



Steven F. Greenwald



Jeffrey P. Gray

=Conn. v. AEP: Call for Congressional Action

By Steven F. Greenwald and Jeffrey P. Gray

In September, the Second Circuit Court of Appeals reversed the district court ruling in *Connecticut v. American Electric Power* ("Decision"), a lawsuit initiated by eight states, New York City, and environmental organizations against six power-generating utilities. The plaintiffs allege that carbon dioxide emissions from the defendants' fossil fuel-fired power plants in 20 states are contributing to a public nuisance—climate change and global warming. The Decision rejects a variety of defenses asserting that climate change-related damages raise "political questions" and are thus not suitable for judicial resolution.

The *Connecticut* case is one of several now pending in which plaintiffs are advancing various tort theories to challenge the carbon emissions by the electric utility, automotive, and oil industries. Assuming the Decision is not overturned by the Supreme Court, and assuming no superseding federal legislation, the Decision will be urged as precedent for the existence of a "federal common law public nuisance" claim and is likely to encourage the filing of additional actions asserting the theory.

Climate Change Is Not a Discrete Issue

Remedial measures to combat climate change are best designed and implemented by legislators and regulatory agencies. Judicial initiatives triggered by a finding of fault will distract society from the critical objectives of determining the actual scope of the problem, how best to solve it, and how to allocate the costs required to address it. (See "Climate Change: Policy via Litigation?" in the July 2008 issue of *POWER*.)

The Decision's 139 pages of legal analysis and history trace public nuisance law back to the American colonies and British monarchy. Nonetheless, the Decision turns on the fundamental question of the capability of a court's adjudicatory process to respond meaningfully to climate change. The Decision strains to portray climate change as a garden-variety "discrete" dispute, limited to "Defendants' alleged public nuisance and Plaintiffs' alleged injuries." It is not.

The Decision rationalizes that on remand the district court will not be asked "to fashion a comprehensive and far-reaching solution to global climate change." The Decision further promises that "[w]ell-settled principles of tort and public nuisance law" will provide the district court "appropriate guidance" to resolve the "discrete" issue. We respectfully disagree.

The District Court Should Do What?

The complaints seek to impose tort liability, alleging that the defendants' generation of electricity has been and will continue to be wrongful. The plaintiffs request the court to "permanently . . . enjoin each Defendant to abate [the] nuisance first by capping carbon dioxide emissions and then by reducing emissions by a specified percentage each year for at least ten years."

These questions are not "discrete"; rather, they are inextricably intertwined with the climate change/energy future issues being debated nationally. Furthermore, no "well-settled principles" are available to guide the district court. The "remand for further proceedings" order offers no criteria to resolve whether the generation of electricity, fully compliant with operating permits and other regulatory requirements, may constitute an actionable tort.

With respect to the possible remedy the district court may impose, the Decision again retreats into legal abstractions—the district court may not "set across-the-board domestic emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit." How the district court is to adhere to this mandate and yet fashion a meaningful remedy and reduce emissions in the eight plaintiff states that stretch from coast to coast is never intimated.

Congress Must Act

Tort law works best in discrete two-party disputes in which the court's order can restore the damaged party to the conditions existing prior the tortious conduct (such as through monetary damages) and the remedy has little or no consequences on the general public (such as prohibiting a "junk yard" at a neighbor's residence). Tort law offers a poor means to seriously address climate change. Emissions at fossil fuel plants can only be reduced by ceasing or curtailing operations or installing retrofits. Either option will increase the generation costs and potentially impair the reliability of electric service. The costs emanating from the court order will inevitably flow to consumers. The judicial system lacks the expertise to balance the competing values of cost and reliability of electric service versus the costs climate change will continue to impose if the planet maintains its current emission levels.

The Decision, however, does offer a better solution. It reminds us that the separation of powers cornerstone of our federalist system retains for Congress the full authority to "override" any judicial decision based on "federal common law." Enacting effective climate change legislation presents Congress daunting economic and scientific challenges, but further congressional delay is not a responsible option. Political rhetoric based on "climate change denial" must yield to proposing solutions to the challenges that climate change poses for this and future generations.

As John Rowe, chairman and CEO of Exelon Corp., recently stated: "The carbon-based free lunch is over." The Decision makes clear that, by failing to act in a timely way, Congress will be abdicating its legislative responsibilities to the judiciary, which is ill-equipped to develop or implement an effective strategy for addressing climate change. ■

—**Steven F. Greenwald** (stevegreenwald@dwt.com) leads Davis Wright Tremaine's Energy Practice Group. **Jeffrey P. Gray** (jeffgray@dwt.com) is a partner in the firm's Energy Practice Group.