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CLIMATE CHANGE

PUBLIC NUISANCE

Two decades of debate on global climate change will be condensed into a single hour of argument before the U.S. Supreme Court April 19, followed by a vote that will irrevocably set the course for our government's approach to this issue in coming years, says attorney R. Trent Taylor in this BNA Insight.

Taylor contends a reversal of the U.S. Court of Appeals for the Second Circuit in *American Electric Power v. Connecticut* “will drive a stake in the heart of climate change litigation, and it will cease to exist.” Conversely, a 4-4 split—Justice Sonia Sotomayor has recused herself—would transform climate change litigation into “a significant threat to the energy industry.”

Judgment Day for Climate Change Nears: U.S. Supreme Court Ruling In *American Electric* Will Chart Course of Government Policy Going Forward

By R. TRENT TAYLOR

Judgment day for the fate of climate change policy in the United States has now been set. On April 19, two decades of debate on this issue will be condensed into a single hour of argument, and then a vote will be taken that will irrevocably set the course of how our government will handle the issue of global warming.

Surprisingly though, it will **not** be Congress that will be taking this vote. Instead, it will be the U.S. Supreme Court, who waded into the debate on global warming by

granting review Dec. 6 in *American Electric Power v. Connecticut* (No. 10-174). A ruling in the case could transform climate change litigation from a “small impetus” to a very large hammer and a significant threat to the energy industry. The Second Circuit previously decided that this lawsuit, alleging that four private utilities had contributed to global warming through their carbon emissions, could move forward (582 F.3d 309 (2009)). That decision was widely ridiculed for two reasons: (1) it endorsed a “butterfly effect” approach to litigation—

that a utility's emissions in New York could subject it to liability for allegedly reducing the mountain snowpack in California and lowering the water levels of the Great Lakes; and (2) it established that a single court could impose an emissions cap based on what it deems "reasonable."

Ironically, the lawsuit was never meant to achieve any success in the legal arena. It was a shot across the bow, a way to force both the legislative and executive branches of government to do something about climate change. Even the author of the federal appeals court's decision, Judge Peter Hall, acknowledged this in a recent speech, stating that the climate change litigation was designed to provide "some small impetus" to stonewalling lawmakers.

And that makes some sense considering when it was conceived. The suit was originally filed back in 2004, at the midpoint of the Bush presidency when the legislative and executive branches were dominated by Republicans. Environmentalists were frustrated that neither Congress nor the EPA had enacted a climate change policy, so they took a stab at a more inviting forum—the judiciary, which was less conservative than it is now.

Of course, the opposite is true now—Democrats control the executive branch as well as the Senate, and the judiciary, especially the Supreme Court, is seen as more conservative. Hence, the decision to file the lawsuit may have backfired badly in light of the Court's decision to take up the case. In a perfect example of the law of unintended consequences, this lawsuit, which was meant to push the legislative and executive branches to enact a comprehensive climate change policy and bolster stronger protection for the environment, may end up doing the exact opposite.

While the exact outcome is not known yet, what is certain is that the outcome of this case will definitively chart the course of climate change policy going forward. There are three reasons why.

Tipping Point for Climate Change

The conservative bloc of the Roberts Court has shown a willingness to wade into hot button debates, like campaign finance and gun control, without regard to political niceties. And it may very well do so again with global warming in this case. It is this reason, more than any other, that has liberals unnerved at the potential outcome in this case.

While any decision the Court reaches cannot directly affect the debate over climate change policy taking place in the executive and legislative branches, it will certainly have an impact. It was this Court's surprising 5-4 decision in *Massachusetts v. EPA* (549 U.S. 497 (2007)), that gave legitimacy to climate change regulation in a way that had not previously existed. It did this by making a very detailed case as to why regulation of greenhouse gas emissions was important, citing and quoting numerous scientific authorities.

If the conservatives prevail in this case, they will likely seek to rollback some of that language and potentially discuss whether government regulation of carbon emissions is even appropriate, a topic touched upon in Justice Antonin Scalia's dissent in *Massachusetts v. EPA*. In addition, they may question whether the link between global warming and manmade emissions is as definitive as the majority decision in *Massachusetts v.*

EPA asserted. If any of this occurs, even in passing, it would obviously have great weight, both in the numerous other cases currently pending which challenge the greenhouse gas emission regulations as well as with the legislators considering climate change policy proposals. Indeed, with climate change skeptics having recently gained momentum, it could even serve as a tipping point in the larger cultural war over global warming, further dampening political resolve to take any action on climate change.

Significant Change in Environmental Law

In addition, this case has the potential to rewrite environmental law significantly, and not in the direction environmentalists want. At issue is whether the federal common law of nuisance has been displaced by statutes and regulations related to greenhouse gas emissions. But underlying that issue is a larger question: to what extent should any environmental common law tort claims, whether state or federal, be permitted in today's world where there are federal and state statutes as well as regulations regarding every conceivable subject matter. There has been a movement afoot in the judiciary as of late to sharply limit the ability of plaintiffs to file common law environmental claims by finding such suits preempted or displaced by federal statutes with *State of North Carolina v. TVA* (4th Cir., No. 09-1623, 7/26/10) being the most prominent example. This case could be the vehicle for the U.S. Supreme Court to do so as well, and may fundamentally reorient the balance between common law and statutory causes of action in environmental litigation more in favor of industry, ultimately leading to a sharp drop in the number of future common law environmental claims in the future.

Another issue likely to be decided in this case is the scope of standing. The Supreme Court's 2007 decision in *Massachusetts v. EPA* opened the door to this type of litigation by expanding the scope of standing. This case has the potential to rollback that expansion and make it harder for plaintiffs in environmental litigation to move forward with such suits in the future.

Final Word on Climate Change Litigation

Climate change litigation has existed for more than six years and has hovered specter-like over the climate change debate—a silent reminder that a flood of litigation could be unleashed if a satisfactory policy was not enacted.

But the U.S. Supreme Court will decide once and for all this spring whether this type of litigation should be allowed to proceed. If the Court reverses as is expected, it will drive a stake in the heart of climate change litigation, and it will cease to exist. It will no longer provide any "impetus" to enact climate change policy, and its ability to exert any pressure on legislators, policymakers, or the energy industry will disappear. And it will stand as a reminder of the unpredictable nature of relying on legal tactics to effect a broader political strategy.

Alternatively, a 4-4 vote here (because Justice Sotomayor has recused herself) would affirm the lower court decision and give climate change litigation new life. In fact, it would transform climate change litigation from a "small impetus" to a very large hammer and significant threat to the energy industry. There could be an

explosion of new climate change litigation that would be inoculated from dismissals prior to discovery.

Thus, this case is extremely important not only for the future of climate change litigation and environmental law generally, but also for the future of climate change policy in the United States. It will bear close watching as the Court hears oral argument this spring and likely issues a decision in early summer.

R. Trent Taylor is a partner in the Toxic Tort and Environmental Litigation Department and the Climate Change Practice Group at McGuire-Woods LLP in Richmond, Va. Taylor concentrates his practice on environmental, products liability, and toxic and mass tort cases, with an emphasis on public and private nuisance. He can be reached at rtaylor@mcguirewoods.com.