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# Just Warming Up: Climate Litigation And Regulation of Greenhouse Gases

By **Stanley N. Alpert**

The U.S. Supreme Court recently decided *American Electric Power Co., et al. v. Connecticut, et al.*, No. 10-174 (hereinafter, *AEP*). The case was brought by six states, including New York, as well as the City of New York, and three private land trusts to force four private major electric power producers and the Tennessee Valley Authority to reduce their greenhouse gas emissions (GHGs). The Court ruled that the Clean Air Act and its requirement that EPA regulate GHGs upon an endangerment finding displaces the federal common law of nuisance, and that to the extent the case sought an injunction reducing GHG emissions it could not proceed. The Court remanded without deciding the issue of federal preemption of state tort law, which was not addressed by the parties.

Given changed legal circumstances since the states, city and trusts filed this case, the ruling is no surprise, and emitters of GHGs should understand that the decision does not interrupt the steady progress toward regulating carbon and other GHGs in the United States. Major corporations recognize that GHG regulation is a fact of life, and the new decision is consistent with just that, despite the loss to the plaintiffs.

As an initial matter, the plaintiffs prevailed on some serious doctrinal barriers, fought and won in the U.S. Court of Appeals for the Second Circuit: Article III standing, political question and prudential question, a loss on any one of which might have stopped the lawsuit. The Court tied 4-4 on those issues, which therefore affirmed the Second Circuit on all these threshold jurisdictional issues. The district court believed that the matter was a non-justiciable political question, but the Supreme Court's affirmance of the Second Circuit put that particular roadblock and the others to rest.

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## Background

In 2004, when this case was filed, there was an entirely different regulatory environment. The Bush administration believed that the Clean Air Act did not permit EPA to regulate climate change and that it was unnecessary in any event. To seek reductions in carbon emissions, the plaintiffs turned to the courts under the common law.

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However, in 2007, the Supreme Court changed the legal landscape. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court ruled that, under the Clean Air Act, EPA was required to make findings as to whether GHGs were an endangerment to the environment, and, if so, to regulate them. Subsequently, under President Barack Obama, EPA came down conclusively on the side of regulation, determining that the science was well settled and that mankind's impacts on a changing climate could not be denied. Acting under the Supreme Court's directive and having made its determination, EPA is now proceeding steadily toward GHG regulation. This includes regulations requiring GHG reporting, light duty vehicle GHG regulations, and implementation of a scheme for regulating major industrial plants.

The *AEP* ruling specifically reaffirmed *Massachusetts v. EPA* and encouraged EPA to adhere to its legal duty to regulate GHGs under the Clean Air Act. While the Supreme Court did not express a view on the science, the new *AEP* decision noted that EPA has determined that the consequences of excessive GHG emissions include more heat-related deaths, coastal flooding, more intense and frequent hurricanes, destruction of ecosystems supporting animals and plants, and potential significant disruptions of food production.

## Ruling and Non-Ruling

The only issue lost to the plaintiffs in the new decision was the right to proceed under federal common law to demand GHG reductions of the power plant emitters. EPA's authority to regulate greenhouse gases under the Clean Air Act "displaces" any right to pursue a federal common law nuisance claim. Since the seminal *Erie R. Co. v. Tompkins,* federal common law on matters cognizable by the states was curtailed, but pre- and post-*Erie* there developed a federal common law to address issues within national legislative authority with ambient or interstate impacts. The Court had ruled, for example, that Missouri could sue Chicago to prevent untreated sewage discharges into shared waters. *Missouri v. Illinois*, 180 U.S. 208, 241-43 (1901).

While the defendants in *AEP* invited the Court to overrule federal common law principles, it declined to do so. To the contrary, the Court expressly states that the subject of this case is a proper one for federal common law. However, because Congress has legislated in the Clean Air Act in a manner that "speaks directly to the question at issue," federal common law is displaced by the statute's grant of authority to EPA.

It is to be noted that "displacement" of federal common law is a very different question from preemption of state law, because where Congress addresses the question, the need for federal common law, which is "an unusual exercise of law-making by federal courts," then "disappears." By contrast, preemption of state law requires a clear and manifest purpose » Page 7

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by Congress to preempt state law, whether expressly or by filling the field in a manner that state law cannot regulate the same activity. In the case of federal common law, displacement occurs merely if Congress acts in the field.

One critical issue was decided by the Supreme Court contrary to the Second Circuit's prior ruling. The Second Circuit had held that if EPA has not yet acted by exercising its regulatory authority, there is no displacement of federal common law. The Supreme Court disagreed. The critical point is simply that Congress has given EPA the authority. EPA might decline to act at all, in which case there would still be no room for federal common law for GHG limits. (By contrast, the Supreme Court made clear that if EPA arbitrarily and capriciously fails to carry out its mandate, the federal courts have jurisdiction to compel the agency to comply with the law.)

The new Supreme Court decision did not address state law preemption at all, which may be addressed if the plaintiffs pursue it on remand. The question will be whether, for example, New York state law can regulate GHG pollution emanating from other states. Preemption of state law is much more difficult to find than preemption of federal common law, as mentioned above.

Also left undecided is the appropriate use of state common law tort systems to seek damages for climate-disruption damages. For example, *Native Village of Kivalina, et al. v. ExxonMobil Corp.*, (N.D. Cal.), is a case filed in 2008 for an Inupiat Eskimo tribe against major oil and electric power corporations and the nation's largest coal company. The case seeks monetary damages to relocate the village because global warming melted the sea ice that formerly protected Kivalina from storms. The cost of relocating the village is estimated to be as much as $400 million or more.

After the lower court dismissed the case on the basis of standing and the political question doctrine, the plaintiff has appealed to the U.S. Court of Appeals for the Ninth Circuit. The Supreme Court's affirmance of the Second Circuit's order on the preliminary issues of standing, political question and prudential question should assist the *Kivalina* plaintiffs, but the decision had nothing to do with the complex tort damages issues presented by that case. Can a court assess damages against certain major polluters when climate change is such a diffuse global issue?

## Conclusion

At bottom, the new *AEP* decision underscores our nation's legal requirement that the federal EPA address GHGs, which EPA itself has determined contribute to climate change. As the Supreme Court stated:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.

By contrast, the Court held, EPA is the designated agency to make an "informed assessment of competing interests," taking into account potential environmental benefit as balanced against the nation's energy needs and potential economic disruption.