

## SECOND CIRCUIT SWINGS OPEN THE DOOR FOR GLOBAL WARMING TORT LITIGATION

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On September 21, 2009, the U.S. Court of Appeals for the Second Circuit issued an opinion on climate change nuisance liability that was both surprising and highly consequential for the energy, industrial, auto, and insurance industries. The two judge panel (reduced from three when the Honorable Sonia Sotomayor was appointed to the Supreme Court), held in *State of Connecticut v. AEP*<sup>1</sup> that: (1) public nuisance claims against greenhouse gas ("GHG") emitters were not barred on political question grounds; and (2) private organizations, upon a showing of injury different (in scope or kind) from the public at large, had standing to pursue that litigation. As discussed below, this decision has the potential to spur a rash of "global warming" litigation against energy, auto, and industrial defendants.

Before the issuance of this opinion, three federal trial courts had dismissed global warming public nuisance claims against GHG emitters on the grounds that any restrictions upon carbon dioxide and other GHGs should be set by the publicly-elected branches of government. Last week's federal appellate decision (at least until such time that the entire Second Circuit or the Supreme Court weigh in) reverses that trend. The decision permits plaintiffs, eight states, the city of New York and three land trusts,<sup>2</sup> to proceed against six electric power corporations characterized by plaintiffs as the "largest emitters of carbon dioxide in the United States." In vacating the trial court judgment, the Second Circuit held that the plaintiffs had standing to bring claims under the federal common law of nuisance and that those claims do not present

"non-justiciable" political questions. The plaintiffs filed complaints in 2004 against these six electric power corporations seeking to abate defendants' ongoing contributions to the public nuisance of global warming and force defendants to cap and reduce their carbon emissions.

In ruling that the district court erred in dismissing the complaints on political question grounds, the Second Circuit found it significant that plaintiffs are not seeking to have the court "fashion a comprehensive and far-reaching solution to global climate change." Rather, plaintiffs request only to limit domestic electricity plants' emissions that they allege constitute a public nuisance which is currently causing and will continue to cause them injury in the future. According to the Second Circuit, merely because plaintiffs' injuries are part of a global problem, does not result in defendants' contributions to the problem being beyond the reach of the judiciary. Essentially, the Second Circuit characterized the case as a garden variety tort suit.<sup>3</sup>

In addressing standing, the Second Circuit found that all of the plaintiffs (including the private entities) had standing to bring their claims in their proprietary capacity as property owners. The States assert their claims in both their proprietary and parens patriae capacities, while New York City and the Land Trusts sued in their proprietary capacities. After the Supreme Court's ruling in *Massachusetts v. EPA*, which provided states special solicitude in establishing standing when serving the public interest, the Second Circuit found that the states

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1. No. 05-5104 (2d Cir. Sept. 21, 2009).

2. The Trusts are described in the complaint as not-for-profit corporations each suing on its own behalf, in its proprietary capacity as an owner of particular pieces of property.

3. The court cited to the following language in support of this view. "[W]here a case appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) (quoting *Baker*, 369 U.S. at 217).

were more than “nominal parties,” whose quasi-sovereign interests in safeguarding the health of citizens and resources were sufficient to render them appropriate parties to bring these claims. The court stated that the private plaintiffs had standing to bring nuisance claims because there was a showing of actual or threatened injury in fact that is “different in kind” from the public at large. As stated in the opinion, the Second Circuit is of the view that municipalities, private parties, and governmental entities may have an “equally strong claim to relief in a circumstance invoking an overriding federal interest or where the controversy touches issues of federalism.”

The lengthy opinion is also remarkable for what it does not say. There is little comfort to be found in the 139-page opinion for any business concerned about a major proliferation of GHG litigation. The court focused largely upon what it characterized as the judiciary’s “masterful” ability to handle

nuisance cases of all shapes and sizes. And, there is no reason to believe that the decision is somehow specifically limited to a narrow category of plaintiffs or defendants. In short, Pandora’s box has been thrown wide open -- and it will likely take the muscle of either Congress or five U.S. Supreme Court Justices to force it shut.

This Alert was written by Bill Stewart and Danielle Willard who can be reached at 610.832.8356. Bill is Co-Chair of the firm’s Climate Change/Global Warming practice area, and his work on global warming related topics has been featured by NBC News, *The Wall Street Journal*, the *National Law Journal*, *Money*, *Best’s Review*, *Business Insurance*, and *International Financier*. Bill is involved in much of the civil climate change litigation active today, and his book, *Climate of Uncertainty*, will be available in November.