

## U.S. SUPREME COURT RESTRICTS CLIMATE CHANGE NUISANCE SUITS

June 22, 2011

To Our Clients and Friends:

On June 20, 2011, the U.S. Supreme Court, in *American Electric Power Co. v. Connecticut* (“AEP”), blocked states and private parties from suing utilities for contributing to global warming under a federal common law theory of nuisance. In an 8-0 decision authored by Justice Ruth Bader Ginsburg, the Court held that the Clean Air Act and the actions of the U.S. Environmental Protection Agency (“EPA”) under the Clean Air Act displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants. According to the Court, regulation of greenhouse gas (“GHG”) emissions is better left to EPA as the “expert agency” designated by Congress rather than to individual federal judges.

### BACKGROUND

A public nuisance suit is based on the notion that an entity may be doing something or failing to do something that causes injury to public health or safety. The U.S. Supreme Court has recognized the existence of a federal common law of nuisance, but has established that, if Congress passes specific legislation meant to protect public health and safety against a defined “public nuisance,” then such legislation supersedes any federal common law right to seek abatement of the nuisance through federal courts. A number of climate-related public nuisance suits have been filed in recent years in response to Congress’ failure to pass climate change legislation and EPA’s perceived delay in regulating GHGs under the Clean Air Act.

In 2004, the plaintiffs in *AEP*, which included eight states, New York City and three land trusts, filed two suits based on a nuisance theory against five large power companies – American Electric Power Company, Southern Company, Xcel Energy, Cinergy Corporation (now owned by Duke Energy Corp.) and the federal Tennessee Valley Authority. According to the plaintiffs, the defendant power companies are the five largest carbon dioxide emitters in the United States and contribute substantially to global warming. The plaintiffs sought an order compelling the defendants to cap their GHG emissions and then reduce emissions by a specified percentage each year for at least ten years.

In September 2005, the U.S. District Court for the Southern District of New York dismissed the suits, concluding that they raised political questions and that courts were not the proper forum for resolution of such issues. In 2009, the U.S. Court of Appeals for the Second Circuit reversed the District Court ruling, finding that the tort suits should proceed. The Second Circuit determined that the Clean Air Act did not displace federal common law because EPA had yet to set standards governing GHG emissions from the defendants' power plants. At the time of the Second Circuit's decision, EPA had not promulgated rules regulating GHG emissions.

Parallel to the progress of the *AEP* case, the landscape surrounding federal regulation of GHGs shifted significantly. Whereas EPA had previously declined to regulate GHG emissions under the Clean Air Act, the Supreme Court ruled in its 2007 *Massachusetts v. EPA* decision that the Clean Air Act did in fact authorize federal regulation of emissions of carbon dioxide and other GHGs. In December 2009, EPA issued a finding under the Clean Air Act that six GHGs endanger public health and welfare. The endangerment finding was a prerequisite for further EPA regulation. EPA subsequently commenced rulemaking under the Clean Air Act to limit GHG emissions from new, modified and existing fossil-fuel fired plants.

#### THE SUPREME COURT RULING

The Supreme Court's 8-0 *AEP* ruling (Justice Sonia Sotomayor was recused) concludes that, so long as EPA has the authority to regulate GHGs under the Clean Air Act, there is no place for federal common law nuisance suits seeking abatement of GHG emissions. The Court noted that the Clean Air Act provides a means for public and private parties to seek limits on emissions of carbon dioxide from domestic power plants – the same relief sought by the plaintiffs. The Court rejected the Second Circuit's view that the federal common law is not displaced until EPA actually exercises its regulatory authority. Instead, the Court held that the mere delegation of authority to EPA is sufficient to displace federal common law.

The Court split 4-4 in leaving intact the Second Circuit's exercise of jurisdiction in the case, effectively rejecting the argument that the case dealt with a political question that should not be resolved by the courts.

The *AEP* ruling effectively closes the door to federal common law public nuisance suits based on GHG emissions; however, the Court has left open the issue of whether the Clean Air Act precludes the bringing of a state common law nuisance claim.

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We will continue to monitor developments related to climate change litigation, legislation and regulation. Please feel free to contact us with any questions.

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