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Key Appellate Decision Expands the Potential for Greenhouse Gas Nuisance Claims

On September 21, 2009 the Second Circuit Court of Appeals issued a key ruling allowing climate change federal common law nuisance claims against five large utilities to proceed. That decision, *State of Connecticut v. American Electric Power Company Inc.*, overturned a lower court ruling blocking the suit.

Overview of Decision

This lawsuit originated in 2004 when eight states and three environmental organizations sought "abatement of defendants' ongoing contributions to a public nuisance" under federal common law and state law, alleging detailed present and future impacts from defendants' greenhouse gas (GHG) emissions. The plaintiffs allege that the defendants are jointly and severally liable for those harms and seek a permanent injunction that would require capping of CO^2 emissions and then specified annual reductions for at least 10 years.

The District Court initially dismissed the case on the theory that "separation-of-powers principles" foreclosed plaintiffs' claims because the case raised a non-justiciable political question. In other words, the District Court decided that climate change policy should be addressed first in Congress and that nuisance suits in federal court would interfere with that legislative process. However, the Second Circuit reversed, holding that the case was really an "ordinary tort suit" and that

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"not every case with political overtones is non-justiciable." *Id.* at 33 and 35. Further, since common law nuisance merely fills gaps not yet regulated protecting the political process was unnecessary because "the legislative branch is free to amend the Clean Air Act to regulate carbon dioxide emissions, and the executive branch, by way of the EPA, is free to regulate emissions assuming its reasoning is not divorced from the statutory text." *Id.* at 36 (citations omitted).

The Second Circuit then confirmed that plaintiffs had standing to bring such nuisance suits. The court began by concluding that the states had the right to sue on behalf of their constituents in common law nuisance claims. The court then analyzed plaintiffs' injury allegations and found them legally sufficient for standing; in particular, because California alleged current harm from reduced snowpack in its mountains and resultant water supply concerns. Importantly, the court also found that the plaintiffs' "current and future injuries [we]re 'fairly traceable' to defendants' conduct." *Op.* at 61 (citations omitted). Finally, the court determined that standing was appropriate because a ruling against the defendants had the potential to lessen the alleged harms.

The court then found that plaintiffs had asserted a viable public nuisance claim. The Second Circuit concluded that a potentially viable claim existed, noting that the "touchstone of a common law public nuisance action is that the harm is widespread, unreasonably interfering with a right common to the general public." *Id.* at 79. Applying that broad definition, the court held that the states had asserted a public nuisance claim of a sufficiently "serious magnitude." *Id.* at 80. While noting that the issue has not been addressed by the Supreme Court, the Second Circuit also held that private entities could assert a federal public nuisance claim, because "[p]rivate parties and governmental entities that are not states may well have an equally strong claim to relief in a circumstance invoking an overriding federal interest…." *Id.* at 93.

Finally, the Second Circuit concluded that prior legislation and regulations had not displaced plaintiffs' claims. Noting the contingent state of EPA's climate change rulemakings, the court refused to "speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act" would "speak directly to" the claims presented. Thus, it found the Clean Air Act did not presently displace public nuisance climate change claims and would not do so "at least until EPA makes the requisite findings." *Id.* at 119.

Key Implications

- This decision, while binding only in New York, Connecticut and Vermont, will encourage plaintiffs nationwide to file similar "climate change nuisance" claims.
- Those in the power generation sector are most likely to be targeted in such litigation, as well as major GHG emitters in other industrial sectors.
- Environmental organizations will use the threat of such claims to generate additional pressure on Congress to enact comprehensive climate change legislation and to leverage more comprehensive EPA regulations under the existing Clean Air Act.

If you have questions or concerns, please contact any of the Squire Sanders environmental lawyers listed in this Alert or the one with whom you are most familiar.