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The Future Of Global Warming Lawsuits Is Now

Law360, New York (December 14, 2010) -- The U.S. Supreme Court's grant of certiorari in American Electric Power Co. v. Connecticut, No. 10-174 (AEP) on Dec. 6, 2010, could significantly alter the course of current and future litigation seeking to hold industry liable for the alleged effects of greenhouse gas emissions on climate change. At issue in the case is whether states can seek redress under federal common law for the effects of climate change allegedly caused by anthropogenic (i.e., man-made) greenhouse gas emissions.

The decision to grant certiorari signals that the court will weigh in early on whether reductions of greenhouse gas emissions and climate change are properly dealt with through tort litigation or if such issues are inherently political and must therefore be dealt with by Congress and the executive branch. The court's decision likely will be of significance to those businesses whose operations generate greenhouse gas emissions, together with their respective insurers. Yet while a broad ruling unquestionably would affect existing and prospective civil cases related to climate change, any conclusion that a reversal would end all such litigation seems premature at best.

Second Circuit Decision

The case dates back to 2004, when eight state attorneys general, the City of New York and three land trusts filed two complaints in the U.S. District Court for the Southern District of New York alleging that AEP and four other electric power companies are responsible for about 10 percent of all carbon dioxide emissions from human activities in the U.S.

The complaints alleged that the power companies have created a common-law public nuisance by contributing to global warming and harming the environment, state economies and public health. The plaintiffs sought permanent injunctive relief requiring the power companies to abate the nuisance by capping and then reducing their emissions by a specified percentage each year for at least a decade.

The trial court dismissed both cases on grounds that they present "non-justiciable political questions" because their resolution would require identification and balancing of interests (e.g., economic, national security) that are constitutionally committed for resolution to the U.S. Congress or the executive branch. In other words, courts lack jurisdiction over suits whose adjudication would require examination of questions that are constitutionally committed to the political branches and/or for which no judicial standards exist.

On Sept. 21, 2009, a two-judge panel of the U.S. Court of Appeals for the Second Circuit[1] vacated the trial court's dismissal and remanded the case for further proceedings, allowing the plaintiffs' claims to proceed.

In reversing as to the political question issue, the panel described the case as an "ordinary tort suit" and held that a decision by a single federal court regarding whether the emissions of six domestic electricity plants constitutes a public nuisance does not implicate broader policy issues that arguably would fall to the political branches.

The panel further held that the plaintiffs have standing to bring their claims, that the plaintiffs can assert claims under the federal common law of nuisance, and that such claims are not displaced by federal legislation. As to this latter point, the panel found that because there is no comprehensive federal greenhouse gas regulatory scheme, the Clean Air Act and other greenhouse gas legislation do not displace the plaintiffs' claims.

Other Climate Change-Related Civil Litigation

AEP is one of several pending cases presenting common law tort allegations for alleged contributions to global warming. One other suit is Native Village of Kivalina v. Exxon-Mobil Corp., in which an Inupiat Eskimo village sued 24 oil, coal and power companies, alleging that their emissions have contributed to global warming and thereby caused Arctic sea ice to diminish.[2]

In Comer v. Murphy Oil USA, Mississippi coastal residents and landowners instituted a class action lawsuit against numerous oil, coal and chemical companies, alleging that their emissions contributed to global warming and increased the severity of Hurricane Katrina.[3]

As in AEP, defendants in the Kivalina and Comer cases successfully moved to dismiss those respective actions on grounds that, e.g., the plaintiffs lacked standing and the claims were barred by the political question doctrine. The appeal to the Ninth Circuit in Kivalina is still pending. The subsequent history of the Comer case is more convoluted: a panel of the Fifth Circuit initially disagreed with the district court's dismissal and remanded the case for arguments on the merits.

Thereafter, the Fifth Circuit, left with a bare quorum due to the recusal of seven justices, voted to hear the Comer appeal en banc, automatically vacating the panel's earlier decision. The subsequent recusal of an eighth justice resulted in the loss of the quorum necessary to hear the appeal.

The Fifth Circuit concluded it lacked authority to reinstate the vacated panel decision and thus ultimately dismissed the Comer appeal entirely. The plaintiffs have filed a petition for a writ of mandamus to the Supreme Court, seeking to require the Fifth Circuit to reinstate the appeal. For the moment, however, the district court's ruling in favor of the industry defendants stands.

No "Ordinary" Case

AEP presents several important legal issues, including whether the plaintiffs' claims constitute an "ordinary tort case" or are barred by the political question doctrine. Regardless of the answer to this particular question, there are a number of twists and turns that make the case anything but ordinary.

Justice Sotomayor did not take part in the Supreme Court's decision to hear the appeal, given her prior involvement in the case as a judge on the Second Circuit. As a result of her recusal, it appears that only eight justices will hear the case, raising the possibility of a 4-4 deadlock. In such an event, the Second Circuit's ruling in favor of the plaintiffs would remain intact, but the case would not be binding upon other federal courts of appeal.

Then there are the noteworthy events that precipitated the Supreme Court's certiorari decision, which seemed doubtful for months after the private utility defendants filed their petition.

Although there was a potential disagreement brewing among the circuits concerning whether nuisance law could be used to hold companies liable for greenhouse gas emissions, that disagreement arguably had not fully matured, given that 1) the Ninth Circuit has not yet decided the Kivalina appeal, and 2) reinstatement of the district court's decision in Comer technically created a "split" but occurred only after a series of recusals left the Fifth Circuit unable to hear the appeal or, as was decided, to reinstate the panel decision in favor of the plaintiffs in that case.

What likely tipped the scales in favor of review was the Obama administration's decision to support the petitioners by urging the Supreme Court to take and reverse the decision in the case.

The solicitor general's brief, submitted on behalf of defendant Tennessee Valley Authority, argued that the court could resolve the case on relatively narrow grounds, either by finding 1) that the plaintiffs lacked prudential standing (because global warming presents a generalized grievance) or 2) that their claims are displaced by U.S. Environmental Protection Agency actions taken after the Second Circuit issued its decision.

Although many environmentalists considered the administration's move a betrayal, an alternative view is that it supports the administration's efforts to implement strong, comprehensive regulation of greenhouse gases under the CAA.

"Displacement": A Key Issue

Based on the arguments presented by the solicitor general, the court's decision could hinge on whether the EPA and Congress have regulated greenhouse gases to the extent required to displace court involvement.

The Second Circuit's conclusion on this issue was that the then-existing EPA regulatory scheme was insufficient to displace the plaintiffs' federal common law claims, although the court left open the possibility that further regulatory developments could do so. The EPA indisputably has taken significant actions to address greenhouse gas emissions since the Second Circuit's decision; the question is whether those actions will be considered sufficiently comprehensive to displace the common law in this context.

In particular, the EPA is set to begin regulating greenhouse gases under the CAA's Prevention of Significant Deterioration (PSD) program beginning in January 2011. The PSD program imposes federal emission control requirements only on new and modified sources of pollution, not on existing sources.

Because the AEP case targets existing stationary sources of greenhouse gases, the plaintiffs likely will argue that the EPA's regulatory scheme falls short of displacing the common law. The plaintiffs also could argue that only the top tier of emitting facilities are currently regulated due to the EPA's Tailoring Rule, and thus there is no comprehensive scheme.

Proposed congressional efforts to freeze or eliminate EPA authority over stationary sources, if successful, also could affect the displacement analysis. On the other hand, the very fact that the Clean Air Act covers greenhouse gases — as confirmed by the Supreme Court's holding in Massachusetts v. EPA[4] — may support the notion that Congress and the EPA have a comprehensive regulatory scheme.

Decisive action by Congress, in the form of enacting comprehensive climate change legislation, might eliminate any doubts regarding this issue in the federal common law context. This appears unlikely to occur in the foreseeable future. In the meantime, both the litigants and other interested parties will closely watch the legislative and regulatory landscapes for new developments that could affect the court's decision.

Potential Impact on Future Climate Change-Related Litigation

A broad ruling in AEP could affect the outcomes in the Kivalina and Comer cases, as well as shape the course of future climate change-related litigation. Any suggestion that a reversal would sound the death knell for such litigation on a going-forward basis, however, appears premature.

For one thing, there are some key differences between AEP and these other cases, including the identity of the plaintiffs (states versus private parties), legal theories pursued (federal common law versus state common law and claims unrelated to nuisance), and remedies sought (injunctive relief versus monetary damages).

For another, the trial bar in previous public interest tort actions has proved to be remarkably adaptable. Indeed, it took more than 40 years for tort litigation against tobacco companies to succeed, and the history associated with claims in the asbestos, hazardous waste and similar contexts reveals a similar pattern of initial success for defendants at the motion to dismiss stage, only to be followed by dedicated, repeated efforts by plaintiffs to find a legal theory that "sticks."

If past is prologue, no matter how the court rules in AEP, the trial bar will attempt to find a way around the decision and continue pursuing climate change-related litigation, resulting in significant transactional and defense costs for the foreseeable future. This obviously has implications for targeted industries — i.e., those that emit greenhouse gases as part of their operations — as well as their insurers.

As to the latter group, it bears noting that one coverage action associated with a claim in connection with the Kivalina action, Steadfast v. AES Corp.,[5] already is pending. The amount and direction of future litigation in these areas undoubtedly will be shaped to some degree by the decision in AEP, which the court is expected to consider and decide prior to the end of its current term in June 2011.

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[1] The original panel included then-Judge Sotomayor, who did not participate in the decision because of her August 2009 appointment to the U.S. Supreme Court.

[2] Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir.).

[3] Comer v. Murphy Oil USA, 585 F.3d 855, 861 (5th Cir. 2009), opinion vacated pending reh'g en banc, 598 F.3d 208, appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), petition for writ of mandamus filed (U.S. Aug. 26, 2010) (No. 10-294).

[4] Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007).

[5] Steadfast v. AES Corp., No. 2008-058 (Va. Cir. Ct. Feb. 5, 2010), appeal pending, No. 100764 (Va. Supreme Ct.).