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Deferring To The Executive Branch On Global Warming

Law360, New York (June 23, 2011) -- On Monday, June 20, 2011, the U.S. Supreme Court issued its decision in what has been identified as a bellwether climate change case, American Electric Power Co. v. Connecticut. Eight states, New York City and three land trusts had sued several years before seeking abatement of emissions from some of the largest national emitters of CO2 and other greenhouse gases: fossil fuel-fired power plants located in 20 upwind states.

The unanimous opinion (Justice Sonia Sotomayor recused herself), written by Justice Ruth Bader Ginsburg, essentially deferred to the executive branch on the issue. The initial district court holding had dismissed the case as a political question. The recent Supreme Court decision did essentially the same thing, only based upon a slightly different legal premise.

The court held that congressional delegation of regulatory authority to the U.S. Environmental Protection Agency to address the emission issues was sufficient to preempt whatever sort of applicable federal common law of nuisance may have arisen previously.

Recent developments, including the EPA's December 2009 finding that GHG emissions trigger the federal Clean Air Act ("CAA") following a judicial nudge, simplified the issues before the court. The judicial nudge had come in the form of the court's prior 2007 decision involving Massachusetts and a state's rights to in essence force the EPA's hand on CAA regulation.

Relying in part on the Massachusetts case, the Supreme Court held that any federal common law of nuisance did not, under the present circumstances, provide sufficient authority to the federal judiciary to regulate emissions. More specifically, once Congress speaks directly to "CO2 emissions from power plants" and delegates authority to the EPA to regulate them, "the delegation [alone] is what displaces federal common law." Id. at page 10.

The decision reversed the intermediate U.S. Court of Appeal for the Second Circuit's decision which had overturned the district court and allowed the case to proceed. The decision also, however, remanded the case for potential further proceedings on the undecided issues of whether and how state nuisance law(s) may apply.

The parties had not briefed this issue, and the extent to which state nuisance law might be preempted by the CAA is subject to a more exacting, clear and manifest congressional purpose preemption standard than the federal preemption the court addressed. Accordingly, these issues were remanded, and the case is not completely over.

Even though the court expressly recognized in detail the potential negative consequences of climate change, it seemed reluctant to burden less-equipped federal judges with fashioning an acceptable

emission abatement plan. Rather, the court cited various competing interests in urging deference to an expert agency like the EPA.

The case might have turned out differently had the EPA not been compelled by the Massachusetts decision to act on regulating GHGs in the interim. But with the EPA now occupying the field, the judges seemed comfortable with allowing the complex issues to be resolved almost by default. The court did, however, "hasten to add" that EPA's judgment could be challenged separately and, therefore, "would not escape [potential future] judicial review." Id.

Some commentators previously had looked to this case to resolve much of the climate-change debate. The Supreme Court, however, while recognizing the potentially serious issues associated with global warming, seemed willing to allow the regulatory process to work itself out. The court also seemed to have little choice but to defer to the EPA. Justice Ginsberg's decision expressed concern over, and refused to accept that, the federal judiciary must take up the challenge of addressing these complex scientific and public policy issues.

Justices Samuel Alito and Clarence Thomas, however, issued a short, separate concurring opinion that, while not challenging the basic elements of the decision or the parade of horribles listed there as being associated with climate change (e.g., "increases in heat-related deaths; coastal inundation and erosion caused by melting ice caps and rising sea levels; more frequent and intense hurricanes, floods, and other "extreme weather events" that cause death and destroy infrastructure; drought due to reductions in mountain snow pack and shifting precipitation patterns; destruction of ecosystems supporting animals and plants; and potentially "significant disruptions" of food production"), did raise apparent reservations about the earlier Massachusetts case. Their concurring opinion pointedly assumed, for purposes of the present decision, that the interpretation of the CAA set forth in the Massachusetts case "is correct."

Nonetheless, such reservations may come too late. This decision provides further proof of judicial and broader social recognition of global warming. This recognition undoubtedly will be cited to argue that future defendants were on notice of global warming's consequences. Being on notice thereof could, in turn, have broader implications for purposes of, among other things, shareholder litigation and insurance coverage.

Regulation of CO2 and other GHGs by the EPA under the CAA is proceeding, but not fast enough to satisfy some critics. On the other hand, as discussed above, this decision saw all of the justices in apparent agreement on the potential social and ecological damage from climate change. It also left open not only the potential viability of state nuisance claims but also debates over the extent to which liability insurance would be available to defend against inevitable further climate-change litigation.

These debates, over issues including so-called known losses and whether CO2, a natural by-product of human respiration, is a pollutant for purposes of insurance policy exclusions, likely will continue state by state for years to come. Among other implications, corporate directors and officers may want to check with an insurance broker as to how D&O and property claims, including for business interruption, might be covered in light of these issues.

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