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AEP v. Connecticut: The Decision and Its Implications

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AEP v. Connecticut – Supreme Court Holding in a Nutshell

- Opinion by Justice Ginsburg
  - J. Sotomayor recused
  - Separate concurrence by J. Alito, joined by J. Thomas
- Reversed 8-0 and held that the Clean Air Act and the EPA activity it authorizes displaced the federal common law of nuisance
- Equally divided court affirmed standing holding (at least as to some plaintiffs)
- No ruling on the political question doctrine defense raised by the petitioner utilities
- Ruling on federal common law of nuisance claim only
- No ruling on whether state law claims are preempted
- State law claims remanded

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.
- Reversed and remanded

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 outside the 2d Circuit) the 2d 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.

Standing Standard - Background

- Federal court jurisdiction is limited to "cases" or "controversies" under Article III of the Constitution
- Basic Three-Part Test for Article III Standing:
  1) Injury-in-fact
     - "invasion of a legally protectable interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'"
  2) Causation
     - "there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly trace[able] to the challenged action of the defendant…'"
  3) Redressability
     - "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

Standing Holding: *Connecticut v. AEP* Second Circuit

- **Proprietary Article III standing**
  - **Injury in fact**
    - Current injury – e.g., coastal erosion, loss of snowpack
    - Future injury – e.g., sea level rise, flooding, associated impacts on infrastructure, habitat destruction, crop risk
    - No strict temporal requirement; certainty of injury is the requirement
    - Refers to *Massachusetts v. EPA* holding that incremental injury suffices
  - **Causation**
    - Ps alleged that Ds are the 5 largest emitters of CO2 in the US and that Ds directly contribute to their injuries.
    - Particularly at the pleadings stage, the "fairly traceable" requirement is not equivalent to tort causation.
    - Plaintiffs "are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries." *Id.* at 347.
  - **Redressability**
    - Capping Defendants' emissions and reducing them by a certain percentage would redress Ps' alleged injuries.
    - Court rejected Ds' arguments that there is no redressability because Ds account for 2.5% of man-made emissions and global warming will continue even if Ds reduced emissions. Injuries could be less if Ds reduced emissions.

Standing – Parties' Positions on Appeal to the Supreme Court

- Petitioners
  - alleged injuries are not fairly traceable to Defendants' emissions
  - alleged harms will not be redressed by relief sought
  - statutory standing cases (*Mass. v. EPA*) do not apply
  - prudential standing also bars suit
- TVA (US)
  - At least some of the state plaintiffs have Article III standing, but it is appropriate to resolve the case on prudential-standing grounds before looking at other threshold issues
  - plaintiffs lack prudential standing because their suits are generalized grievances more appropriately addressed by the representative branches
  - prudential standing (different than Article III) embodies judicially self-imposed limits on the exercise of federal jurisdiction

Standing – Parties' Positions on Appeal to the Supreme Court

- States
  - Article III standing established
  - standing more firmly established than in *Mass. v. EPA*
  - need not consider prudential standing
  - generalized grievance doctrine is not a standing issue
- Organizations – similar only without the potential "state" issues

Standing – Treatment at *AEP* Oral Argument

Examples

- Roberts – skeptical of prudential standing approach
- Scalia – what good does it do you to decide this case on Article III grounds – the plaintiff could go to state court . . .
- Kennedy – "you're lacking any clear precedent" [to petitioners]
- Ginsburg – states would have standing on same basis as *Mass. v. EPA*; thought generalized grievance was Article III
- Kagan – *Mass. v. EPA* does not say it is limited to statutory causes of action

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.

Political Question Doctrine Background

- Threshold question of justiciability
- Based on separation of powers
- "Political question" = issue reserved for the political (i.e., elected) branches of the Federal Government (i.e., the Executive Branch and Congress)
- Seminal PQD case is *Baker v. Carr*, 369 U.S. 186 (1962)
- First three *Baker* factors litigated in *AEP* but high court never reached the issue:
  1. "textually demonstrable constitutional commitment of the issue to a coordinate political department"
  2. "lack of judicially discoverable and manageable standards for resolving [the issue]"
  3. "impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion"

PQD – SECOND CIRCUIT'S HOLDING

PQD does not bar the suit.

- **First *Baker* factor does not apply:**

  "We find no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance."

- **Second *Baker* factor does not apply:**

  "Federal courts have successfully adjudicated complex common law public nuisance cases for over a century. . . . Well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims and the federal courts are competent to deal with these issues"

- **Third *Baker* factor does not apply:**

  "Where 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 nonjudicial discretion. . . . Not every case with political overtones is non-justiciable"

What's Next?

- Litigation in *AEP*, *Comer*, and *Kivalina* but likely not in *North Carolina v. TVA*
- 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 refiling 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.

Other Cases: *Kivalina v. ExxonMobil Corp.*

THE PLAYERS

- PLAINTIFFS: Inupiat Eskimo village who reside in the City of Kivalina, Alaska
- DEFENDANTS: 24 power, utility and oil companies including *ExxonMobil*; *BP America*; *Chevron*; *Conoco Phillips*; *Shell Oil*; *Peabody Energy*; *AES*; *AEP*; *DTE Energy*; *Duke Energy*; *Dynergy*; *Edison Int'l*; *Mid Am. Energy*; *Mirant*; *NRG Energy*; *Pinnacle West*; *Reliant Energy*; *The Southern Co.*; *Xcel*

NATURE OF THE LAWSUIT

- In 2008, Plaintiffs commenced a federal lawsuit in the N.D. Cal. seeking damages based upon federal and state nuisance claims, civil conspiracy, and concert of action.
- Plaintiffs claim that Defendants' GHG emissions have caused global warming which in turn has caused erosion of the Kivalina coastline due to thinning of sea ice; Plaintiffs allege that Kivalina is becoming uninhabitable.

Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009)

- Decision Overview:
  - Federal nuisance claim presented non-justiciable political questions
  - Plaintiffs' federal nuisance claim could not meet the "fairly traceable" standard for causation for Article III standing, and
  - Plaintiffs state claims are dismissed without prejudice based upon the court's discretion not to decide pendent state law claims.
- PQD
  - Neither the Constitution nor any federal law prescribes the issues in the case to a decision by the political branches, but such a finding is not dispositive.
  - No workable standards for a jury to decide whether Defendants' emissions caused more harm (erosion to the Kivalina coastline) than good (providing power, utilities, and oil to industry and residences).
  - The allowable amount of GHGs Defendants can emit and who should bear the cost of global warming, requires the court to make an initial policy determination that is best left to the political branches.

Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009)

- Standing
  - Contribution theory cannot satisfy fairly traceable requirement
  - Plaintiffs do not allege sufficient facts to show that Defendants' emissions are the "seed" of Plaintiffs' injury. Plaintiffs cannot trace the erosion of the Kivalina coastline to any Defendant's emissions.
  - Any argument by Plaintiffs that they are within the "zone of discharge" of Defendants' emissions also fails because the link between the injuries alleged and the Defendants' specific emissions is too tenuous. If the court adopted Plaintiffs' argument, the entire world would be within the "zone of discharge.
  - Special solicitude not applicable.
- Ninth Circuit appeal stayed pending decision in *AEP* by SCT
- Plaintiffs have requested that stay be lifted

Other Cases: *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.

EPA Activity

- More regulation?
- Move beyond permitting of new or modified sources?
- Expand to existing stationary sources?
- Expected Timeline
- Continuing and additional rulemaking challenges?
- Challenges to permits?

EPA Timeline

- 4/2/2007 - *Massachusetts v. EPA*
- 9/15/09 - EPA and NHTSA Proposed Light-Duty Vehicle GHG Standards and Corporate Average Economy Standards
- 9/22/09 - EPA issues final GHG Reporting Rule
- 9/30/09 - EPA announces Proposed Rule on Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule
- 12/7/09 – EPA endangerment finding and cause and contribution finding on GHGs
- 4/2/10 – EPA memo on when GHGs subject to regulation for stationary source NSR.
- 5/13/10 - EPA sets greenhouse gas (GHG) emissions thresholds to define when permits under the New Source Review Prevention Significant Deterioration (PSD) and Title V Operating Permit programs are required for new and existing industrial facilities.

EPA Timeline (examples cont'd)

- 2010 - EPA amendments to GHG Reporting Rule (additional categories)
- 1/2/11 – EPA Light Duty Rule takes effect and "GHGs subject to regulation"
- 4/6/11 – Senate votes down bill to strip EPA of authority to regulate GHGs
- 7/26/11 - EPA Due to Propose Rule on GHG Standards for New and Existing Electric Utility Steam Generating Units
- 5/26/12 - EPA expected to finalize CAA rule on GHG standards for new and existing electric utility steam generating units by this date

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?

Summary: Who Is Impacted?

- GHG Emitters
- NGOs
- States
- Other Parties Claiming Damage Due to Climate Change
- Insurance Industry

Implications - Recap

- All sides can claim victory
- Federal common law nuisance claims are dead
- EPA activity – will it increase?
- State law claims – litigation will continue
- Preemption challenges
- Political question doctrine and standing challenges (or state court equivalents)
- Individual state reactions (e.g., Texas affirmative defense bill)

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