

## **The Second Circuit Reinstates Global Warming Claims Predicated On Public Nuisance Theory**

On September 21, 2009, a panel of the United States Court of Appeals for the Second Circuit reinstated global warming claims based upon a public nuisance theory in the highly publicized case, styled *State of Connecticut, et al. v. American Electric Power Company Inc., et al.*

In 2004, eight States (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin), New York City, and three land trusts separately sued electric power companies (American Electric Power Co., Inc., American Electric Power Service Corp., Southern Company, TVA, Xcel Energy, and Cinergy Corp.) that own and operate fossil-fuel-fired power plants in twenty states seeking abatement of defendants' ongoing contributions to the public nuisance of global warming. Plaintiffs contend that these defendants are the five largest emitters of carbon dioxide in the United States -- emitting approximately 650 million tons per year. As such, plaintiffs allege these defendants are causing and will continue to cause serious harm impacting human health and natural resources. Plaintiffs brought their actions under federal and state nuisance law and seek to force defendants to cap and reduce their carbon dioxide emissions. Defendants moved to dismiss on a number of grounds and the district court held that plaintiffs' claims presented a non-justiciable political question and dismissed the complaints.

The Second Circuit's opinion was authored by two justices as the third panel member, Sonia Sotomayor, was appointed to the Supreme Court. Among its key rulings, the panel held that: (1) the district court erred in dismissing the complaints on political question grounds; (2) all plaintiffs have standing; (3) federal common law of nuisance governs their claims; (4) plaintiffs have stated claims under the federal common law of nuisance; and (5) plaintiffs' claims are not displaced.

Meanwhile, it was announced that the U.S. Environmental Protection Agency will require large emitters to begin collecting greenhouse gas data under a new reporting system. This new program is said to cover approximately 85 percent of the nation's greenhouse gas emissions and apply to roughly 10,000 facilities. The first annual reports for the largest emitting facilities, covering calendar year 2010, are due in 2011. Vehicle and engine manufacturers outside of the light-duty sector will begin phasing in the reporting with model year 2011.

<http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>