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Paving The Way For GHG Public Nuisance Claims?

Law360, New York (October 22, 2009) -- In a ground-breaking and lengthy analysis, the U.S. Court of Appeals for the Second Circuit held that eight states, New York City and three land trusts could bring public nuisance claims against owners of some of the largest U.S. electric power plants, alleging that the plants' greenhouse gas emissions contribute to global warming.

Plaintiffs seek to cap and reduce these coal-fired power plants' carbon dioxide emissions, under principles of the federal common law of nuisance.

Overturning the lower court's decision on Sept. 21, 2009, the appellate court ruled that plaintiffs' claims were justiciable (i.e., within the federal judiciary's power to decide), that each plaintiff had standing to sue, that all plaintiffs stated a claim upon which relief could be granted, and that the federal common law cause of action was not displaced by federal statutes or regulation. Connecticut v. American Electric Power Co., Slip Op., Sept. 21, 2009. ("Slip Op.")

The Complaints and District Court Ruling

In 2004, two groups of plaintiffs, consisting of: (a) eight states, led by Connecticut, and New York City; and (b) three private land trusts, filed separate complaints against six corporate entities who own fossil fuel-fired electric power plants operating in 20 states.[1]

Plaintiffs assert that these plants release 25 percent of all CO2 emitted by the U.S. electric power sector and 10 percent of all U.S. man-made CO2 emissions.

Plaintiffs allege that defendants' emissions will have a lasting effect on climate and temperatures, adversely impacting the public, the environment, and other natural resources, including plaintiffs' properties. They seek to hold defendants jointly and severally liable for creating a public nuisance and demand that the nuisance be abated.

In 2005, the U.S. District Court for the Southern District of New York (Preska, J.) dismissed both complaints, holding that plaintiffs claims could not be decided by the federal judiciary because they presented a "political question."

The political question doctrine is a legal concept almost as old as the federal judiciary and rooted in the concept of separation of powers. Slip Op. at 15.

Judge Preska ruled that plaintiffs' claims would impermissibly require the court to balance the interests of those seeking to reduce pollution against those seeking to protect against the economic impact of emission reduction programs. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271-72 (S.D.N.Y. 2005).

The court held that this balancing of interests was "transcendently legislative" and, thus, the court declined to get involved in the face of "deliberate inaction of Congress and the Executive." 406 F. Supp. 2d at 271-73.

Because the district court found the claims nonjusticiable, that court did not reach defendants' arguments to dismiss the claims for lack of standing or for failure to state a claim under the federal common law of nuisance.

The Second Circuit's Opinion Reverses District Court and Allows Case to Proceed

On appeal, the Second Circuit reversed the district court's dismissal on justiciability grounds, and further held that all plaintiffs had standing and had adequately pled federal common law nuisance claims.

The Second Circuit also found that these common law claims were appropriate despite current legislative and executive actions addressing air pollution and GHG emissions.

Thus, the appellate court sent the case back to the trial court for further proceedings. However, as discussed below, those proceedings likely will be delayed by further appellate activities.

Political Question Doctrine Does Not Preclude Claims

The appellate court first addressed the district court's sole basis for dismissal — that plaintiffs' claims raised a non-justiciable "political question."

In Baker v. Carr, 369 U.S. 186, 217 (1962), the U.S. Supreme Court set forth six "formulations" on which a claim may be found to be a nonjusticiable political question.

The Second Circuit rejected all six formulations, including the basis on which the lower court relied — that the claims presented the court with "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217; see Slip Op. at 33.

In its analysis, the Second Circuit repeatedly focused its analysis on the language of the pleadings and requests for relief. The court characterized those pleadings as nuisance claims against specific parties for particular emissions, which plaintiffs seek to limit and reduce. The court refused to cast plaintiffs' claims as ones seeking to combat global warming generally.

The Second Circuit noted that, similar to other public nuisance cases that federal courts have decided, the courts have the constitutional authority, and could create manageable standards, for resolving the case, particularly as federal courts frequently deal with complex, scientific issues — including in the nuisance context — and have done so for over a century. Slip Op. at 24-31.

Given the "high bar" against finding a political question (Slip Op. at 16), the court found that plaintiffs' claims were, at base, "an ordinary tort suit," and, therefore, clearly within the court's ability to decide. Slip Op. at 33.

Contrary to the reasoning of the district court, the Second Circuit found that Congressional and Executive inaction did not preclude justiciability, but allowed the court to use common law to fill "regulatory gaps." Slip Op. at 32.

Finally, the Second Circuit found that in judging the claims in this case, the court would not be contradicting past actions of either the legislative or executive branch.

In particular, the court stated that, at worst there is no unified federal policy to contradict, and at best there is a policy of reducing GHG emissions, citing to the Energy Policy Act of 1992 and the Global Climate Protection Act of 1987. Id. at 34-35.

According to the Second Circuit, although this case has "political ramifications," it does not present a political question. Id. at 35.

Moreover, as they have in the past, Congress or the White House could always take action to override the federal courts' common law decisions. Id. at 35-36.

States, New York City and Private Land Trusts Have Standing

Having found the claims justiciable, the appellate court analyzed plaintiffs' standing to bring the claims. The Second Circuit found that, at this early stage of the litigation, the states had appropriately alleged a basis for standing, based on their capacity as property owners.[2]

Applying the standard for analysis established in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Second Circuit held that all plaintiffs sufficiently allege injury-in-fact, finding that the parties allege concrete, particularized, and current or imminent injuries. Slip Op. at 49-56.

The court found, for example, that California alleges a current injury from erosion due to flooding resulting from early-melting snowpack. Slip Op. at 51.

Notably, the Second Circuit rejected defendants' argument that plaintiffs' alleged future injuries were too speculative, finding that plaintiffs allege current exposure from current emissions, which they allege will definitely cause injury.

While the injuries may be incremental and may not occur within a particular time period, plaintiffs allege sufficient injury-in-fact to survive dismissal of the complaints. Slip Op. at 52-56.

Under the next step of the Lujan standing analysis, the Second Circuit found that plaintiffs' allegations regarding (1) the volume of CO2 emitted by the defendants; and (2) the emissions' effect on global warming, demonstrated "causation," i.e. , that the alleged injury is "fairly traceable" to defendants' actions. Slip Op. at 57-61.

The court rejected defendants' arguments, finding instead that causation was established because plaintiffs allege that defendants' actions "contributed to" plaintiffs' alleged injuries, even though defendants were not the sole cause.

Finally, although defendants argued that plaintiffs do not allege that their requested relief — forcing a certain percentage of emission reductions over the course of ten years — would prevent global warming, the Second Circuit held that plaintiffs had alleged that their injuries were redressable because defendants' reductions in CO2 emissions would "provide some measure of relief." Slip Op. at 63-64.

Thus, based on the Lujan factors, particularly as applied by the Supreme Court in the Massachusetts v. EPA global warming case,[3] plaintiffs had standing to pursue their claims.

Claims Stated Under Federal Common Law of Nuisance

With these threshold jurisdictional matters resolved, the appellate court, exercising its discretion to address issues not reached by the lower court in the "interest of judicial economy," analyzed whether plaintiffs stated a claim under the federal common law of nuisance. Slip Op. at 65.

Determining that the Restatement (Second) of Torts § 821B established the elements of a federal common law nuisance claim, the Second Circuit ruled that plaintiffs had pleaded "an unreasonable interference with a right common to the general public," and thus stated a sufficient claim. Slip Op. at 67, 80, 102.

In response to defendants' argument that the Constitution limits the scope of interstate nuisance actions, the Second Circuit found that those constitutional limitations do not apply here, particularly because this is a case between states and private parties.

The court also rejected defendants' argument that federal nuisance cases must be "a simple type;" due to pollution from an out-of-state source; and so harmful as "they would have justified war at the time of the founding." Slip Op. at 71-80. The Second Circuit found no such criteria existed for federal common law nuisance claims.

The court also held that, based on federal precedent and the restatement, nonstate parties, i.e., the city and the trusts, could sue under the federal common law of nuisance. Slip Op. at 80-99. As with the state plaintiffs, the court found New York City and the land trusts had adequately alleged a federal common law public nuisance claim. Slip Op. at 99-102.

Federal Common Law Nuisance Claims Re CO2 Not Displaced by Federal Statute

Having found that all plaintiffs had pled a prima facie case for federal common law public nuisance, the court addressed the question of whether the public nuisance cause of action was "displaced" by federal legislation, including the Clean Air Act.[4]

The appellate court found that the scope of federal legislation must be carefully analyzed to determine whether common law is displaced. Slip Op. at 103.

Defendants asserted that the Clean Air Act and other legislative and executive action demonstrate a "comprehensive scheme" displacing common law claims relating to global warming. Slip Op. at 108-09.

The Second Circuit found that, at least until the U.S. Environmental Protection Agency issued the necessary endangerment findings and promulgated regulations regarding GHG emissions from stationary sources, no displacement of federal common law could be found. Slip Op. at 130.

After rejecting the separate arguments for dismissal advanced by defendant Tennessee Valley Authority based on its special federally chartered status, the court's final decision was to decline to adjudicate plaintiffs' state law public nuisance claims. Slip Op. at 138.

In concluding its opinion, the Second Circuit harkened back to the U.S. Supreme Court's decision in Illinois v. City of Milwaukee, 406 U.S. 91 (1972), in which, prior to the enactment of the modern Clean Water Act, the Supreme Court found that sewage discharges into interstate waters constituted federal common law public nuisance.

Paraphrasing the Supreme Court's language in that case, the Second Circuit reiterated that public nuisance claims could be appropriate until laws and regulations of GHG emissions "preempt the field." Slip Op. at 139.

The Second Circuit's Decision in Context

After the Second Circuit's decision, defendants have several procedural options for their next steps. They could seek a rehearing either by the same panel of judges or en banc, i.e. , by all the judges on the Second Circuit.[5]

Alternatively, defendants could file a petition for writ of certiorari with the U.S. Supreme Court. Defendants also have the option of allowing the case to proceed in the trial court. If and when further district court proceedings occur, further fact-finding and analysis will be required.

The Second Circuit's decision is one of several pending or recently decided cases in which parties seek to use the federal courts to attack GHG emissions. All of these cases involve the political question and/or standing issues addressed by the Second Circuit. Notably, none of these other courts have definitively allowed global warming cases to proceed past the pleadings stage.

For example, in Comer v. Murphy Oil USA Inc.¸ the U.S. District Court for the Southern District of Mississippi dismissed plaintiffs' private and public nuisance claims that the GHG emissions of defendants — oil companies and others — contributed to climate change, thereby worsening the impacts of Hurricane Katrina. 1:05-CV-436-LG-FHW (S.D. Miss. Aug. 30, 2007), appeal pending, No. 07-60756 (5th Cir.).

Like the trial court in Am. Elec. Power, and in contrast with the Second Circuit's opinion, the Comer trial court found plaintiffs' claims a non-justiciable political question.

Also in contrast to the Second Circuit's decision, the Comer court found that plaintiffs did not have standing because they did not adequately allege the "causation" element required by Lujan.

Depending upon the decision of the Fifth Circuit on appeal, the Comer case could present a split in the federal appellate circuits, potentially making these issues appropriate for decision by the U.S. Supreme Court.

Similarly, in Ctr. for Biological Diversity v. U.S. Dep't of the Interior, the D.C. Circuit Court of Appeals dismissed plaintiffs' global warming case for lack of standing. 563 F.3d 466 (D.C. Cir. 2009).

In Ctr. for Biological Diversity, plaintiff asserted that, in violation of the National Environmental Policy Act and the Outer Continental Shelf Lands Act, the federal government had not considered climate change impacts when opening the Outer Continental Shelf to additional leasing.

Although the appellate court found that the plaintiff environmental group had standing pursuant to procedural elements of the statutes, the D.C. Circuit first found that plaintiff did not have "substantive" standing because it could not allege sufficient injury-in-fact or a distinctive harm resulting from climate change. 563 F.3d at 477- 78.

The D.C. Circuit's treatment of standing, although not relied on for the ultimate result in the case, contrasts with that of the Second Circuit.

Also of note is the pending complaint before a federal court in California brought by an Alaskan village seeking to recover for property and other damages allegedly due to the effects of climate change.

In Native Vill. of Kivalina v. ExxonMobil, the village brought a nuisance claim arguing that several utilities' and oil and coal companies' GHG emissions resulted in the ongoing destruction of the village, requiring that all residents eventually be relocated, at costs of hundreds of millions of dollars. Case No. CV-08-1138, N.D. Cal. (complaint filed Feb. 26, 2008).

The oil companies' pending motion to dismiss asserts that: (1) plaintiffs did not adequately allege that defendants' actions caused plaintiffs' injuries; and (2) the federal common law of nuisance does not permit nuisance claims for GHG emissions. (Oil Cos. Motion to Dismiss, No. 4:08-CV-01138-SBA (Doc. No. 134) (N.D. Cal. Jun 30, 2008). The district court has not yet ruled on this motion.

Depending on the outcome of these lawsuits, GHG emitters could find themselves facing a wide range of litigation in federal and state courts. Further developments in these cases should be carefully monitored and evaluated.

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[1] The eight state plaintiffs are: California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin. The three land trusts — Open Space Institute Inc., Open Space Conservancy Inc. and Audubon Society of New Hampshire — own property in several states on the U.S. East Coast and Canada.

[2] The court also found that the states have parens patriae standing as quasi-sovereigns. Slip Op. at 46.

[3] Massachusetts v. EPA, 549 U.S. 497 (2007).

[4] As the court explained, common law can be "displaced" by federal statute, which is a concept different from "preemption," which addresses when federal law supersedes state law. Slip Op. at 102, n. 37.

[5] The Second Circuit opinion, although unanimous, was issued by only a two-judge panel, as the third judge originally assigned to the panel, the Honorable Sonia Sotomayor, was elevated to the U.S. Supreme Court before the decision was issued.