

**Climate Alert**

Significant Climate Change-Related News and Updates from the LLB&L Climate Change Practice Team

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**The Dam Breaks**

*Second Circuit Holds that Political Question Doctrine Does Not Preclude a Public Nuisance Claim for Alleged Contributions to Global Warming*

Over the last few years plaintiffs have made several attempts to bring public nuisance claims against the energy and automotive industries, claiming that such defendants should be held accountable for their alleged contribution to global warming due to their emissions of greenhouse gases. Up until last week, the political question doctrine effectively served as the dam that prevented a flood of plaintiffs' "global warming" cases — every court that addressed the issue held that the political question doctrine<sup>1</sup> mandated the dismissal of such global warming based public nuisance claims. See, e.g., *Connecticut v. American Electric Power Co.*, 406 F. Supp.2d 265 (S.D.N.Y. 2005); *Comer v. Murphy Oil*, Case No. 1:05-CV-436 (S.D. Miss Aug. 30, 2007); *California v. General Motors Corp.*, No. C06-05755 MJJ (N.D. Cal. Sept. 17, 2007).

Last week, in the appeal of *Connecticut v. American Electric Power Co.*, the Second Circuit Court of Appeals broke the dam — it held that the political question doctrine did not preclude a public nuisance claim brought against five power companies that emit carbon dioxide for their alleged contribution to global warming.

**Background**

In 2004, eight states — California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin — and New York City (collectively, the "Plaintiffs") filed suit against American Electric Power Co. Inc., American Electric Power Service Corp., Southern Company, the Tennessee Valley Authority, Xcel Energy Inc. and Cinergy Corp. (collectively, the "Defendants") seeking "abatement of defendants' ongoing contributions to a public nuisance" under federal common law, or in the alternative, under state law. The complaint alleged that the Defendants were the five largest emitters of carbon dioxide in the United States, and among the largest in the world. As relief, the complaint sought to permanently enjoin the Defendants to abate the nuisance by capping carbon dioxide emissions and then by reducing emissions by a specified percentage each year for at least 10 years.

In 2005, District Court Judge Loretta Preska dismissed the complaint by applying the political question doctrine, finding that Plaintiffs' causes of action were "impossib[le] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion." Judge Preska rejected Plaintiffs' argument that this was a simple pollution-as-public-nuisance case, and instead noted that none of those cases "touched on so many areas of national and international policy." Since the Plaintiffs sought injunctive relief that included abatement of carbon dioxide emissions, Judge Preska especially noted that the court was being asked to make "policy determinations" such as: (1) determination of the appropriate level at which to cap emissions; (2) determination of the appropriate percentage reduction; (3) creation of a schedule to implement the reduction; (4) balancing the implications of such relief on the United States' ongoing climate change negotiations with other nations; (5) assessment and measuring available alternative energy resources; and (6) determination and balancing of the implications of such relief on the United States' energy sufficiency and, thus, its national security.

The Plaintiffs appealed and for three years the Second Circuit considered the appeal. In the interim, Judge Sonia Sotomayor, who originally was a member of the panel that heard the oral argument, was elevated to the Supreme Court. On September 21, 2009, the remaining two judges on the panel issued a decision that reversed the dismissal based on the political question doctrine. The court further found that Plaintiffs had standing to bring their claims, that Plaintiffs had sufficiently pled a claim for federal common law nuisance and that such federal common law nuisance claims were not displaced by the Clean Air Act.

**The Court's Answer on the Political Question Doctrine**

While the Second Circuit's opinion contains a lengthy discussion of standing, standards of federal common law nuisance and displacement, this *Alert* will focus on the political question doc-

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trine because it is the true departure point from all other cases that preceded this decision. The Second Circuit analyzed each of the factors for determining a political question, and held that each of them did not apply. These factors and the Second Circuit's holding on each were as follows:

- 1) **Is There a Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department?** In attempting to argue that this factor was met, the Defendants asserted that the issue in the case was "whether carbon dioxide emissions . . . should be subject to mandatory limits and/or reductions" and that, as such, a determination by the court would impermissibly interfere with the President's authority to manage foreign relations and induce other nations to reduce emissions. The Second Circuit rejected this argument, noting that the Defendants had magnified the issue to the point of misstating it. The Court took a narrow view of the case and said that the Plaintiffs were not asking the court to fashion a comprehensive remedy for global warming, but instead were seeking to limit the emissions of six domestic coal-fired plants — the Second Circuit did not see this as the establishment of a national or international emissions policy.
- 2) **Is There a Lack of Judicially-Discoverable and Manageable Standards for Resolving This Case?** Like with the first factor, the Second Circuit took a narrow view of the issue being presented to it and rejected the Defendants' assertion that the court would have to tackle such issues as how fast emissions should be reduced, who should bear the costs and what are the impacts on jobs, the economy and the nation's security. The Second Circuit reasoned that courts have historically handled complex common law public nuisance cases and have applied well-settled tort rules

to new and complex problems. The Second Circuit held that the court could apply the standards from the Restatement of Torts and that such standards were workable. Again, the Second Circuit said this was a "discrete question" that "the district court will be called upon to address and [to] resolve the particular nuisance issue before it, which does not involve assessing and balancing the kind of broad interests that a legislature or a President might consider in formulating a national emissions policy."

- 3) **Is it Impossible to Decide this Case Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion?** While the District Court had relied heavily on this factor and found that any regulation made by the courts was contrary to the political branches refusal to act, the Second Circuit took a completely different view of the refusal to act. Instead, the Second Circuit reasoned that Congress's refusal to legislate does not express an intent to supplant the common law, but rather, the common law is designed to fill in such regulatory gaps. The Second Circuit stated: "[Plaintiffs] need not await an 'initial policy determination' in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century."
- 4) **Will Adjudication of This Case Demonstrate "Lack of Respect" for the Political Branches, Contravene "An Unusual Need for Unquestioning Adherence to a Political Decision Already Made," or "Embarrass" the Nation as a Result of "Multifarious Pronouncements by Various Departments?"** The Second Circuit lumped the fourth through sixth factors for the political question test into one fairly brief discussion. The Second Circuit recognized that each one of these factors is relevant only if judicial resolution would "contra-

dict prior decisions by a political branch." The Second Circuit then concluded that since "there really is no unified policy on greenhouse gas emissions," a decision by the court would not demonstrate a lack of respect for the political branches, contravene a relevant political decision already made or result in an embarrassing multifarious pronouncement. The court then went on to note that while cases involving carbon emissions and global warming have "political overtones," "it is error to equate a political question with a political case."

At the end of its analysis rejecting the political question doctrine, the Second Circuit appears to challenge the very necessity of the political question doctrine in instances where the court is being asked to review federal common law: "[G]iven the nature of federal common law, where Congress may, by legislation, displace common law standards by its own statutory and regulatory standards and require courts to follow those standards, **there is no need for the protections of the political question doctrine.**" (emphasis added)

**Commentary – A Flood of Litigation?**

There can be little doubt that the Second Circuit broke the dam of the political question doctrine as it related to global warming-based nuisance claims. The internet is already replete with quotes from potential plaintiffs and their possible counsel about their excitement over the new opportunity for additional litigation.

While it is likely that the defendants in this case will seek additional review, either via a request for reconsideration by the entire Second Circuit (an *en banc* review) or a request that the Supreme Court hear the case, such review at this time is not a foregone conclusion — such additional review by the Second Circuit or the Supreme Court is rarely granted.

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**The Dam Breaks**

*Second Circuit Holds that Political Question Doctrine Does Not Preclude a Public Nuisance Claim for Alleged Contributions to Global Warming* (cont'd.)

In light of the Second Circuit's holding in *Connecticut v. AEP*, the decisions in two pending global warming cases will take on even more significance. There currently is an appeal before the Fifth Circuit Court of Appeals (*Comer v. Murphy Oil*) and a motion to dismiss pending in a case before the Northern District of California (*Native Village of Kivalina v. ExxonMobil Corp.*). It is possible that these courts may be spurred to issue rulings in these cases in response to the Second Circuit's decision. If the Fifth Circuit reaches a different conclusion than the Second Circuit, there will be a split in the circuits, which increases the chances that the Supreme Court will address the political question doctrine for global warming public nuisance cases. Until there is such a higher review, however, companies that are large emitters of greenhouse gases should expect a new rash of lawsuits from now emboldened plaintiffs.

It should be noted that while the Second Circuit has decided that global warming is not a political question, Congress is very publicly grappling with the issue in its current session. There is a distinct possibility that some form of greenhouse gas emissions legislation will be passed before next year's midterm elections. It would not be surprising if any legislation that is ultimately adopted contained language expressly preempting the type of public nuisance claims alleged in *Connecticut*. Alternatively, if such legislation is adopted without express pre-emption language, courts may decide in future cases or appeals that the legislation impliedly pre-empts these types of claims. However, in the event that Congress declines or fails to pass climate change legislation, it appears that the Second Circuit may have broken the dam on global warming nuisance litigation.

**Endnotes**

- 1 The political question doctrine is set forth in the seminal Supreme Court case of *Baker v. Carr*, 369 U.S. 186 (1962), and generally stands for the proposition that certain issues are of such a policy or political nature that they should not be decided by the courts, but rather left to the legislature and/or executive for determination.

**About the Authors**

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