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HB Supreme Court Spotlight:
AEP v. Connecticut

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AEP - NATURE OF THE LAWSUIT

- Plaintiffs: Coalition of 8 States, City of NY, and 3 land trusts
 - Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin
- Defendants: Six electric power companies
- In 2004, Plaintiffs commenced a lawsuit seeking an order requiring that Defendants abate the public nuisance of global warming.
- Plaintiffs alleged that Defendants' coal-operated power plants constitute a public nuisance under federal and state common law but only the federal common law issue is before the Supreme Court.
- Plaintiffs claimed that Defendants are “the five largest emitters of carbon dioxide in the U.S.”



AEP - HARM ALLEGED

EXAMPLES

- California: less mountain snowpack → less melting snowpack → less runoff → less fresh water
- Warmer average temperatures, late fall freezes, early spring thaws
- Future injuries: increased deaths and illness due to heat waves; increased smog; increased concomitant respiratory problems; beach erosion; sea level rise and coastal inundation; salinization of marshes and water supplies; droughts; floods; wildfires



AEP - RELIEF SOUGHT

- Plaintiffs asked the court to hold each Defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance; and
- To permanently enjoin each Defendant to abate its contribution to global warming by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.
- No monetary damages sought.



AEP - TRIAL COURT DECISION

- Dismissed Plaintiffs' case on grounds that the lawsuit raised "non-justiciable political questions that were better suited to resolution by the political branches and that were beyond the limits of the court's jurisdiction."
- In other words, the district court held that these kinds of cases should be handled by the Executive Branch and Congress, not the Courts.



Connecticut v. AEP, 582 F.3d 309 (2d Cir. 2009)

- **The Second Circuit reversed and concluded:**
 - Plaintiffs’ claims did not present non-justiciable political questions. Seeking to limit emissions from coal-fired power plants is something that could be adjudicated by the courts; “ordinary tort suit”;
 - All plaintiffs have standing to bring their claims;
 - Plaintiffs stated a claim under the federal common law of nuisance; and
 - Plaintiffs’ federal common law claims have not been displaced by federal legislation. The Clean Air Act and other legislation on the subject of greenhouse gases have not displaced federal common law public nuisance claims.
 - Court did not reach Plaintiffs’ state common law nuisance claims because they held federal nuisance claim was not displaced.
- Note – This was a decision by two judges because Judge Sotomayor recused herself after having heard oral argument.



AEP: Petitioners asked the High Court to address 3 questions

- **Standing:** Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.
- **Displacement:** Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.
- **PQD:** Whether claims seeking to cap defendants' carbon dioxide emissions at “reasonable” levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by “judicially discoverable and manageable standards” or could be resolved without “initial policy determination[s] of a kind clearly for nonjudicial discretion.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).



Crux of the *AEP* Supreme Court Decision

- Opinion by Justice Ginsburg
- Decision based on displacement
- Court held 8-0 that the States', New York City's, and land trusts' federal common law nuisance action seeking injunctive relief in the form of emissions caps on stationary source greenhouse gas (GHG) emitters is displaced by the Clean Air Act and the EPA regulatory activity that it authorizes.



AEP Supreme Court Decision - Displacement

Level of Regulation Pursuant to Clean Air Act Not Relevant to Displacement Question

- The Court noted that “[t]he plaintiffs argue, and the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, i.e., until it sets standards governing emissions from the defendants’ plants.”
- The Court disagreed.
- Relevant question for purposes of displacement is “whether the field has been occupied, not whether it has been occupied in a particular manner.”
- “The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.”
- Thus, the Court rejected plaintiffs’ argument that the cause of action was not displaced because EPA was not fully or actively regulating GHG emissions from these sources yet.



AEP Supreme Court Decision - Displacement

- The Court noted that administrative and judicial recourse should be sought through the Clean Air Act.
- If plaintiffs are dissatisfied with EPA's course of action, their recourse under federal law is to follow Clean Air Act procedures and seek Court of Appeals review.
- As to Court's central displacement holding, Justice Alito filed a concurrence, joined by Justice Thomas, stating that he concurred in the displacement holding on the assumption that the interpretation of the Clean Air Act in *Massachusetts v. EPA* was correct.



Displacement vs. Preemption

- The issue in *AEP v. Connecticut* was whether the Clean Air Act and the EPA action it authorizes displaces federal common law remedies for abating GHG emissions.
- Displacement of federal common law (i.e., federal court-made law) by federal legislation or federal regulation is a function of the separation of powers intrinsic to the U.S. Constitution.
- In contrast, "preemption" normally refers to the supplanting of state law (state regulatory law and/or state common law) by federal law under the Supremacy Clause of the Constitution; federal preemption of state law can be express or implied.
- In *AEP*, Justice Ginsburg noted that "legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded by preemption of state law."
- Thus, preemption of state law claims will be the subject of a later case.



AEP Supreme Court Decision - Standing

- No precedential holding on this issue.
- An equally divided Court 4-4 affirmed (without setting binding precedent) the Second Circuit's holding that plaintiffs had standing to bring the case.
- The Court noted that at least four justices would hold that at least some plaintiffs have Article III standing under Massachusetts, which permitted a State to challenge EPA's refusal to regulate GHGs under the Clean Air Act.
- Industry had hoped to more clearly limit the Court's holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007).
- Litigants had questioned whether the holding that Massachusetts had standing was based on Massachusetts' entitlement to "special solicitude" in the standing analysis because of its quasi-sovereign interests or whether Massachusetts could have met the typical Article III standing test without any special treatment.
- *AEP* did not settle the issue.
- More standing challenges likely related to special solicitude and redressability.



Recall *AEP* – Second Circuit Decision on Standing

- Current and future injuries (harm to the environment, harm to the states' economies, and harm to public health) are sufficiently traceable to Defendants.
- Contribution is enough to satisfy fairly traceable element.
- Plaintiffs also showed that the relief they requested -- limit on Defendants' emissions -- would redress their injuries.



AEP Supreme Court Decision

No Holding on the Political Question Doctrine or Prudential Standing

- Four members of the Court also would hold that there is no other threshold obstacle that bars review. *AEP Slip Op.* at 6.
- The Court noted in a footnote that in addition to the political question doctrine arguments made below, the power companies sought dismissal “because of a ‘prudential’ bar to the adjudication of generalized grievances, purportedly distinct from Article III’s bar.” *Id.* at 6 n.6.
- The Court’s statements on these “other threshold issues” are limited and the Court’s holding is not based on these doctrines.
- Thus, these defenses likely will be raised again in subsequent climate change-related tort cases.
- Statements in dicta in *AEP* likely will be used in later litigation of the PQD issue.



What's Next?

- State law claims
- Preemption challenges to state law claims
- Further litigation of standing and the political question doctrine issues
- Litigation outside United States
- New litigation theories
- Recall tobacco and asbestos experience



Other Cases: *Comer v. Murphy Oil USA*

The Players

- PLAINTIFFS: Putative class of residents and owners of land and property along the Mississippi Gulf coast
- DEFENDANTS: energy, fossil fuel, and chemical companies *Alliance Resource Part.*; *Arch Coal*; *Alpha Natural Resources*; *Consol Energy*; *Foundation Coal*; *Massey Energy*; *Natural Resource Partners*; *Peabody Energy*; *Westmoreland Coal*; *Allegheny Energy*; *Reliant Energy*



Comer v. Murphy Oil USA

Nature of the Lawsuit

- The *Comer v. Murphy Oil USA* case originated in Mississippi. In the aftermath of Hurricane Katrina, Gulf Coast property owners sued oil companies, coal companies, and chemical manufacturers for property damage alleging that the companies' greenhouse gas emissions contributed to global warming which in turn contributed to increased sea levels and the ferocity of Hurricane Katrina.
- Causes of action: state nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims

Trial Court – Dismissed the case on political question doctrine and standing grounds.



Comer in the Fifth Circuit

- 5th Circuit 2009 Merits Decision (585 F.3d 855): Reversed.
 - Held that (1) plaintiffs had standing to bring their nuisance, trespass, and negligence claims; and (2) plaintiffs' nuisance, trespass, and negligence claims did not present non-justiciable political questions.
 - Did not reverse the trial court's decision that plaintiffs did not have standing to bring their unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims.
- Defendants sought rehearing *en banc*.
 - Seven of the sixteen judges recused themselves leaving nine active judges, the minimum quorum needed for *en banc* review. Six of the nine judges voted to grant rehearing *en banc*. This grant had the effect, per court local rules, of vacating the initial Fifth Circuit decision.
- Additional recusal after *en banc* review granted → no quorum → no review (see 607 F.3d 1049)
- Result – trial court decision reinstated



Comer Refiled

- Plaintiffs refiled their climate change tort action (state law claims) in the U.S. District Court for the Southern District of Mississippi on May 27, 2011.
 - See Case No. 11-220.
- Plaintiffs rely on the following Mississippi statutory provision as a basis for refileing some of the same claims:

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

Miss. Stat. § 15-1-69.



North Carolina v. TVA

NATURE OF THE SUIT

- North Carolina alleged traditional emissions (e.g., NO_x, SO_x) from certain TVA plants created a public nuisance in North Carolina

RELIEF SOUGHT

- injunctive relief and attorneys fees and costs

TRIAL COURT DECISION (593 F. Supp. 2d 812 (W.D.N.C. 2009))

- declared air emissions from some plants to be a public nuisance
- imposed injunction requiring use of pollution control technology



North Carolina v. TVA, 615 F.3d 291 (4th Cir. 2010)

4TH CIRCUIT DECISION

- held district court applied the wrong standard: NC law instead of law of the states where the plants are located
- held laws of the states where plants were located specifically permitted the activities and thus that state law precluded the nuisance actions
- nuisance suit was preempted by the Clean Air Act
 - fell short of saying CAA preempted the field but non-source state could not attempt to replace comprehensive federal emissions regulations
 - savings clause cannot be read to allow challenges to activities permitted in the source state
 - little would not be preempted under this holding

PETITION FOR WRIT OF CERTIORARI PENDING

- **Case No. 10-997**
 - Issues related but are not identical
 - Preemption of state nuisance causes of action as opposed to displacement of federal common law of nuisance
 - But case will likely settle and petition will be withdrawn
 - Will need to wait for another case to raise CAA preemption in GHG context



Public Trust Cases

May 4, 2011 - children and various environmental groups began suing the federal government and the 50 states for violations of the public trust doctrine in various actions across the country.

- Based on “ancient” legal mandate establishing a sovereign obligation in states to hold critical natural resources in trust for the benefit of their citizens. They claim that the federal government and the states have not properly protected the atmosphere – a resource which they hold in trust for present and future generations – from GHG emissions that lead to climate change.
- Already in June 2011, the Montana Supreme Court denied a petition seeking enforcement of a state constitutional obligation to regulate greenhouse gases in the atmosphere because the court lacked original jurisdiction.
- Expect a flurry of motions to dismiss in these cases. States likely will claim that the actions are preempted by federal action in the Clean Air Act space and invoke state abrogation doctrine as well as standing defenses.



International Developments - Examples

Micronesia Case – Challenge to enlargement of Czech power plant

Bangladeshi Constitution - The country's parliament is expected to approve a report by its committee for constitutional reforms that would insert an obligation for the government to act on climate change into the country's constitution.

UNFCCC process – Thus far, has failed to yield a binding agreement.

- post-2012 framework in questions
- treatment of developed vs. developing nations at issue

International carbon markets – growth or contraction



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