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Supreme Court prohibits federal common law nuisance suits seeking limits on carbon dioxide emissions

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By a vote of 8 – 0, the United States Supreme Court recently ruled that congressional delegation of authority to EPA to regulate pollutants under the Clean Air Act ("Act") speaks directly to regulation of carbon dioxide emissions from power plants and therefore displaces any right a plaintiff might otherwise have to seek abatement of carbon dioxide emissions from such facilities under federal common law. The court's decision was handed down on June 20, 2011, in the case of *American Electric Power Co., Inc., et al. v Connecticut*, et al. and builds on its earlier decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) in which carbon dioxide and other greenhouse gases (GHG) were found to be "air pollutants" under the Act and therefore subject to regulation by EPA. It was the decision in Massachusetts that paved the way for EPA to develop regulations governing greenhouse gas emissions. In *AEP*, a number of states, together with the City of New York and several private land trusts, sued five large utilities operating coal-fired electric power plants in the United States. Plaintiffs alleged that the utilities collectively emitted 25 percent of all carbon dioxide produced at domestic power plants and 10 percent of all carbon dioxide from human activity in the United States. According to plaintiffs, these emissions constitute a "substantial and unreasonable interference with public rights" and are thus a nuisance under federal common law, as well as state tort law. Plaintiffs sought to hold defendants jointly and severally liable for global warming and to obtain an injunction in district court which would cap defendants' emissions and require periodic reductions over a period of 10 years or more. The district court, however, dismissed the claims, holding that they were "non-justiciable political questions" best left to policymakers.

The 2nd Circuit Court of Appeals took up the issue in 2007 and reversed the lower court. The 2nd Circuit found that plaintiffs' claims were not barred by the political question doctrine and that plaintiffs had, in fact, stated a claim allowing

for abatement under the federal common law of nuisance. Critical to the 2nd Circuit's decision to allow the case to go forward was the fact that EPA had not yet promulgated regulations governing carbon dioxide emissions from power plants. However, this fact was thought relevant by the 2nd Circuit based on an overly broad interpretation of the Supreme Court's decision in *Milwaukee v. Illinois*, 452 U.S. 304 (1981). In *Milwaukee* (which involved a similar interstate pollution situation under the Clean Water Act), plaintiffs sought abatement of water pollution under a theory of federal common law nuisance. There, plaintiffs' claims were ostensibly dismissed because EPA had been delegated authority to, and had, in fact, promulgated regulations comprehensively regulating the water pollution at issue. According to the 2nd Circuit, the situation in *AEP* was different from *Milwaukee* because EPA, while having authority to do so, had not promulgated regulations addressing the pollution at issue. Because there were no such regulations in place for carbon dioxide emissions from power plants, the 2nd Circuit reasoned that federal common law had not been displaced and plaintiffs' claims could go forward.

On appeal to the Supreme Court, the justices (in a 4 – 4 vote) first rejected plaintiffs' standing argument with virtually no discussion and proceeded to the merits of the case. In addressing the substantive issue, the court first explored the concept and evolution of a specialized federal common law. The court characterized federal common law as a body of law addressing "areas of national concern" and within the scope of "national legislative power," such as "air and water in their ambient or interstate aspects." While confirming these parameters within which the court may be called to develop the federal common law, the court cautioned that it "remains mindful that it does not have creative power akin to that vested in Congress." In that vein, the court observed that it has "not yet decided whether private citizens . . . or political subdivisions . . . of a State may invoke the federal common law of nuisance to abate out-of-state pollution. Nor [has the Court] ever held that a State may sue to abate any and all manner of pollution originating outside its borders." Indeed, while recognizing "that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances," and acknowledging the global scale and importance of the global warming issue, the court set these interstate and international pollution issues aside for another day, finding it unnecessary to decide them in light of its treatment of the core issue: whether Congress has displaced the need for the court to engage in judicial law-making.

In addressing the issue of displacement of federal common law, the court first observed that, where Congress "addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears." Unlike the concept of federal preemption of state law (discussed below) – which involves issues of federalism and thus requires "evidence of a clear and manifest [congressional] purpose" to occupy the field – the test for whether congressional legislation overrides a declaration of federal common law is simply whether the statute "speak[s] directly to [the] question at issue." Thus, Congress may override or "displace" any need to develop or apply federal common law simply by passing federal legislation addressing the issue at hand. After all, "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest."


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Turning, then, to the Clean Air Act, the court held that the Act "and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon dioxide from fossil-fuel power plants." To arrive at this conclusion, the court examined the mechanics of the Act and its directives to EPA. At its core, the Act requires EPA to identify and regulate stationary sources of pollutants that contribute to air pollution that "may reasonably be anticipated to endanger public health and welfare." As was decided in Massachusetts, carbon dioxide is a pollutant regulated under the Act. Likewise, power plants are one of the categories of pollutant sources already identified by EPA as being "reasonably anticipated to endanger public health and welfare." Those elements being established, the court observed that the Act requires EPA to establish limits for carbon dioxide emitted from both new and existing power plants and empowers EPA to enforce such limits. Furthermore, if EPA does not establish required emissions limits or does not engage in appropriate enforcement of those limits, the public is authorized to petition for rulemaking and pursue citizen's suits to implement the Act, all of which is reviewable by the federal courts. Indeed, the decision in Massachusetts was specifically directed at requiring EPA to develop regulations addressing carbon dioxide emissions, and EPA is currently doing so

with a target date of May 2012 for completion. In the court's view, this leads to the inexorable conclusion that the Act "speaks directly to emissions of carbon dioxide from the defendants' plants." Consequently, because the "Act itself 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 . . . [we] see no room for a parallel track" through a nuisance lawsuit.

The court clarified *Milwaukee* by finding immaterial the fact that EPA has not yet completed its work on implementing regulations to control carbon dioxide emissions from power plants. The critical inquiry for purposes of determining if federal common law has been displaced is "whether the field has been occupied, not whether it has been occupied in a particular manner." According to the court in *AEP*, the field was occupied when "Congress delegated to EPA the decision whether and how to regulate carbon dioxide emissions from power plants." It is that delegation by Congress that displaces federal common law – not the exercise of that delegation. As such, whether or not EPA has completed its rulemaking process under a delegation of authority by Congress is irrelevant to a determination as to whether federal common law has been displaced.

Clearly, then, the path for those dissatisfied with EPA's progress or conclusions (i.e., the manner in which it occupies the field) is through involvement in the rulemaking process in the first instance and subsequent judicial review of that process. As noted by the court, where EPA has been delegated rulemaking authority, "EPA's judgment . . . would not escape judicial review" insofar as the federal courts "can review agency action (or a final rule declining to take action) to ensure compliance with the Clear Air Act." That EPA is to exercise its expert judgment in determining if and to what extent emissions of a pollutant from a stationary source endanger public health or welfare "is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits." Ultimately, if plaintiffs are dissatisfied with EPA's final decision regulating carbon dioxide emissions from power plants, their recourse is limited to a judicial review of EPA's decision-making process.

From a practical standpoint, the court correctly views EPA as the proper party to make judgments about the complex scientific issues being debated in connection with the greenhouse effect and global warming. Such judgments require "informed assessment of competing interests" including environmental impacts, energy needs and economic repercussions. In the Act itself, Congress required many in-depth inquiries including the costs of implementation, differences among sources and control technology, and non-air health and environmental issues, to name a few. For the courts to undertake these inquiries would require expertise that judges do not possess and resources they cannot access. EPA, as the expert in such matters, "is surely better equipped to do the job than individual

judges issuing ad hoc, case-by-case injunctions." Further, a process whereby federal judges in multiple jurisdictions impose the remedies sought by plaintiffs "cannot be reconciled with the decision-making scheme Congress enacted." As such, the court concluded that the 2nd Circuit erred in allowing judges to set limits on greenhouse gasses under federal common law because Congress empowered EPA to develop such limits and because EPA's exercise of authority is subject to judicial review to ensure EPA does not make decisions in a manner that is arbitrary, capricious or contrary to law.

Finally, the court noted that plaintiffs also asserted tort claims under the laws of the states where the power plants are located. Because the 2nd Circuit held that federal common law applied, it did not address the state law claims. As such, the Supreme Court was precluded from dealing with the issue and the district court has been left to consider the state law claims and whether or not they are preempted by the Act on remand.

In summary, the *AEP* decision holds that where there is a congressional delegation of authority to EPA to regulate pollutants under the Clean Air Act that speaks directly to a particular pollutant from a particular source, such delegation displaces any right a plaintiff might otherwise have to seek abatement of the pollutant emitted from such source under federal common law. The court did not decide whether state law is preempted in any way by the Act. While seemingly a victory for industry, the decision presents a slippery slope. If Congress chooses to legislatively repeal EPA's authority to regulate carbon dioxide as a pollutant under the Act (as is currently being urged by many), the federal common law of nuisance could spring back into play. Just how this plays out will, perhaps, depended on how GHGs are further addressed, if at all, in any new federal legislation. At least for now, the issue of how to address GHGs remains in the hands of EPA, subject to review by the courts to ensure that EPA does not act arbitrarily, capriciously or contrary to law.

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