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Byproducts Of Restricting EPA Authority

Law360, New York (August 1, 2011) -- In the U.S. Supreme Court's June 20, 2011, American Electric Power Co. Inc., et al. v. Connecticut, et al. decision, a unanimous court provided a significant victory to business, while simultaneously reaffirming its broad view of the Environmental Protection Agency's authority under the Clean Air Act to regulate carbon dioxide emissions.

The court's 8-0 decision rejected eight states' efforts to bring a federal common law nuisance action against five major electric power companies because "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."

However, the court's approach in AEP creates an opportunity for unintended consequences from recent congressional efforts to limit the EPA's authority to regulate greenhouse gases. If the Clean Air Act no longer grants the EPA the authority to regulate greenhouse gas emissions, will industry again be faced with federal common law nuisance claims seeking ad hoc regulation by injunctions issued by federal judges?

American Electric Power v. Connecticut

In July 2004, eight states, New York City, and two private land trusts, attempted to employ a century-old tool to effectuate greenhouse gas emissions limits by filing lawsuits alleging nuisance claims against American Electric Power Company and four other major electric companies.

Plaintiffs sought abatement of defendants' alleged ongoing contribution to the public nuisance of global warming and alleged that the defendant power companies were the five largest carbon dioxide emitters in the Unites States, by emitting 650 million tons of carbon dioxide per year. Connecticut, et al. v. American Electric Power Co., et al., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

In addition to injunctive relief capping emissions, the lawsuits also sought to hold defendant companies "jointly and severally liable for contributing to an ongoing public nuisance, global warming." Id. at 270.

The district court dismissed these complaints as presenting nonjusticiable political questions, relying upon Baker v. Carr, 369 U.S. 186 (1962). In a similar nuisance lawsuit against the automobile industry, the district court in California also dismissed the action based on the political question doctrine because:

"[t]he adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court." California v. General Motors Corp., (N.D. Cal. Sept. 17, 2007).

On appeal of the dismissal of the complaint against the power companies, the Second Circuit reversed the district court and held that the suits were not barred by the political question doctrine and that plaintiffs had sufficiently stated a claim under the "federal common law of nuisance." Connecticut, et al. v. American Electric Power Co., et al., 582 F.3d 309, 358, 371 (2d Cir. 2009).

The Court of Appeals relied upon Supreme Court precedent recognizing federal common law to fill in "statutory interstices." See, e.g., Illinois v. Milwaukee, 406 U.S. 91, 93 (1972). The court determined that the Clean Air Act did not "displace" federal common law because EPA had not issued any rule regarding greenhouse gases and it "cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'speak[ ] directly' to the 'particular issue' raised here by Plaintiffs." 582 F.3d at 380.

The Supreme Court unanimously reversed the Second Circuit's decision and held that the Clean Air Act "and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Massachusetts [v. EPA, 549 U.S. 497 (2007),] made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act." American Electric Power Co. Inc., et al. v. Connecticut, et al., No. 10-164, at *10 (2011).

Although the EPA had already begun rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants at the time of the AEP decision, the court's ruling makes clear that an agency's rulemaking is not what displaces common law actions. Instead, "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. at *12.

Even if the EPA declined to regulate carbon dioxide emissions at the conclusion of its rulemaking, "the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination." Id. The court did not address the political question doctrine relied upon by the district court in this case and in the automobile industry nuisance suit.

Congressional Efforts to Strip EPA of Authority to Regulate Greenhouse Gases

Prior to the issuance of the Supreme Court's AEP decision, and as a result of the EPA's proposed rules regarding greenhouse gas emissions, both Republican and Democratic members of the House and Senate introduced various measures designed to eliminate the EPA's authority to regulate greenhouse gas emissions, including carbon dioxide emissions, under the Clean Air Act.

For example, Sen. Rockefeller, D-W.Va., introduced the "EPA Stationary Source Regulations Suspension Act" (S. 231) that would prevent the EPA Administrator from taking any actions under the Clean Air Act to regulate stationary source emissions of carbon dioxide or methane for two years.

Sen. John Barrasso, R-Wy., introduced S.228 which would preclude federal regulation of greenhouse gases, but would allow regulation of greenhouse gases from mobile sources — with the authority for such regulation placed exclusively with the U.S. Department of Transportation.

The "Energy Tax Prevention Act of 2011" (H.R. 910 and S. 482) introduced by Rep. Fred Upton, R-Mich., and Sen. James Inhofe, R-Okla., would similarly prohibit the EPA from using the authority of the Clean Air Act for the purpose of addressing climate change and would nullify the EPA's Endangerment Finding that is a prerequisite to greenhouse gas regulation.

These are three examples of at least 12 measures introduced in this Congress to expressly provide that the Clean Air Act does not permit the EPA to issue rules regarding greenhouse gas emissions. The Upton-Inhofe legislation has come the closest to reaching the president's desk by passing through the full House on April 7 (final vote of 255-172), but failing in the Senate on a 50-50 vote, with 60 votes required for passage.

The administration indicated that it opposes passage of the Upton-Inhofe bill (and similar legislation) because it would "strip EPA of its authority to develop sensible standards for currently unchecked carbon pollution." OFFICE OF MGMT & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 910 - ENERGY TAX PREVENTION ACT OF 2011 (April 5, 2011).

Potential Impact of Proposed Congressional Legislation on Common Law Nuisance Suits

A number of industries testified before Congress earlier this year in support of these measures to limit the ability of the EPA to regulate greenhouse gas emissions. Industry support for this legislation is based on their position that "regulating greenhouse gases under Titles I and V of the Clean Air Act is like trying to put a square peg in a round hole." "H.R. ___, The Energy Tax Prevention Act of 2011" Discussion Draft: Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce, 112 Cong. 50 (Feb. 9, 2011) (Testimony of Fred T. Harnack, United States Steel Corporation).

These witnesses argued that regulating greenhouse gases under the Clean Air Act would be detrimental to the American economy because it subjects U.S. businesses to regulations not borne by international competitors, even though domestic greenhouse gas levels are equally affected by international carbon emissions.

However, if Congress does pass legislation expressly stating that the EPA does not have the authority to regulate carbon dioxide (and other greenhouse gases) under the Clean Air Act, then Congress has no longer "delegated" this authority to EPA.

Pursuant to the court's reasoning in AEP, therefore, the federal common law of nuisance may no longer be displaced for carbon dioxide emissions. Thus, this congressional action could have the collateral consequence of reinvigorating federal common law nuisance cases before "individual district judges issuing ad hoc, case-by-case injunctions." No. 10-164, at *14.

In considering the impact of the pending congressional measures stripping the EPA's authority, members of Congress and industry representatives must also consider what entity may end up with that authority to regulate greenhouse gases in the absence of the EPA — the federal courts. As the Supreme Court noted, "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." Id.

Conclusion

In addition to congressional authority to delineate the extent of the EPA's regulating power under the Clean Air Act, Congress also has the power to set the jurisdictional limits of federal courts under Article III of the Constitution. If Congress wishes to be effective at removing the threat of higher costs from greenhouse gas regulation on American industry, in light of the AEP decision, any legislation limiting the EPA's authority should also eliminate the jurisdiction of federal courts to hear cases seeking to limit greenhouse gas emissions based upon federal common law nuisance claims.

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