

## The Return of Climate Change Lawsuits

By *Richard Faulk*

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Climate change lawsuits have acquired a new and complex vitality as a result of a Monday's decision from the Second Circuit Court of Appeals. The court reversed the dismissal of public nuisance claims filed by various states, municipalities and private entities against operators of coal-fired power plants. [State of Connecticut v. American Electric Power Co. Inc., 05-5104-cv \(2d Cir., Sept. 21, 2009\)](#). Citing the lack of standards for determining whether the defendants' conduct was unreasonable, and the overarching international implications of regulating greenhouse gases, the district court held that the plaintiffs' claim raised "political questions" that could not be decided by federal courts. A panel of two judges of the Second Circuit disagreed, however, and remanded the matter for further proceedings. Although Judge Sonia Sotomajor was originally the third judge on the panel, her elevation to the US Supreme Court precluded her from formally participating in the decision. The Second Circuit's decision is extraordinarily broad and entails major risks for all industries, not just the electric utilities. Any industry that generates greenhouse gas emissions is implicated, and that category includes virtually all businesses. Although the decision is lengthy and complex, and bears detailed study, the points below are especially significant.

First, the court concluded that the claims did not involve "political questions" that were unsuitable for judicial decisions. Even though the case plainly concerned damages caused by global warming, the court characterized the case as an "ordinary tort case" concerning emissions from six power plants. It concluded that the controversy involved nothing other than the localized activities described in the complaint -- and held that the narrowed controversy entailed no overarching national or international issues. Since the case was therefore governed by "well-settled" principles of tort and public nuisance," federal courts were fully competent to resolve it. In so holding, the court trivialized the significance and scope of the controversy and belittled the ultimate impact of its holding -- even though, in fact, its ruling may serve as a "bellwether" determination for many controversies yet to arise.

Second, the court applied reduced standing requirements. Previously, the Supreme Court held in *Massachusetts v. EPA* that states have "special solicitude" standing to pursue relief when challenging environmental regulatory issues. Yesterday, in a public nuisance tort suit, the second circuit held that municipalities and even private nonprofit entities have standing to sue, based largely on the impact of global warming on properties they allegedly own. Contrary to the Restatement of Torts, which the court professed to follow, the court did not require these injuries to be a "substantial interference." Instead, they need only be an "identifiable trifle" involving "recreational" or "aesthetic" concerns. Apparently, the court decided to graft the standing requirements for statutory citizens suits onto the common law tort of public nuisance. Under this reasoning, it is difficult to imagine persons who lack standing to file nuisance claims regarding greenhouse gas emissions.

Third, the court held that the federal public nuisance remedy was not "displaced" by the Clean Air Act or regulations issued pursuant to it. Until and unless Congress or the EPA actually chooses to preempt

federal common law, it remains available. Here, the EPA has merely "proposed" to regulate the area, and Congress is still deliberating whether to pass climate change legislation. In the absence of concrete action, the common law remedy remains viable.

This decision presents business interests with a "Hobson's choice" scenario. So long as industries resist regulations and legislation, they risk public nuisance liability in the courts. Hence, delaying regulation does not confer any advantages. Indeed, it may be advantageous to accept comprehensive regulations and statutes that "displace" private tort remedies. If, however, the regulations and legislation are not sufficiently comprehensive, industries may still face lawsuits to the extent that claims are not completely preempted. Hence, the entire process must be handled carefully.

The ultimate resolution of these complex controversies is difficult to project. It is ironic, however, that the phenomenon of public nuisance litigation, which so recently was 'on the ropes' after being rejected by the highest courts of several states, is now being reinvigorated by our federal judiciary.

The Second Circuit panel's decision will almost certainly be challenged by a motion for rehearing en banc. Whatever the result of that proceeding may be, an application for US Supreme Court review seems inevitable. The panel's decision may also influence proceedings on other federal public nuisance cases involving greenhouse gas emissions that are currently pending in other federal courts in the Fourth, Fifth and Ninth Circuits.

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