIABILITY AND INSURANCE ISSUES

UPDATE 4

Connecticut v. American Electric Power Company, Inc.
(2nd Cir. (N.Y.)) 2009 WL 2996729

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**Climate Change Litigation in the US:
Theories of Liability and Insurance Issues
An Update**

***Connecticut v. American Electric Power Company, Inc.*
(2nd Cir. (N.Y.) 2009 WL 2996729)**

After four years and extensive briefing, the United States Court of Appeals for the Second Circuit finally issued its watershed opinion concerning the judiciary's role in considering climate change issues. The Court emphatically reversed the district court, vacated the judgment and remanded the matter for additional proceedings. In so doing, the Court of Appeals further cracked the door for potential judicial solutions to global climate change.

Background

In July 2004, Connecticut, seven other states (collectively, "the States") and New York City sued American Electric Power Company, Inc., and five other electric power generating companies (collectively, "the Defendants"). In a separate lawsuit also filed in July 2004, three non-profit organizations that purchase and maintain "ecologically significant and sensitive properties for scientific and educational purposes" (collectively, "the Trusts") also sued the Defendants. Plaintiffs asserted actions under the federal common law of public nuisance or, in the alternative, state nuisance law.

Both cases were brought and consolidated in the U.S. District Court for the Southern District of New York and sought equitable relief to abate the Defendants' ongoing contribution to the "public nuisance of global warming" by capping and then reducing carbon dioxide (CO₂) emissions from their petroleum and coal fired power plants located in twenty states. The plaintiffs alleged that Defendants were the largest emitters of CO₂ in the United States and among the largest in the world. The plaintiffs alleged that global warming had caused, and was continuing to cause, serious harm to human health and natural resources. The district court ruled that the actions presented non-justiciable political questions.

The appeal was briefed and argued in June 2006, and supplementally briefed in July 2007, in response to the United States Supreme Court's decision in *Massachusetts v. Environmental Protection Agency* ((2007) 549 U.S. 497).

Political Question

The Court of Appeals first treated the political question issue and stated that "simply because an issue may have political implications does not make it non-justiciable." It examined the plaintiffs' allegations in light of the six factors articulated by the Supreme Court in *Baker v. Carr* (1962) 369 US 186.

The Court found that although the case raised complex issues, there were judicially discoverable standards based in well settled principles of public nuisance, which the federal courts had used for more than 100 years to resolve such cases. This is something well within the historical function of the courts and, as such, there is no reason to cede these issues to the exclusive domain of the political branches of the government.

The Court also found no legislative intent to preclude the judicial branch from weighing in on climate change issues. It found that refusal to regulate falls short of legislative intent to displace federal common law. Moreover, in the Court's view, the fact that statutory law did not provide plaintiffs with a remedy did not mean they had to wait for "the political branches to craft a 'comprehensive' global solution to global warming." The Court held that the plaintiffs could proceed under the federal common law without an initial policy decision or determination from Congress or the Executive.

The Court looked for legislative action in the area and asked: "What is the U.S. policy on greenhouse gas emissions?" The Court answered the question by concluding that, "[t]here really is no unified policy." It concluded that if plaintiffs were to proceed with their claims there would be "no disrespect for the political branches" nor "contravention of a previous political decision" nor result in "multifarious pronouncements that would embarrass the nation."

The Court held that the district court erred when it dismissed the cases on the ground that they raised non-justiciable political questions.

Standing

The Court of Appeals next addressed whether plaintiffs had standing to bring their claims.

The States' Parens Patriae Standing

The Court treated the States' standing under two theories: (1) *parens patriae* (i.e., quasi-sovereign rights raised by a state on behalf of its citizens or to protect its natural resources); and (2) proprietary (i.e., rights as an owner or proprietor similar to those of a private person's but done on behalf of its citizens). It first evaluated the States as *parens patriae*.

The Court of Appeals recited a long line of cases in which the federal courts had upheld a state's *parens patriae* standing in public nuisance cases. It concluded that the States' interests in protecting their citizens' health and their own natural resources made them more than "nominal parties." The States held "quasi-sovereign interests" in their concern for the physical and economic well being of their citizens, and they alleged wide-spread injuries from CO₂ emissions that would affect nearly their entire populations. The Court also doubted that individuals filing private suits could obtain "complete relief." It held that the States had *parens patriae* standing in the underlying case

The Plaintiffs' Proprietary Standing

The Court observed that the States, New York City and the Trusts were also suing in their proprietary capacity as property owners. It discussed the tests set out in *Lujan v. Nat'l Wildlife Fed'n* ((1990) 497 U.S. 871) and as distilled by *Public Citizen, Inc. v. National Highway Traffic Safety Administration* ((D.C. Cir. 2007) 489 F.3d 1279).

Injury in Fact

Defendants argued that none of the plaintiffs alleged current injury and that their alleged future injuries were not imminent enough for standing. The Court disagreed and recited California's allegations that global warming had already reduced its snow pack and caused early melting, which in turn caused flooding resulting in current injury to its lands. The Court also articulated the States' and New York City's allegations of future increased sea levels, more severe flooding and harm to the coastal infrastructure among a list of other anticipated injuries in the next 10 to 100 years. The Court cited similar allegations made by the Trusts with regard to their lands, although with no stated specific time frame for such events. It noted that the "imminent" element required that the injury not be too speculative and that it be certainly impending and certain to occur. It found that the plaintiffs' allegations were stated in terms of certainties and not mere possibilities or contingencies. The Court found that all the plaintiffs had alleged future injury, and that the States had alleged current injury, sufficient for standing's required injury in fact.

Causation

The Court then addressed the issue of causation concluding that the "fairly traceable" requirement at the pleading stage was not the same as the requirement of tort causation. It indicated that plaintiffs assert that Defendants' continued CO₂ emissions contribute to global warming, which harms them now and will continue to harm them in the future in specific ways. The Court concluded that plaintiffs were "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."

Redressibility

The Court indicated that a plaintiff does not have to allege that every injury would be remedied or that harm from other sources would be affected. It reviewed plaintiffs' allegations and found they adequately met redressibility.

The Court held that all plaintiffs had proprietary standing to bring their federal common law public nuisance claims.

Displacement of Common Law Claim

The Court of Appeals also addressed Defendants' argument that a claim under the federal common law of public nuisance for greenhouse gas emissions had been displaced by Congress through statutory law. It noted that the common law would apply unless "a statutory purpose to the contrary was evident."

Defendants depended primarily on the Clean Air Act. The Court explained that although the Supreme Court in *Massachusetts* had held that greenhouse gases fit within the definition of "air pollutant," the EPA must first make a finding of endangerment to public health and welfare and then, and only then, regulate those emissions. The Court noted that while EPA has now proposed a rule finding that emissions of CO₂ and five other greenhouse gases from new motor vehicles endanger public health and welfare, it had not finalized such a rule.

The Court further pointed out that, while the language of *Massachusetts* specifically addressed emissions from new motor vehicles, it was reasonable to assume EPA had such authority to make a finding regarding stationary sources. In order to regulate stationary sources, however, the Court stated that EPA would have to make a finding of endangerment and a finding that greenhouse gases in the ambient air were a result of "numerous or diverse mobile or stationary sources." The Court said, however, that the EPA has not made those required findings and that, furthermore, even if it makes those findings it would have to formulate and promulgate regulations before the Court could analyze whether those rules displaced the common law. It held that the Clean Air Act did not, under the current conditions, displace the federal common law of public nuisance for the emission of CO₂.

The Court evaluated each of Defendants' other federal statutes as a basis to displace the federal common law of public nuisance for the emission of CO₂ from stationary sources. It found that these laws only required planning, monitoring, study or gathering of statistics or encouraged development of policy regarding global warming or climate change and that they fell well short of regulating CO₂ emissions. Accordingly, it held that these statutes did not displace the federal common law of public nuisance for the emission of CO₂.

Summary and Conclusion

The Court of Appeals held that the district court erred in dismissing the complaints on non-justiciable political question grounds. The Court further held that the plaintiffs had standing to bring their suits and that each stated a claim under the federal common law of public nuisance. It held that federal statutes had not displaced the common law cause of action. The Court of Appeals vacated the judgment and remanded the cases to the district court for further proceedings.

The decision in this case makes it clear that a state, municipality or private party, under the proper circumstances, may bring a federal common law cause of action for public nuisance to enjoin the emissions of CO₂. The complaint must be well pleaded raising the particular facts

needed to support the various findings. It is important to not stretch the holding in this case beyond what it took up. In other words, while this case sets the ground work for adjudication of public nuisance claims based on global warming, it did not address the merits.

Your comments and questions are most welcome and may be addressed to:

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