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CLIMATE CHANGE

With the absence of legislative action on climate change, proponents of reducing greenhouse gas emissions have turned to EPA and the courts. But, in *AEP v. Connecticut*, the U.S. Supreme Court nixed a federal common law public nuisance action seeking to limit power plants' GHG emissions, holding that the Clean Air Act regulatory scheme displaces such a claim. The authors say that *AEP* leaves open the possibility that if Congress were to repeal EPA's authority to regulate GHGs without providing some other mechanism to address climate change, the courts could conceivably entertain federal common law nuisance claims.

AEP v. Connecticut and Greenhouse Gas Control: Impacts in Courts and Beyond

BY JONATHAN S. MARTEL AND LAUREN DANIEL

On June 20, 2011, in *American Electric Power Co. Inc. v. Connecticut*,[1] the U.S. Supreme Court unanimously held that the Clean Air Act displaces federal common law nuisance claims brought to reduce greenhouse gas emissions. This decision reverses the holding of the U.S. Court of Appeals for the Second Circuit that states and private parties may pursue a public nuisance action under federal common law to limit power plants' greenhouse gas emissions.

The opinion, written by Justice Ruth Bader Ginsburg, notes that the eight member court (Justice Sonia M. Sotomayor was on the Second Circuit panel, though she was elevated before the decision was issued, and she recused herself), divided 4-4 on whether plaintiffs in this case had standing to bring suit, and thus whether the federal court had jurisdiction. Under the Supreme Court's practice, when the court is equally divided on a point, the decision below is affirmed on that point. Because the Second Circuit found in favor of jurisdiction, the Supreme Court proceeded (without binding future courts on the jurisdictional issue), to consider plaintiffs' federal common law claims. Referencing its 2007 decision in *Massachusetts v. EPA*,[2] the Supreme Court held that the Clean Air Act addresses carbon dioxide from defendants' plants and thus displaces the federal common law of nuisance. The court remanded the case, declining to rule on plaintiffs' state law tort claims.

[1] 79 U.S.L.W. 4547 (U.S. June 20, 2011) (No. 10-174), *slip opinion available at* http://www.supremecourt.gov/opinions/10pdf/10-174.pdf.

[2] 549 U.S. 497, 75 U.S.L.W. 4149 (2007).

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The outcome in *AEP* stops federal common law nuisance claims regarding greenhouse gas emissions (at least as long as EPA retains regulatory authority over the matter), and creates additional arguments against state common law claims. The high court is skeptical that judges can effectively manage such matters. But the outcome also arguably satisfies a potential objective of the plaintiffs: Through the Supreme Court's endorsement of regulatory over judicial competence, the decision supports federal regulatory action to address climate change. In Congress, where many view the Clean Air Act as not an appropriate tool to address climate change, the court's decision suggests that a federal nuisance action might proceed absent *some* legislative action. This means that legislative action to repeal EPA's authority without providing some other mechanism to address climate change (either a positive alternative program or an enactment explicitly to preempt common law claims), could spur new common law cases.

Background and Proceedings in Lower Federal Courts

In 2004, several states, the city of New York, and three private land trusts brought claims in the U.S. District Court in the Southern District of New York under both the federal common law of nuisance and state tort law against five of the largest carbon dioxide emitters in the United States, including private power companies and the federal Tennessee Valley Authority. The complaints alleged that the defendants' contribution to global warming created a ''substantial and unreasonable interference with public rights.'' In September 2005, the district court dismissed the action, finding that the suits presented non-justiciable political questions. In September 2009, the court of appeals reversed, holding that the claims were justiciable, plaintiffs had properly alleged standing to bring suit, plaintiffs had stated a proper claim under the federal common law of nuisance, and the Clean Air Act did not displace the claim because EPA had not yet promulgated rules regulating greenhouse gases.

In the interim between the district court and court of appeals decisions, the Supreme Court held in *Massachusetts v. EPA* that the Clean Air Act authorizes EPA to regulate greenhouse gases. Subsequently, EPA issued rules regulating emissions from motor vehicles, issued permitting requirements for greenhouse gases from major stationary sources, and committed to issuing proposed new source performance standards addressing greenhouse gases from power plants by July 2011 and final rules by May 2012.

AEP Opinion Overview

The *AEP* decision reaffirms the holding in *Massachusetts* that the Clean Air Act authorizes EPA to regulate emissions of greenhouse gases. The Supreme Court further held that this authority displaces federal common law nuisance claims regarding greenhouse gases. Ginsburg's opinion, relying on *Massachusetts*, explained: ''The [Clean Air] Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief plaintiffs seek by invoking federal common law. We see no room for a parallel track.''[3] Justice Samuel A. Alito Jr., joined by Justice Clarence Thomas, concurred to note that the displacement holding rests on the uncontested assumption that the other justices' interpretation in *Massachusetts* of the Clean Air Act to provide authority regulate greenhouse gases is correct. Notably, Chief Justice John G. Roberts Jr. and Justice Antonin Scalia, who dissented in *Massachusetts*, joined the majority without joining the concurrence, suggesting that they would not attempt to reverse the *Massachusetts* precedent.

On jurisdiction, the justices, absent Sotomayor, divided evenly, thus affirming the Second Circuit's finding of jurisdiction. Significantly, although the opinion does not address the political question doctrine, the Supreme Court could not have proceeded to the merits unless at least four justices agreed with the Second Circuit that this was no bar. Regarding standing, the opinion states that four justices (presumably Ginsburg, Stephen G. Breyer, Elena Kagan, and Anthony M. Kennedy), would hold that ''at least some plaintiffs have Article III standing under *Massachusetts*.''[4] In *Massachusetts*, the majority emphasized the ''special solicitude'' a sovereign state should be afforded in standing analysis. The ''at least some'' reference suggests that at least one justice of the four supporting standing would not hold that private plaintiffs have standing, but that only the states do. This suggests that, in future greenhouse gas litigation, at least five justices might reject standing for non-state plaintiffs.

The Supreme Court declined to decide whether plaintiffs' state law tort claims could proceed because the Second Circuit, ruling that federal common law governed, did not address it and it was not briefed. The Supreme Court did note that the preemptive effect of the Clean Air Act is a key issue in determining the availability of a state lawsuit.[5]

Impacts of *AEP* Decision

Supporters of Clean Air Act Regulation of Greenhouse Gases

Ginsburg's opinion in *AEP* goes well beyond a neutral finding that Congress chose to delegate power to regulate greenhouse gases to EPA (and thus to displace federal common law on the matter). Rather, the opinion stands as an endorsement of Congress's delegation of such power to EPA as an expert agency. It would have been enough for the court to conclude that ''the [Clean Air] Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants,''[6] supported by the court's detailed review of EPA's authority to set New Source Performance Standards for greenhouse gases and the statutory enforcement mechanisms. The court went further, however, to conclude that it believes Congress made the right choice: ''It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.''[7] The court then catalogued the advantages EPA would have in regulating greenhouse gases as compared to judges. Moreover, although the court concluded that the Clean Air Act displaces federal common

[3] Slip Opinion No. 10-174 at 11.
[4] Slip Opinion No. 10-174 at 6.
[5] Slip Opinion No. 10-174 at 15.
[6] Slip Opinion No. 10-174 at 10.
[7] Slip Opinion No. 10-174 at 14.

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law whether or not EPA actually sets greenhouse gas standards, the court emphasized that federal courts would hold EPA to its statutory obligations: ''EPA's judgment, we hasten to add, would not escape judicial review.''[8] Further, the court warned: ''EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' ''[9] And more generally: ''Federal courts . . . can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted.''[10] Taken together, the court's discussion serves to validate EPA's role and the role of the courts in holding EPA to its obligations in this area.[11]

Plaintiffs

Of course, the court rejected the federal common law claims in this case. States and others looking to pursue federal common law claims to enjoin emitters of greenhouse gases are barred. Several notes about this outcome are in order:

First, notwithstanding the court's clearly expressed preference for agency action over judicial control through nuisance law, the opinion leaves open the possibility that if Congress were to repeal EPA's authority to regulate greenhouse gas emissions, the courts could then entertain federal common law nuisance claims (though possibly limited to states as the entities that could establish standing).

Second, plaintiffs have suggested that federal common law damage claims (in contrast to claims for injunctive relief), survive *AEP*. Residents of the Inupiat village of Kivalina in Alaska are seeking damages from energy companies claiming their village is being encroached by rising water levels and now appealing dismissal of their claims to the Ninth Circuit.[12] The appeal was stayed until July 15, 2011, pending the outcome in *AEP*. The plaintiff-appellants have now filed a motion seeking supplemental briefing to argue that the Clean Air Act does not displace federal common law nuisance claims for damages. If federal common law were to provide a damages remedy at all, plaintiffs will have to explain how a damages remedy is any less coercive or displaced by a federal statutory regime than injunctive relief.

Third, the state plaintiffs in *AEP* were presumably politically motivated. Filed in 2004, when EPA was maintaining that it did not have authority to regulate greenhouse gases under the Clean Air Act, the states arguably intended their case to increase pressure for legislative or regulatory action to control greenhouse gas emissions. The court's decision, suggesting that such an action would lie in the absence of federal statutory law displacing common law nuisance action, would seem to support the state plaintiffs' objective. For those in Congress opposed to EPA action under the Clean Air Act, repeal of EPA's legislative authority would create the risk of renewed federal common law actions. Accordingly, unless those opposed to Clean Air Act regulation can muster support for legislative action expressly to preempt common law claims with no regulatory program, the decision may support those who would leave the Clean Air Act alone or consider an alternative regulatory mechanism. Of course, the alignments in Congress are complex, but the specter of renewed federal common law nuisance litigation could affect the debate, as the state plaintiffs may well have intended in filing the *AEP* lawsuit.

Plaintiffs Looking for State Common Law Remedies

The status of state common law nuisance claims seeking to reduce emissions of greenhouse gases remains unclear, but there is more in *AEP* for defendants than plaintiffs in such cases. To be sure, the Supreme Court noted Clean Air Act preemption as a threshold issue and potential arguments that the Clean Air Act preempts state regulation of stationary sources will receive renewed scrutiny. The Supreme Court in *Massachusetts* explained that there may be substantial overlap between state and federal regulation in this area as long as there is no conflict.[13] However, even if the courts would conclude that the Clean Air Act does not preempt such suits, the suggestion that a majority of the court would find against standing for plaintiffs other than states would of course substantially limit such suits, in federal courts and those states whose judicial systems follow federal standing jurisprudence. Further, the court's own strong endorsement of executive agency control and skepticism of the ability of judges in this area would seem to apply equally to the state systems as the federal. Accordingly, plaintiffs' prospect of successful state common law claims regarding greenhouse gases arguably faces greater hurdles after *AEP* than before.

[8] Slip Opinion No. 10-174 at 13.

[9] Slip Opinion No. 10-174 at 13 (quoting Clean Air Act, 42 U.S.C. § 7607(d)(9)(A)).

[10] Slip Opinion No. 10-174 at 13.

[11] Arnold & Porter LLP maintains a website that compiles and displays all known climate litigation in the United States, including the more than 100 pending challenges to EPA's greenhouse gas regulations. It can be found at http://www.climatecasechart.com.

[12] *Native Village of Kivalina* v. *Exxon Corp.* (9th Cir. No. 09-17490).

[13] *See Massachusetts v. EPA*, 549 U.S. 497, 75 U.S.L.W. 4149 (2007). Congress has expressly preempted state regulation of emissions as to motor vehicles, with a limited exception for California if certain criteria are met, and states that adopt requirements identical to California's. *See* 42 U.S.C. § 7543.

* Arnold & Porter LLP represents a major energy company in defense of claims that greenhouse gas emissions constitute a public nuisance in *Native Village of Kivalina v. ExxonMobil Corp.* and *Comer v. Murphy Oil USA Inc.*