SIMPSON THACHER MEMORANDUM

Global Warming Alert: United States Supreme Court Issues Ruling in *Connecticut v. American Electric Power Company, Inc.*

June 20, 2011

In a much anticipated ruling, the United States Supreme Court decided today that federal common law claims seeking abatement of greenhouse gas emissions by utility companies must be dismissed. Reversing the Second Circuit, the Court held that the Clean Air Act displaces any federal common law right to seek abatement of carbon dioxide emissions. Significantly, the Court left open the question of whether nuisance and other state law claims against emitters of greenhouse gases may proceed. *Connecticut v. American Electric Power Company, Inc.*, No. 10-174 (U.S. June 20, 2011). For insurers, this means that the question of whether their policyholders will be the subject of tort suits in federal court because the policyholder emitted greenhouse gases remains unresolved.

BACKGROUND

Connecticut v. American Electric Power Company, Inc. was filed in 2004 by eight states, the City of New York and three private plaintiff environmental organizations against various electric utility companies. Two complaints asserted federal and state common law "public nuisance" claims, alleging that global warming is causing and will continue to cause harm to human health and natural resources. Plaintiffs sought to compel defendants to cap and reduce their carbon dioxide emissions. The New York district court presiding over the case dismissed the complaints, finding that they raised a political question inappropriate for judicial resolution. The court reasoned that resolution of the climate change issues presented would require "identification and balancing of economic, environmental, foreign policy, and national security interests," -- tasks better suited to a political rather than judicial branch of government. *Connecticut v. American Electric Power Company, Inc.*, 406 F. Supp.2d 265, 274 (S.D.N.Y. 2005).

Then, in 2007, the Supreme Court decided *Massachusetts v. EPA*, 549 U.S. 497 (2007). It ruled that the Environmental Protection Agency (EPA) had authority to set greenhouse gas emission standards and had offered no reasoned explanation for failing to do so. After the Court's ruling, the EPA commenced various rulemaking activities directed to greenhouse gases.

On September 21, 2009, a panel of the Second Circuit that included then-Judge Sotomayor reversed the district court, holding that the plaintiffs had stated actionable federal nuisance claims. *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009). It rejected the political question doctrine as a basis for dismissal and concluded that because there exists a well-established body of tort and public nuisance case law, there was no lack of "judicially discoverable and manageable standards for resolving" plaintiffs' claims. Furthermore, the Second Circuit ruled that the Clean Air Act did not displace federal common law in this context.

On December 6, 2010, the United States Supreme Court granted *certiorari*. At oral argument, the Court focused primarily on three issues: (1) whether the plaintiffs have standing to sue the power companies seeking a reduction in emissions; (2) whether the claims at issue constitute a political question better left to the legislative or executive branch; and (3) whether Congress's and the EPA's efforts to regulate greenhouse gas emissions displaced plaintiffs' ability to bring global warming suits under common law nuisance claims.

THE RULING

First, the Court divided equally (4-4) on the threshold question of whether the federal courts have jurisdiction over lawsuits regarding greenhouse gas emissions or whether the issue is instead a non-justiciable political question that is outside the scope of the jurisdiction of the federal courts. Since she was a member of the Second Circuit panel that decided the case below, Justice Sotomayor recused herself and did not participate in the Court's decision. Because the Supreme Court was evenly divided, under the Court's rules, the decision of the Second Circuit finding that the exercise of jurisdiction over the lawsuit was proper stands. Significantly, Justice Sotomayor had voted to exercise jurisdiction while a judge of the Second Circuit, suggesting that so-called "global warming suits" may fall within the jurisdiction of federal courts and are not non-justiciable political questions.

Second, a unanimous Court (8-0) reversed the Second Circuit's ruling that the federal common law of nuisance is not displaced by the Clean Air Act. The Court held that because the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions, federal common law claims seeking such regulation are "displaced" by the federal legislation, even if no such regulations ultimately issue. The Court stated, "The Act itself [ ] provides a means to seek limits on emission of carbon dioxide from domestic power plants – the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track." Slip op. at 11. The Court rejected the argument that federal common law is not displaced until the EPA "actually exercises its regulatory authority, *i.e.*, until it sets standards governing emissions from the defendants' plants." *Id.* at 12. As the court explained, the relevant factor in finding legislative displacement is whether "the field has been occupied, not whether it has been occupied in a particular manner." *Id.* (citations omitted).

Importantly, the Court left open several avenues of judicial review in this context. First, the Court noted that because federal courts maintain authority to review agency actions, plaintiffs are still free to seek federal court review of particular EPA regulations. Second, the Court left open the possibility of state law claims in this context. The viability of such state law claims will ultimately depend on the preemptive effect of the Clean Air Act – an issue that had not been briefed by the parties in *American Electric Power*. Accordingly, the Court left this issue "open for consideration on remand." *Id.* at 16.

Federal courts will assume preemption when federal legislation although not expressly preempting state regulation is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (quotation omitted). In addition to implied preemption of this type, "a state law also is invalid to the extent that it actually conflicts with a . . . federal statute.

Such a conflict will be found where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 491-92 (quotations omitted). In this regard, the Supreme Court in *American Electric Power* could well be telegraphing the Court's view as to how the preemption issue should be resolved when it referenced the appropriateness of Congress making the EPA the primary regulator of greenhouse gas emissions because: "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad-hoc, case by case injunctions," *slip op*. at 14. The Court's observation that having district courts perform the necessary balancing of interests under federal common law "cannot be reconciled with the decision-making scheme Congress enacted," *Id*. at 15, should likewise apply when the question is having judges make similar individual determinations under state nuisance law.

THE FUTURE OF CLIMATE CHANGE LITIGATION

Perhaps the most direct implication of the *American Electric Power* decision is its precedential effect on a similar climate change nuisance suit currently on appeal to the Ninth Circuit. In *Native Village of Kivalina v. Exxon Mobile Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009), an Eskimo village alleged that global warming diminished Arctic sea ice, resulting in the destruction of land and necessitating a relocation of their village. The district court dismissed the global warming claims against several energy companies based on lack of standing and the political question doctrine. In contrast to the Second Circuit's *American Electric Power* ruling, the California district court reasoned that the public nuisance claims were ill-suited for judicial resolution because they would inherently require a court to balance the ecological harm at issue with the utility of the defendants' actions, and to make a policy decision about who should bear the cost of global warming. The Ninth Circuit has yet to rule on the appeal (and had issued a stay in effect until June 2011), undoubtedly awaiting guidance from the Supreme Court in the *American Electric Power* case. In light of today's ruling, it is clear that federal common law claims in *Kivalina* should be dismissed.[1]

Although the American *Electric Power* ruling eliminates federal common law as the basis for climate change nuisance suits, it is unlikely to signal the end of litigation against energy companies or other utilities that have emitted greenhouse gases or manufactured products that emit such gases. Plaintiffs seeking to pursue such claims may assert alternate bases of liability, including (1) state-based nuisance law or other state law tort theories; (2) products liability

[1] A third climate change lawsuit, *Comer v. Murphy Oil USA*, had been percolating in the Fifth Circuit, but was dismissed last year as a result of a procedural glitch. A Mississippi district court dismissed a global warming nuisance class action suit against oil and energy companies. The Fifth Circuit reversed, ruling that the private plaintiffs had standing to pursue claims relating to the defendants' greenhouse gas emissions and that the claims did not present non-justiciable political questions. *Comer v. Murphy Oil USA*, 585 F.3d 885 (5th Cir. 2009). The Fifth Circuit subsequently voted to rehear the case en banc, which vacated the earlier Fifth Circuit ruling. However, due to the recusal of several Fifth Circuit judges, the circuit court lacked a quorum to hear the case en banc. As a result, the Fifth Circuit was obligated to dismiss the en banc appeal. *Comer v. Murphy Oil USA*, 2010 WL 2136658 (5th Cir. May 28, 2010). As a result of this procedural turn of events, the current operative ruling in the case is the district court's dismissal of the class action.

claims, such as failure to warn or design defect; (3) statutory claims arising from the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), Clean Air Act or other federal and state statutory laws; (4) regulatory enforcement actions; (5) "greenwashing" theories (which may support a variety of claims relating to a company's efforts to "go green,"); and (6) shareholder or other derivative litigation based on misrepresentations or mismanagement of risks affecting climate change. To the extent that such lawsuits are permitted to proceed, it is likely that the plaintiffs in such actions will face obstacles at every stage in litigation. Aside from the standing and political question doctrine issues, climate change lawsuits may ultimately fail on the basis of preemption, causation, injury, and damages.

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