

A NEW TOOL FOR COMBATING CLIMATE CHANGE? SECOND CIRCUIT FINDS COMPANIES MAY BE SUED FOR THEIR GREENHOUSE GAS EMISSIONS

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To Our Clients and Friends:

A recent Court of Appeals decision is opening a new front in the battle to curb emissions of greenhouse gases (“GHGs”). To date, proponents of efforts to curb GHG emissions have focused on the potential passage of comprehensive climate change legislation by the U.S. Congress and regulation of GHGs by the U.S. Environmental Protection Agency (“EPA”). The recent decision, however, raises the possibility of judicially imposed regulation of GHG emissions.

Second Circuit Decision. On September 21, 2009, the United States Court of Appeals for the Second Circuit reversed a lower court ruling and held that a public nuisance suit brought against large emitters of GHGs could proceed. In *Connecticut v. American Electric Power*, eight states, New York City and three land trusts (“Plaintiffs”) sued six large electric utilities that, in the aggregate, annually emit approximately 650 million tons of carbon dioxide (“Defendants”). Plaintiffs filed suit in 2004 claiming that Defendants’ carbon dioxide emissions contributed to climate change, which threatened public health and natural resources, resulted in environmental damage and constituted a public nuisance. Plaintiffs sought a court order directing the power companies to reduce their carbon dioxide emissions by 3% annually for 10 years. The U.S. District Court for the Southern District of New York dismissed the case on the basis that granting Plaintiffs’ requested relief would require legislation, making the issue a political question outside the court’s jurisdiction.

Reversing the lower court’s decision, the Second Circuit found that Defendants’ contributions to climate change interfered with a “public right in protecting natural resources.” As a result, the Court declared that the federal common law of nuisance governed Plaintiffs’ claims.

The lack of a federal regulatory scheme addressing climate change was a key factor in the Second Circuit’s decision. The Court found that while the federal Clean Air Act addresses pollution and climate change, it does not yet require regulation of carbon dioxide emissions. In 2007, the U.S. Supreme Court held in *Massachusetts v. EPA* that the EPA had the authority to regulate carbon dioxide under the Clean Air Act. The EPA subsequently proposed an endangerment finding that carbon dioxide is a threat to human health. However, the EPA’s proposed endangerment finding is not final and, more importantly, the EPA has not yet started regulating all sources of carbon dioxide. Thus, the Court concluded that the federal

common law of nuisance governed Plaintiffs' claims as no comprehensive federal framework existed to displace the nuisance claim.

Climate Change Legislation and Regulation. The Court's decision comes at an important time in the U.S.'s efforts to curb GHG emissions. In June, the U.S. House of Representatives narrowly passed a bill initiating a nation-wide cap-and-trade program designed to curb GHG emissions. Leaders in the Senate planned to introduce similar legislation after the summer, though such legislation has been delayed while the Senate focuses on health care reform. Timing for potential passage of Senate legislation remains uncertain.

In addition to the activities on Capitol Hill, the EPA has taken steps to regulate GHG emissions. On September 22, 2009, the EPA finalized its rule requiring certain emitters of GHGs to report their GHG emissions. The EPA estimates the rule will require reporting from approximately 10,000 U.S. facilities and cover approximately 85% of the nation's GHG emissions. Also, on September 15, 2009, the EPA and certain other agencies released a proposed rule establishing GHG emission and fuel economy standards for motor vehicles. Efforts to curb GHG emissions from stationary sources likely are not far behind.

Looking Ahead. Over the next several months, there likely will be continued efforts to curtail GHG emissions. In December, U.S. representatives will attend meetings in Copenhagen where developed and developing nations will try to reach agreement on an international climate change accord. Depending on progress with health care reform legislation, pressure may build in the Senate to revisit passage of a comprehensive climate change bill comparable to the one passed by the House of Representatives in June. The EPA is also expected to continue its efforts to regulate GHG emissions.

In the meantime, the Second Circuit's decision likely will spur other potential claimants to file suit against GHG emitters. The Court's ruling is only binding on courts within the Second Circuit; whether courts in other jurisdictions choose to follow the reasoning of the Second Circuit is an open question. Additionally, the U.S. Supreme Court could overrule this decision if Defendants decide to appeal. Finally, future claims of this nature could be preempted if a federal GHG emissions regulatory scheme were implemented.

We will continue to monitor these developments. Please feel free to contact us with any questions.

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