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LONDON MARKET NEWS

Federal Court Announces That Plaintiffs May Bring Nuisance Claims Against Power Plants for Global Warming

Breaking Developments In London Market Law
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***Connecticut et al. v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009)**

On September 21, 2009, the Court of Appeals for the Second Circuit ruled that plaintiffs may bring federal nuisance claims against owners of power plants.

In 2004, eight states, New York City and three private land trusts (hereinafter the "Plaintiffs") filed suit against six electric power corporations that own and operate fossil-fuel-fired power plants in 20 states (hereinafter the "Defendants"). Plaintiffs alleged that Defendants, as the largest emitters of carbon dioxide in the United States, are contributing to global warming and causing serious harm affecting human health and natural resources. Plaintiffs brought suit under the federal common law of nuisance to force Defendants to cap and then reduce their carbon dioxide emissions.

Defendants moved to dismiss, and the district court ruled that Plaintiffs' claims presented a non-justiciable political question because the allegations were intertwined with national domestic and foreign policy. The decision was appealed to the Second Circuit. Three years later, the Second Circuit held, in relevant part, that (1) the district court erred in dismissing the complaints, (2) that the plaintiffs had standing to bring suit, and (3) that the federal common law of nuisance may properly be invoked by the Plaintiffs.

One question before the Second Circuit was whether the Plaintiffs (states and environmental land trusts) had standing to bring suit against the electric power corporation for public nuisance. With respect to the states, the Court concluded that these Plaintiffs had standing based on the *parens patriae* power (*i.e.*, the states' sovereign interest to protect and safeguard public health). The State of Massachusetts had additional standing based on its proprietary interest as a property owner. The environmental land trusts similarly had standing based on proprietary interests. Further, the Court found that the Plaintiffs' claims sufficiently alleged imminent injuries because the Defendants' actions (*i.e.*, emitting carbon dioxide) would necessarily result in current and future harms to the environment.

Next, the Second Circuit addressed whether the Plaintiffs have stated a claim under the federal common law of nuisance. The Court relied on the Restatement (Second) of Torts Section 821B(1) as an appropriate definition of public nuisance for purposes of federal common law. The Restatement defines a public nuisance as "an unreasonable interference with a right common to the general public." The Plaintiffs claimed that, "Defendants' emissions, by contributing to global warming, constitute a substantial and unreasonable interference with

public rights in the plaintiffs' jurisdictions" (*i.e.*, the right to public comfort and safety; the right to protection of vital natural resources and public property; and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world). The Second Circuit accepted this argument, concluding that these grievances suffice to allege an unreasonable interference with public rights within the meaning of federal public nuisance law.

Finally, the Second Circuit noted that there is no federal legislation that "preempts the field." Although some Environmental Protection Agency ("EPA") regulations aim to regulate air quality (*i.e.*, the Clean Air Act), the Court specifically found that Congress has yet to implement federal climate change legislation that offers (or denies) the Plaintiffs their desired remedy. The Court was particularly persuaded by the fact that the EPA has not endeavored to regulate or impose requirements on industry for the emission of greenhouse gases. Accordingly, the Court concluded that the Plaintiffs' nuisance claims must be allowed.

General Ramifications of the American Electric Power Decision

The landmark *American Electric Power* decision may potentially spawn widespread climate change litigation against automobile manufacturers, utilities and other entities that have been recognized as partly responsible for global warming. Currently, there is only one case in which an insured has sought coverage for global warming claims. *See Steadfast Ins. Co. v. AES Corp.* (Cir. Ct. of Arlington Cty. Va. No. 2008-858). In the underlying litigation, the insured (AES) was one of several energy companies sued for public nuisance. The Plaintiff, like the Plaintiffs in *American Electric Power*, alleged that the energy companies emitted greenhouse gases that caused global warming and resulted in massive erosion of public lands. AES subsequently sought defense and indemnity coverage from its insurer. The insurer filed suit for a declaratory judgment that the climate change lawsuit is outside the scope of the applicable insurance policies. The insurer asserted, in part, that there is no coverage because the emission of greenhouse gases is: (1) not a covered "occurrence", (2) subject to the "Known Loss" exclusion, and (3) subject to the policy's pollution exclusion.

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