



By Richard Lazarus

A Huge Green Win In the 2nd Circuit

Twelve hundred days seems like a ridiculously long rather than a surprisingly short time to transpire between oral argument and an opinion. But when the U.S. Court of Appeals for the Second Circuit announced its ruling in *Connecticut v. American Electric Power* on September 21, 2009, those following that case for years were shocked that it came out so quickly.

The reason is simple. At issue was the viability of an enormously ambitious federal common law of nuisance action filed against several of the nation's largest electric power corporations based on their contributions to global warming. Court watchers have been assuming that a deep division in the panel of three judges who heard the case was causing the delay. Because, moreover, one of those three judges was then-Judge, now-Justice Sonia Sotomayor, it seemed the case would likely have to be reargued because there would no longer be the two-judge majority necessary for a definitive ruling. The only question was how long before the Second Circuit issued a reargument order.

However, not only did the court issue a ruling joined by both of the remaining judges — Joseph McLaughlin and Peter W. Hall — but it was a blockbuster. With an opinion 139 pages long, the plaintiffs who had brought the federal common law nuisance action, including eight states, New York

City, and three land trusts, essentially cleaned house. The district court had dismissed both of their complaints for lack of jurisdiction on the ground that they were raising a “political question” not suitable for judicial resolution. The Second Circuit not only reversed that threshold jurisdictional ruling, but went on to rule on several others, all in plaintiffs’ favor.

Relying on the Supreme Court’s intervening decision in *Massachusetts v. EPA*, the appellate court first held that the states possess both *parens patriae* and Article III standing to maintain their case and that the City of New York and the land trusts also have the requisite Article III standing. The Court also rejected defendant Tennessee Valley Authority’s claim of immunity from suit on the ground that its actions fell within the “discretionary function exception” and therefore outside the waiver of sovereign immunity otherwise contained within the TVA’s Enabling Act.

Embracing the *Second Restatement of Torts*’ definition of “public nuisance,” the Second Circuit next held that both complaints stated a valid claim under the federal common law of nuisance. The court rejected the defendants’ arguments that the complaints’ allegations, because of their sheer breadth and underlying factual complexity, fell outside of the kind of public nuisance claims maintainable under the federal common law. The court also held that there was no absolute bar to non-state parties, including both New York City and private land trusts, from bringing a federal common law of nuisance claim, so long as they met additional criteria, which they satisfied here. In particular, each had satisfactorily alleged facts that established a harm to themselves “of a kind different from that suffered by the general public.”

Finally, the Second Circuit held that federal statutes, including the Clean Air Act, had not “displaced” a federal common law of nuisance action based on

allegations that emissions of greenhouse gases were causing global warming. The court distinguished the Supreme Court’s 1981 ruling in *Milwaukee v. Illinois* that the Clean Water Act, because of its comprehensive nature, had left no room for a federal common law of nuisance action for water pollution. Relying on the Milwaukee Court’s statement that the controlling inquiry is whether existing federal statutes “speak directly to a question,” the panel concluded that “neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to ‘speak directly’ to the ‘particular issue’ raised by Plaintiffs” because EPA is not yet regulating such emissions.

Having won such a sweeping victory, however, the plaintiffs face two major challenges. The first is how best to use this win to help promote meaningful climate change in Congress and regulatory action by EPA, where the issues will best be addressed.

The plaintiffs should celebrate, but they must also be prepared for the next challenge

The second challenge is no less daunting: to keep this case away from the Supreme Court. The four dissenting justices in *Massachusetts v. EPA* are likely to have their judicial hackles raised by the standing rulings and several of the others, especially Justice Stephen Breyer, may be troubled by the Second Circuit’s easy discounting of the significance for the displacement issue of *Massachusetts v. EPA*’s ruling that EPA has authority to regulate greenhouse gas emissions. The plaintiffs’ best bet will be to emphasize the interlocutory nature of the appellate ruling. Should, however, the High Court grant review, Justice Sotomayor will presumably be recused, effectively denying plaintiffs her vote on the merits.

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