dentons.com

DENTONS

Insights and Commentary from Dentons

The combination of Dentons US and McKenna Long & Aldridge offers our clients access to 1,100 lawyers and professionals in 21 US locations. Clients inside the US benefit from unrivaled access to markets around the world, and international clients benefit from increased strength and reach across the US.

This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

BNA, INC.

DAILY ENVIRONMENT REPORT

BNA Employee-Owned Since 1947

CLIMATE CHANGE

LITIGATION

In *American Electric Power v. Connecticut*, the U.S. Supreme Court decided what many observers believe was the most important environmental case since its 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497, 63 ERC 2057 (2007). The authors argue that the *AEP* decision could have important implications, particularly with the court's lack of a precedential holding on standing, and because the decision did not address state tort claims. *AEP* left a number of issues unresolved, they contend, and state and federal courts, regulators, and legislators will continue to grapple with the question of whether and how to address climate change in the months and years to come.

The Supreme Court's AEP Decision on Legislative Displacement of Federal Common Law Nuisance Claims and Its Implications for Climate Change Tort Litigation

By Christina M. Carroll, Lawrence S. Ebner & J. Randolph Evans

The U.S. Supreme Court on June 20 decided its first climate change-related tort case, *American Electric Power Co., Inc. v. Connecticut*, No. 10-174 (*AEP*). The Supreme Court held 8-0 that the federal common law nuisance action seeking injunctive relief in the form of emissions caps on stationary source greenhouse gas (GHG) emitters filed by states, New York City, and land trusts is displaced by the Clean Air Act and the Environmental Protection Agency regulatory activity that it authorizes.[1]

An equally divided court affirmed 4-4 (without setting binding precedent) the holding of the U.S. Court of Appeals for the Second Circuit that plaintiffs had standing to bring the case. The court did not reach the Tennes-

[1] *American Electric Power Co. Inc. v. Connecticut*, U.S., No. 10-174, 6/20/11, 72 ERC 1609 (U.S.). (119 DEN A-5, 6/21/11).

 ISSN 1060-2976

see Valley Authority's prudential standing arguments and did not base its decision on the political question doctrine defense advocated by petitioners. Nor did the court reach plaintiffs' state-law claims, which were not briefed. Instead, the court remanded the case for further consideration of the state-law claims in light of its decision.

The decision is important for several reasons.

■ First, and foremost, the court held that the Clean Air Act and the EPA regulatory activity that it authorizes categorically displaces any federal common law right to seek abatement of carbon-dioxide[2] emissions from coal-fired power plants. Congress's delegation of regulatory authority under the Clean Air Act to EPA, not the extent of EPA's specific regulatory actions on the issue, is what displaces the federal common law of nuisance.

■ Second, the lack of a precedential holding on standing outside the Second Circuit is significant because the utilities had sought to pare back the Supreme Court's holding on that issue in *Massachusetts v. EPA*. This has potentially broad implications for a range of environmental challenges.

■ Third, the court's holding was not based on other threshold issues (i.e., the political question doctrine or prudential standing), and the court barely mentioned those doctrines in its decision.

■ Fourth, the court's ruling may encourage further regulatory action by EPA or lawsuits filed against EPA. The court held that federal common law is displaced because EPA is the congressionally-chosen expert on the subject of GHG emissions and that plaintiffs have a remedy under the Clean Air Act if they are not satisfied with EPA's regulations, EPA's decision not to regulate, or EPA's lack of progress in regulating GHGs. This may spur EPA to take further and swifter regulatory action with respect to GHGs after slowing its pace in the wake of lawsuits challenging its authority under the Clean Air Act and proposed bills to strip it of authority to regulate GHGs.

■ Fifth, the case only addressed federal common law nuisance claims (as opposed to state tort claims); it addressed claims for injunctive relief, not for state tort damages since the court did reach the state tort claims. This leaves open the possibility that the plaintiffs' bar will contend that these are distinctions that make a difference.

■ Finally, the Court could not squarely address the state tort preemption issue which will be pivotal in future climate change-related tort litigation.

This article explores these and other implications of the *AEP* decision and provides further detail on the background and basis for this decision, the other recent and pending climate change tort litigation cases, and the impact of *AEP* on those cases.

I. Background

A. Plaintiffs' Claims in AEP

In 2004, Connecticut and a coalition of seven other states,[3] the City of New York, and three land trusts sued American Electric Power Co., American Electric Power Service Corp., Southern Co., Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. seeking an order requiring that defendants abate the public nuisance of global warming. As the Second Circuit observed in its decision on appeal, plaintiffs alleged that AEP and the other defendants' coal-operated power plants create a public nuisance under federal and state common law. Plaintiffs claimed that defendants were '' 'substantial contributors to elevated levels of carbon dioxide and global warming,' '' as their annual emissions compromise '' 'approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States.' ''[4]

In their complaint filed in the U.S. District Court for the Southern District of New York, the states and land trusts claimed that they are or will be harmed by climate change. For example, California alleged that it will accumulate less mountain snowpack, and thus there will be less melting snowpack, less resulting runoff, and ultimately less fresh water.[5] Also states claimed there are or will be warmer average temperatures, late fall freezes, and early spring thaws.[6] The states alleged future injuries including: 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; and wildfires.[7]

Plaintiffs asked the trial court to hold each defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance. Plaintiffs also asked the court 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. Plaintiffs did not seek monetary damages. Defendants sought to dismiss the case on numerous grounds including the political question doctrine, standing, and displacement of federal common law.

B. The AEP Trial Court Decision

In 2005, the U.S. District Court for the Southern District of New York 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.''[8] In other words, the district court held that these kinds of cases should be handled by the executive branch and Congress, not the courts.

C. The Second Circuit Decision

On Sept. 21, 2009, a two judge-panel[9] of the Second Circuit vacated the trial court's dismissal and remanded the case for further proceedings. The Second Circuit reversed for the following four reasons:

---

[2] At times, the court referred to *carbon-dioxide* emissions more narrowly as opposed to *GHG* emissions more broadly.

[3] The other state plaintiffs are New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin.

[4] *Conn. v. Am. Elec. Power Co. Inc.*, 582 F.3d 309, 316, 69 ERC 1385 (2d Cir. 2009).

[5] *Id. at* 317.

[6] *Id.*

[7] *Id.* at 318.

[8] *Conn. v. Am. Elec. Power Co. Inc.*, 406 F. Supp. 2d 265, 271-74 (S.D.N.Y. 2005).

[9] This was a decision by two judges because Judge Sotomayor recused herself, after having heard oral argument, when she was appointed to the Supreme Court.

  DEN ISSN 1060-2976

■ First, the Second Circuit held that plaintiffs' claims do not present non-justiciable political questions.[10] The Court noted that a decision by a single federal court regarding whether the emissions of six coal-fired power plants constitutes a public nuisance does not set a national or international emissions strategy.[11] Seeking to limit emissions from coal-fired power plants is something that could be adjudicated by the courts. The Second Circuit held that this was an ''ordinary tort suit.''[12]

■ Second, plaintiffs have standing to bring their claims.[13] Plaintiffs sufficiently alleged that their current and future injuries (harm to the environment, harm to the states' economies, and harm to public health) are ''fairly traceable'' to and caused by defendants.[14]

■ Third, plaintiffs can assert claims under the federal common law of nuisance.[15]

■ Fourth, plaintiffs' federal common law nuisance claims are not displaced by federal legislation.[16] Because there is no comprehensive federal GHG regulatory scheme, the court held that the Clean Air Act and other GHG legislation do not displace Plaintiffs' federal common law public nuisance claims.[17] The court did not reach Plaintiffs' state common law nuisance claims because the Court held the federal nuisance claim was not displaced.

Worth noting is the Second Circuit's rejection of what it characterized as defendants' ''misstate[ment of] the issues [the] Plaintiffs seek to litigate.''[18] According to the court, ''[n]owhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead, they seek to limit emissions from six domestic coal-fired electricity plants. . .,'' which, as stated above, was not barred by the political question doctrine, and could be adjudicated by the courts.[19]

II. The Supreme Court's Decision in AEP

A. The Clean Air Act & Displacement of Federal Common Law

The court held that the Clean Air Act and the EPA actions it authorizes categorically displace any federal common law right to seek abatement of carbon-dioxide[20] emissions from coal-fired power plants. *Id.* at 10. 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 standard governing emissions from the defendants' plants.'' *AEP* Slip Op. at 12. The Court disagreed. The Court held that Supreme Court precedents made clear that the relevant question for purposes of displacement is ''whether the field has been occupied, not whether it has been occupied in a particular manner.'' *Id.* The Court held that it was irrelevant that the Clean Air Act permits emissions until EPA acts. *Id.* ''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.'' *Id.* 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.

The plaintiffs also could not use federal common law to upset the EPA's expert determination. *Id.* The court noted that administrative and judicial recourse should be sought through the Clean Air Act. *Id.* at 12. 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. *Id.* at 13. As to the 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.

B. Standing—An Equally Divided Court Affirmed the Second Circuit's Exercise of Jurisdiction

The court split (4-4) on whether plaintiffs had standing to bring their claims. *AEP* Slip Op. at 6. 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. *Id.* This means that the Second Circuit's finding that plaintiffs did have standing (and that the district court therefore had jurisdiction to hear the case) is affirmed, although that ruling is not binding on other circuits. Thus, the court's decision does not provide a jurisdictional bar to future climate change tort lawsuits, which was sought by the power company defendants. The industry had hoped to more clearly limit the court's holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

Thus, the scope of the *Massachusetts v. EPA* holding may be the subject of further litigation. 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. Some of the four justices who affirmed the standing holding would hold that ''some'' (but presumably not all) plaintiffs had standing. Thus, future litigation likely will consider the scope of *Massachusetts v. EPA* and its applicability to private litigants seeking redress for alleged environmental wrongs as well as the critical question of redressability in the climate change-related context.

C. The Court's Decision Did Not Decide Other Threshold Issues–Prudential Standing and Political Question Doctrine

The *AEP* opinion noted that 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

[10] *Am. Elec. Power Co., Inc.*, 582 F.3d at 332. (182 DEN A-4, 9/23/09)
[11] *Id.* at 325.
[12] *Id.* at 329.
[13] *Id.* at 349.
[14] *Id.* at 345.
[15] *Id.* at 345.
[16] *Id.* at 387-88.
[17] *Id.*
[18] *Id.* at 325.
[19] *Id.*
[20] At times, the court referred to carbon-dioxide emissions more narrowly as opposed to GHG emissions more broadly.

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.

III. Other Recent or Pending Climate Change Tort Cases and the impact of *AEP*

AEP is the first climate change tort case to reach the Supreme Court. The Fourth, Fifth, and Ninth Circuits, however, also have recently been called on to decide the following climate change tort cases: *Comer v. Murphy Oil USA*, *North Carolina v. TVA*, and *Kivalina v. ExxonMobil Corp.* Adjudication of *Comer* is complete but proceedings in *North Carolina* and *Kivalina* will continue now that the high court has decided *AEP*. Given the holding in *AEP*, *Kivalina*, *North Carolina*, and state court actions that may be filed are the next battlegrounds for climate change tort litigation.

1. *Comer v. Murphy Oil USA*

The *Comer* 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' GHG emissions contributed to global warming, which in turn contributed to increased sea levels and the ferocity of Hurricane Katrina. Comer and other plaintiffs alleged the causes of action of state nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims. The trial court dismissed the case on political question doctrine and standing grounds.[21]

In 2009, the Fifth Circuit reversed and 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 nonjusticiable political questions.[22] The Fifth Circuit 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.[23]

The 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.[24] This grant had the effect, per court local rules, of vacating the initial Fifth Circuit decision. After rehearing en banc was granted, an additional judge recused and then there was no longer a quorum for the en banc review.[25] As a result, the court was no longer ''authorized to transact judicial business'' and, after considering available alternatives, the court dismissed the appeal, effectively reinstating the district court's decision.[26] Plaintiffs sought review by the Supreme Court but the high court did not take the case.[27]

The case, however, apparently is not yet over. Ned Comer and fellow plaintiffs refiled their climate change tort action in the U.S. District Court for the Southern District of Mississippi on May 27, 2011.[28] The new action, based on diversity jurisdiction, alleges public and private nuisance, trespass, and negligence causes of action under Mississippi law. Plaintiffs rely on the Miss. Stat. § 15-1-69 as a basis for refiling some of the same claims, although the applicability of this statute will undoubtedly be litigated.

2. *Kivalina v. ExxonMobil Corp.*

In *Kivalina v. ExxonMobil Corp.*, Plaintiffs alleged that twenty oil, coal, and electric utility companies have emitted large quantities of carbon dioxide through their operations and that these emissions have caused the melting of Arctic sea ice that formerly protected the village of Kivalina, Alaska, from winter storms that have subsequently eroded the coastline such that houses and buildings are in imminent danger of falling into the sea.[29] Plaintiffs sought monetary damages for defendants' ''past and ongoing contributions to global warming, a public nuisance, and damages caused by certain defendants' acts in furthering a conspiracy to suppress the awareness of the link between these emissions and global warming.''[30] Plaintiffs alleged federal and state causes of action.

On Sept. 30, 2009, the district court dismissed plaintiffs' action and held that the 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 that plaintiffs' state claims are dismissed without prejudice based upon the court's discretion not to decide pendant state law claims.[31] The court held that political questions are implicated because there are 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).[32] Furthermore, the court held that the issues in the case, 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.[33]

On Nov. 5, 2009, the *Kivalina* plaintiffs appealed the case to the Ninth Circuit. The appeal was stayed pending the Supreme Court's decision in *AEP*. Now that *AEP*

[21] *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05 CV 436 LTD RHW, 2006 WL 1066645, at *1 (S.D. Miss. Feb. 23, 2006).

[22] *Comer v. Murphy Oil USA*, 585 F.3d 855, 69 ERC 1513 (5th Cir. 2009). (200 DEN A-10, 10/20/09)

[23] *Id.* at 867-68.

[24] *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010). (39 DEN A-8, 3/2/10)

[25] *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054, 70 ERC 1808 (5th Cir. 2010). (104 DEN A-9, 6/2/10)

[26] *Id.* at 1055.

[27] Petition for writ of mandamus, *In re Comer*, 131 S. Ct. 902 (2011) (No. 10-294), 2010 WL 3493195; *In re Comer*, 131 S. Ct. 902 (2011) (denying petition for writ of mandamus). (7 DEN A-3, 1/11/11)

[28] *Comer v. Murphy Oil USA*, S.D. Miss., No. 11-220, 5/27/11.

[29] *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. CV-08-1138 SBA (N.D. Cal. Feb. 26, 2008), Compl. ¶ 3-4. (40 DEN A-4, 2/29/08

[30] *Id.* ¶ 6.

[31] *Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 70 ERC 2154 (N.D. Cal. 2009). (198 DEN A-5, 10/16/09)

[32] *Id.* at 874-75.

[33] *Id.* at 876-77.

DEN ISSN 1060-2976

has been decided, the Ninth Circuit will apply *AEP* to the *Kivalina* case. The parties will fight about what the *AEP* decision means. Plaintiffs' attorney, Matthew Pawa, already is advocating for a potentially distinguishing factor between *AEP* and *Kivalina*: the *Kivalina* plaintiffs sought monetary damages and injunctive relief whereas the *AEP* plaintiffs only sought injunctive relief.[34] The Ninth Circuit is not obligated to follow the standing holding in *AEP* because a majority of the court did not support that holding. Thus, standing will be litigated again in the near future.

As in *AEP*, the plaintiffs have state law claims, not just the federal common law of nuisance cause of action. The state causes of action are not at issue in the current Ninth Circuit appeal. Thus, the Ninth Circuit appeal will not dispose of *all* of the *Kivalina* plaintiffs' claims. The *Kivalina* plaintiffs may file another action in state court based on state law.

3. *North Carolina v. TVA*

A nuisance case was recently decided by the Fourth Circuit and will take on added significance now that preemption of state law claims is a critical issue to be decided in the GHG context. In *North Carolina v. TVA*, North Carolina alleged TVA emissions of sulfur dioxide, nitrogen oxides, fine particulates, and ozone in upwind states created a public nuisance in North Carolina. North Carolina sought injunctive relief and attorneys fees and costs. North Carolina filed the lawsuit while TVA was in the midst of a long legal battle with EPA related to those same emissions and compliance with the Clean Air Act. The trial court in the North Carolina case declared air emissions from some plants identified in North Carolina's complaint to be a public nuisance.[35] The trial court imposed an injunction requiring use of pollution control technology.[36]

The Fourth Circuit reversed and held that (1) the district court applied the wrong standard of North Carolina law instead of the law of the states where the plants are located; (2) laws of the states where plants were located specifically permitted the activities and thus that state law precluded the nuisance actions; and (3) the nuisance suit was preempted by the Clean Air Act because (a) a non-source state could not attempt to replace comprehensive federal emissions regulations (although without saying the Clean Air Act preempted the field); and (b) the Clean Air Act savings clause cannot be read to allow challenges to activities permitted in the source state.[37]

North Carolina raises a preemption question that was not before the Court in AEP. The issues in the cases are related but are not identical. North Carolina involves preemption of a state law nuisance claim, but is not a climate change tort case. Rather, North Carolina involves pollutants that have long been the subject of EPA regulation and litigation. Nonetheless, litigants in future litigation of GHG state law claims likely will look to this Fourth Circuit Clean Air Act preemption precedent.

North Carolina filed a petition for writ of certiorari with the Supreme Court on Feb. 2, 2011.[38] The Supreme Court has not yet acted on this petition and keeps extending the time for respondents to submit their briefs. This is likely because North Carolina, other states, EPA, and other parties signed a consent decree on April 11, 2011, to settle various actions related to TVA's emissions.[39] North Carolina filed a joint motion to enter the consent decree on June 16, 2011.[40] Thus, unless this settlement does not get entered, North Carolina likely will not move forward at the Supreme Court level. This presents a possibility that a circuit split could develop in the future as other courts look at preemption of GHG tort claims brought under state law.

IV. The Future Of Climate Change Litigation: A Preview of What's next

A. State Law Tort Claims and Consideration of Preemption

Given the result in *AEP*, plaintiffs likely will now test state law tort theories in efforts to get injunctive relief or damages for alleged damages due to climate change. State courts or federal courts sitting in diversity will be the next battleground for climate change litigation. A key issue in these cases will be whether the plaintiffs have standing to bring the claims and whether the actions are preempted by the Clean Air Act and EPA action or inaction pursuant to the act. Justice Ginsburg closed in *AEP* by stating:

> In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act. [*International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)] at 489, 491, 497 (holding that the Clean Water Act does not preclude aggrieved individuals from bringing a ''nuisance claim pursuant to the law of the source State'').

The meaning of Justice Ginsburg's closing lines will be litigated in the near future. The scope of the Clean Air Act's savings clause will be hotly debated. Preemption issues also might arise in the public trust theory cases against many states, some of which were brought in state court.[41] Regardless of the forum, state tort claims and preemption and standing defenses can be expected in the near future.

B. State Legislative Action

With climate change tort cases inevitably headed to state court, some states might take legislative steps to bar climate change-related litigation. For example, on June 17, 2011, Texas Gov. Rick Perry (R) signed a bill providing companies sued for ''nuisance'' or ''trespass'' resulting from GHG emissions with an affirmative defense if those companies were in substantial compliance with air emissions permits while the alleged nuisance or trespass was occurring or the Texas or federal authorities exercised enforcement discretion with re-

[34] *See* 119 DEN A-7, 6/21/11.

[35] *North Carolina v. TVA*, 593 F. Supp. 2d 812 (W.D.N.C. 2009). (8 DEN A-10, 1/14/09)

[36] *Id.*

[37] *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010). (143 DEN A-8, 7/28/10)

[38] *North Carolina v. TVA*, U.S., No. 10-997, 2/2/11. (26 DEN A-4, 2/8/11).

[39] *State of Alabama, et al. v. TVA, Civ. Nos. 3:11-cv-00170, 3:11-cv-00171, Dkt. No. 14 (E.D. Tenn. June 16, 2011)*.

[40] *Id.*

[41] *See* 87 DEN A-16, 5/5/11.

spect to the alleged nuisance or trespass.[42] Texas apparently enacted this provision in preparation for the holding in *AEP* and the expected state court suits. Other states might consider a legislative path to addressing ''preemption'' of GHG suits.

C. EPA Regulation and Litigation

The court held that the plaintiffs' particular grievances should be brought to EPA and addressed under the Clean Air Act, not addressed through adjudication of federal common law nuisance theories. The court noted that if EPA does not set emissions limits for a particular pollutant or source of pollution, states and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. *AEP* Slip Op. at 11 (citing 42 U.S.C. § 7607(b)(1)). Challenges to permits issued pursuant to the Clean Air Act also will continue. Thus, there may be additional challenges to EPA action.

D. Congressional Action

Members of Congress recently have threatened to impose legislation stripping EPA of its authority to regulate GHGs. So far such efforts have not garnered enough support to become the law but such efforts may continue in fits and starts over the years. Some commentators have suggested that if the legislature did strip EPA of its authority, the court's holding in *AEP* would be called into question because the displacement holding is based on the Clean Air Act and EPA's actions pursuant to it. In opposing such arguments, litigants likely would argue that any congressional act in this space would displace the federal common law of nuisance. This issue may be raised at a future date.

D. Conclusion

In sum, state courts, federal courts, state legislatures, Congress, and state and federal regulators will continue to grapple with whether, when, and how to address GHGs and climate change.

[42] *See* SB 875 (to be codified at Tex. Water Code Ann. § 7.257); *see also* http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB875

About the authors

Christina M. Carroll *is a partner in McKenna Long & Aldridge LLP's Washington, D.C., office. Her practice focuses primarily on complex litigation, including insurance, toxic tort, and environmental litigation.*

Lawrence S. Ebner *is a partner in the Washington, D.C., office of McKenna Long & Aldridge LLP, where he leads the firm's nationwide appellate litigation practice with a focus on complex legal issues involving federally regulated or procured products or services, including product liability, toxic tort, and battlefield contractor defense.*

J. Randolph Evans *is a partner in McKenna Long & Aldridge LLP's Atlanta, Ga., and Washington, D.C., offices. He is chair of the Financial Institutions practice and handles high profile, complex litigation matters in state and federal courts throughout the United States.*

The opinions expressed here do not represent those of BNA, which welcomes other points of view.

  DEN ISSN 1060-2976