



U.S. Supreme Court Gives “Cold Shoulder” to Global Warming Suit

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The U.S. Supreme Court, in the much anticipated decision of *American Electric Power Co. v. Connecticut*, No.10-174 (June 20, 2011), held that plaintiffs could not bring a claim of public nuisance under federal common law for alleged contributions to global warming from the emissions of greenhouse gases. In short, the Supreme Court, in an unanimous 8-0 decision (Justice Sotomayor recused herself because she had heard the case when it was before the Second Circuit), held that the authority and actions of the EPA to regulate greenhouse gases under the Clean Air Act have resulted in the preemption of claims under federal common law related to global warming.

Plaintiffs, which consisted of eight states, the City of New York and three nonprofit land trusts, brought suit in 2004 against five separate power companies that allegedly were the five largest emitters of carbon dioxide in the United States. The plaintiffs sought injunctive relief in the form of caps on carbon dioxide emissions followed by annual reductions for at least a decade. The District Court dismissed plaintiffs' suit as presenting non-justiciable political questions, however, the Second Circuit reversed. The Second Circuit found that the suit was not barred by the political question doctrine and that plaintiffs had adequate standing under Article III of the Constitution. The Second Circuit also held that the Clean Air Act did not “displace” federal common law.

Rather than address the political question or standing issue,¹ the Supreme Court reversed the Second Circuit on the basis that the Clean Air Act and the actions of the EPA preempted a claim under federal common law. The Supreme Court first noted its decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) in which it was held that the Clean Air Act authorized federal regulation of the emissions of carbon dioxide and other greenhouse gases. The Court then noted that after the *Massachusetts* decision, the EPA undertook the process of greenhouse gas regulation and has committed to issue a proposed rule by July 2011 and a final rule by May 2012.

After giving a general background of the development of federal common law and the pros and cons of applying federal common law on nuisance to a case based on greenhouse gas emissions, the Court said such questions were “academic” because “any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.”

The Supreme Court analyzed the preemption issue by first noting that the standard to preempt federal common law is not as strenuous as the standard to preempt a state law: The federal standard simply requires that the statute speak directly to the question at issue. After analyzing the structure of the Clean Air Act and EPA's regulatory process thereunder, the Supreme Court concluded that “[t]he Act itself thus



provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law.”

The Supreme Court also rejected the Second Circuit’s position that preemption has not yet occurred because the EPA has not yet issued greenhouse gas emissions standards. The Court indicated that the mere delegation of power to the EPA was sufficient. The Court further cited the EPA’s expertise in the matter and touted the agency as “better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”

The Supreme Court did leave plaintiffs with one potential avenue of recourse, however. Noting that the Second Circuit had not addressed plaintiffs’ state law claims because it held that federal common law governed, the Court stated, “In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, inter alia, on the preemptive effect of the federal Act.” Since no party had addressed this issue, the Court remanded the issue of the availability of a claim under state nuisance law.

Future plaintiffs will undoubtedly seek to distinguish the *AEP* decision on two primary fronts. First, they will point to the fact that the Supreme Court did not decide the issue of whether the Clean Air Act and the actions of the EPA preempted state common law nuisance claims. Plaintiffs will likely probe that area of the law. Second, future plaintiffs will point to the fact that the *AEP* plaintiffs solely sought injunctive relief in the form of abatements of greenhouse gases. Plaintiffs will likely argue that *AEP* does not apply to claims of damages, and that the Clean Air Act cannot preempt a damages claim under federal common law.

In conclusion, while the *AEP* decision may chill some global warming suits, there are still potential avenues and arguments to be pursued by future “global warming” plaintiffs.

Endnotes

- 1 The Supreme Court very briefly noted that it was split four to four on the standing issue. Since the Court was equally divided, the Second Circuit’s “exercise of jurisdiction” was affirmed. This affirmance due to the equally divided Supreme Court still leaves the standing question as a live issue in other federal circuits.*

For more information on the matters discussed in the *Locke Lord QuickStudy*, please contact the authors:

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