



Second Circuit Rules Parties May Sue Greenhouse Gas Emitters Under Nuisance Claim

In a decision that should raise flags across the country in boardrooms of companies with significant greenhouse gas emissions, the United States Court of Appeals for the Second Circuit recently overturned a federal district court decision¹ and ruled in favor of the plaintiffs² in a climate change lawsuit based on a federal common law nuisance claim against six private power companies³ that operate coal-fired power plants in 20 states. *Connecticut et al. v. American Electric Power Co., Inc.* Docket Nos. 05-5104-cv; 05-5119-cv (2nd Cir. Sept. 21, 2009).

The plaintiffs sought abatement of defendants' greenhouse gas emissions, alleging that they have caused, and will continue to contribute to, the public nuisance of global warming, and arguing that they should be required to cap and eventually reduce their emissions. The District Court had dismissed the claims on the grounds that they presented a non-justiciable political question, but it did not address the parties' standing or the substantive issue at hand. Reversing, the Second Circuit's two-judge panel⁴ held that:

- The claims do not present a non-justiciable political question;
- The States have both *parens patriae* and Article III proprietary standing to bring their claims;
- The City of New York and land trusts have Article III proprietary standing;
- Plaintiffs properly stated a claim under the federal common law of nuisance;
- Non-state parties have standing to sue under the federal common law of nuisance; and
- The claims were not "displaced" by federal statutes such as the Clean Air Act, the Energy Policy Act of 1992, or the Energy Policy Act of 2005.

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The judgment of the lower court was vacated and the case was remanded to the district court for further proceedings.

Justiciability of Climate Change Issue

Although climate change is a global issue, the court narrowly defined the issue at hand: it is a common law nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct. Therefore, based on the six-factor test of *Baker v. Carr*, 369 U.S. 186, 210 (1962), the court concluded that neither the executive nor the legislative branch has the exclusive

¹ *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005).

² Plaintiffs-Appellants include the following: the States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin; the City of New York; and three private land trusts, including Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.

³ Defendants-Appellees include: American Electric Power Company Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation.

⁴ The Honorable Sonia Sotomayor was a member of the original panel in 2006, but was subsequently elevated to the Supreme Court.

responsibility to resolve issues involving greenhouse gas emissions or any other form of alleged nuisance, and, in fact, “the department to whom this issue has been ‘constitutionally committed’ is none other than our own—the Judiciary.” Judge Peter W. Hall, writing the opinion for the court, stated that with respect to adjudicating a greenhouse gas emission abatement claim based on public nuisance theory, “[g]iven the checks and balances among the three branches of our government, the judiciary can no more usurp executive and legislative prerogatives than it can decline to decide matters within its jurisdiction simply because such matters may have political ramifications.” The Court concluded that the claims therefore do not present non-justiciable political questions.

Parties Have Standing to Bring Public Nuisance Claim

The Second Circuit further clarified the requirements for climate change standing set forth in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Similar to *Massachusetts*, the court found that states have *parens patriae* standing because of their interests in protecting both their natural resources and the health of their citizens, and because the injuries resulting from greenhouse gas emissions will affect virtually everyone in their states. In addition, the court recognized standing under the traditional standing principles in environmental law, set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and its progeny. The States, the City, and the land trusts successfully contended that, as owners of properties that are open to public or have public access, they suffer from current injuries and are concerned about future injuries resulting from global warming. Because the defendants are five of the largest emitters of carbon dioxide in the United States, the Court found that the plaintiffs sufficiently alleged that their injuries are fairly traceable to the actions of the defendants by asserting that the defendants’ continued emissions of carbon dioxide contribute to global warming, and that global warming harms them now and will harm them in the future in specific ways.

The Court addressed causation by stating that “for purposes of Article III standing they [the plaintiffs] are not required to pinpoint which specific harms of the many injuries they assert are caused by particular defendants, nor are they required to show that defendants’ emissions alone caused their injuries. It is sufficient that they allege that defendants’ emissions contribute to their injuries.” The defendants argued that the plaintiffs’ injuries are not redressable because the capping and reducing emissions by defendants alone will not forestall the future harms that the plaintiffs allege. The court rejected the defendants’ assertion and concluded that it was sufficient to assert that, even if emissions increase elsewhere, the magnitude of the plaintiffs’ injuries would less if the defendants abate their emissions.

Global Warming Claim Under The Federal Common Law of Nuisance

Looking to the Restatement, the Court noted that public nuisance has two elements: an “unreasonable interference” and “a right common to the general public.” The Court found that the States sufficiently alleged that defendants’ emissions, by contributing to global warming, constitute a substantial and unreasonable interference with public rights in their jurisdiction, including, among other rights, the right to public comfort and safety and the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world. Although the defendants are only some of the many emitters of greenhouse gases, it was not necessary to allege that the pollution in question be directly traced or that the plaintiffs sue all sources of the pollution in order to state an actionable public nuisance claim. The Court explained that a nuisance claim does not require that the harm caused by a particular defendant be immediate, or that the harm be localized. Therefore, the Court held, it was proper for the States to collectively sue the defendants under the federal common law of nuisance.

The Court also recognized that the Second Circuit had never ruled on whether a non-state party can bring a federal common law nuisance claim. The only reference in the Circuit’s jurisprudence as to whether municipal and private plaintiffs can bring a federal common law of nuisance action is found in a footnote in *New England Legal Found. v. Costle*, 475 F. Supp. 425, 441 n.18 (D. Conn. 1979). The footnote states that “it may not be essential for the state to be a formal party to a federal common law nuisance action . . . where the interests of the state are sufficiently implicated in a dispute of clearly interstate nature”; however, the footnote does not expressly state that the municipalities or private entities can be a party under the federal common law of nuisance. The Second Circuit also analyzed the Seventh Circuit case of *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979) and agreed with that court’s holding that a municipality could assert a claim under the federal common law of nuisance. The Second Circuit extrapolated from the Seventh Circuit’s decision and held that “private parties and governmental entities that are not states may well have an equally strong claim to relief in circumstances invoking an overriding federal interest or where the controversy touches on federalism” and therefore should not be precluded from bringing claims under the federal common law of nuisance. The Court also applied the Restatement criteria and concluded that both the City of New York and the private land trusts met the Restatement requirements to recover under public nuisance theory.

The Parties' Claims Were Not Displaced by Federal Statutes

The defendants also argued that the plaintiffs' cause of action had been displaced by numerous federal laws that govern emissions. The Court disagreed and stated that the existing federal laws do not speak directly to the particular issue raised by the plaintiffs. The court also rejected the arguments that this lawsuit would undermine the President's strategy concerning global climate change or reduce the bargaining leverage the President needs to implement the strategy in foreign policy.

Future Implications

The Second Circuit holding allows, for the first time, states and other entities to bring a federal common law nuisance claim against power plant companies that are fully in compliance with their operating permits and applicable laws. It is possible that other states, local governments, and interests groups will bring similar

lawsuits. If the Second Circuit's decision is left unchallenged, it may also result in similar nuisance claims being brought against greenhouse gas emitters in other industries, such as automobile manufacturing, transportation, iron and steel, cement, and farming, to name a few. This ruling may also create disincentives for investors and lenders to invest in industrial or commercial projects that have the potential for a similar lawsuit. When EPA promulgates rules regulating greenhouse gas emissions, however, or Congress adopts climate change legislation that specifically addresses the nuisance claims raised in this case, the federal nuisance claim would be "displaced" under the Court's reasoning. Consequently, industries with significant greenhouse emissions may be more likely to support a national system for regulating greenhouse gasses in order to avoid such federal nuisance claims.

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