

December 20, 2010

“Climate Change” Litigation Update -- U.S. Supreme Court Grants *Certiorari* in Climate Change Lawsuit -- Will Decide Whether Companies May Be Sued for Their Greenhouse Gas Emissions And Resultant Contribution to Global Warming

The U.S. Supreme Court granted *certiorari* in *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009) (“AEP”) on December 6, 2010. Justice Sonia Sotomayor, who previously served on the U.S. Court of Appeals for the Second Circuit when it heard the case (though she did not participate in the decision itself), took no part in the consideration or decision of the *certiorari* petition. See *Am. Elec. Power Co. Inc. v. Connecticut*, No. 10-174 (Dec. 6, 2010). Thus, there is a chance of a 4-4 split decision on the merits, which would ordinarily leave the decision of the Second Circuit intact.

The Second Circuit had held that state governments and advocacy groups could seek injunctive relief against greenhouse gas-emitters based on common-law nuisance and trespass theories, and denied the defendants’ petition for a rehearing *en banc* (see [Client Alert, “Climate Change’: Litigation- and Regulatory Update” \(Mar. 31, 2010\)](#)). Certain defendants had filed a *certiorari* petition to the Supreme Court on August 2, 2010.

The Supreme Court granted *certiorari* on three questions:

(1) Whether states and private parties have standing to seek injunctive relief -- specifically, emissions caps -- against utility companies for their alleged contribution to harms claimed to arise from global climate-change.

(2) Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law. According to the defendants, the Clean Air Act establishes a comprehensive statutory scheme that displaces any federal common-law nuisance claim seeking to enjoin the emissions of greenhouse gases. Plaintiffs claim, and the Second Circuit held, that the Clean Air Act does not displace their common-law claims unless and until the Environmental Protection Agency takes regulatory action to control such emissions.

(3) Whether plaintiffs’ claims present “non-justiciable” political questions. Specifically, the third question asks the Court to decide whether plaintiffs’ claims seeking to cap defendants’ carbon dioxide emissions at “reasonable” levels, based on a court’s weighing of the potential risks of climate-change against the socioeconomic utility of defendants’ conduct, would be governed by “judicially discoverable and manageable standards” or could be resolved without “initial policy determination[s] of a kind clearly for nonjudicial discretion.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The Potential Impact of the U.S. Supreme Court's Decision in *AEP*

A ruling by the Supreme Court in *AEP* will have an impact on all the other climate-change lawsuits that are now pending in federal courts, as well as plaintiffs' interest in bringing this type of litigation. If the Court reverses, it could halt the growth of climate-change and related lawsuits. Absent extensions, according to the Supreme Court's rules, the opening brief will be due on January 20, 2011, the opposition brief will be due on February 22, 2011, and the reply brief will be due on March 24, 2011.

Other "Climate-Change" Lawsuits

In another action, *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) ("*Comer*"), in which a group of property owners sought to hold a group of energy and fossil fuel companies liable for property damage caused by Hurricane Katrina, the district court dismissed plaintiffs' lawsuit on the basis that it presented a non-justiciable "political question." That decision remains good law. See [***Client Alert, "Climate Change" Litigation Update -- Fifth Circuit Dismisses En Banc Appeal On Procedural Grounds, So District Court Decision Dismissing Claims Related To Climate Change Stands As Good Law* \(June 11, 2010\)**](#). On August 26, 2010, in an effort to revive their case, the plaintiffs in *Comer* filed a petition for a writ of mandamus to the Supreme Court, which would overturn the dismissal of their appeal. See *In re Comer*, No. 10-294 (Aug. 26, 2010). Plaintiffs do not raise the merits of their claims. Rather, the petition focuses on the procedural questions regarding the viability of the plaintiffs' appeal, which was dismissed after the *en banc* panel of the U.S. Court of Appeals for the Fifth Circuit lost its quorum after granting rehearing but before hearing argument *en banc*. The request for a writ remains pending.

In another nuisance action, *Native Village of Kivalina v. Exxon Mobil Corp.*, No. 09-17490 (9th Cir.), a federal district court dismissed the lawsuit of a village against oil, energy and utility companies claiming that their greenhouse gas emissions threatened the habitability of the village. See [***Client Alert, "Recent Decisions Permit Claims That Private Companies are Contributing to 'Climate Change'" \(Nov. 5, 2009\)***](#). Plaintiff village's appeal is currently pending before the U.S. Court of Appeals the Ninth Circuit.

Also, as previously reported, in *North Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) ("*North Carolina v. TVA*"), the U.S. Court of Appeals for the Fourth Circuit reversed the lower court's finding of a public nuisance as to defendant TVA's coal-fired power plants' air emissions. Though *North Carolina v. TVA* is not a global warming case, the nuisance theory advanced in that case is similar to that raised in the climate-change cases discussed above. The current deadline for the State of North Carolina to file its petition for *certiorari* to the Supreme Court is February 3, 2011. See [***Client Alert, "Fourth Circuit Declines to Permit State Suit Alleging TVA's Power Plants' Interstate Air Emissions Constitute A Public Nuisance" \(Aug. 16, 2010\)***](#).

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