A Setback for Climate Litigation—But There Is Still Hope

By Kenneth J. Warren | *The Legal Intelligencer*

On April 1, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of a lawsuit attempting to hold multinational oil companies liable for the harmful effects of global warming. In *City of New York v. Chevron*, No. 18-2188 (2d Cir. 2021), New York City brought state law tort claims against domestic and foreign companies seeking to recover the billions of dollars expended by the city to build climate resiliency into its infrastructure and programs. The Second Circuit held that federal law displaced the city's claims against the domestic oil companies, and the claims against foreign oil companies were foreclosed by the serious foreign policy consequences that are within the jurisdiction of the political branches of government.

Although this decision is a serious setback for efforts to limit greenhouse gas emissions, options remain. Tort suits invoking the law of states where the emitting facilities are located may be feasible. And the Biden administration's focus on climate suggests that stringent regulatory emission limits or statutory changes imposing an emissions tax or other mechanism to internalize the harms emitters cause may be forthcoming.

The Second Circuit accepted as true facts alleged in the complaint characterizing global warming as "one of the greatest challenges facing humanity today." After Hurricane Sandy, the city commenced a program of constructing seawalls, enlarging the city's storm and wastewater infrastructure and implementing public health programs. Alleging that the actions of the oil company defendants caused the need for the city to implement these measures, the city sought to recover the costs of this work as damages under theories of public nuisance, private nuisance and trespass under New York law.

Notwithstanding the substantial harms the city suffered, the court emphasized countervailing factors. The actions of all consumers of energy, including city residents, contribute to global warming, yet the city sought to single out energy producers. And the court noted that global warming is an international problem, not well-suited to the application of state law.

Central to the parties' dispute is the role of tort law in complementing a regulatory program. From the city's perspective, energy producers are uniquely knowledgeable about global warming and situated to minimize greenhouse gas emissions. Imposing liability through the common law would cause the harms to third parties (externalities) to be borne (internalized) by the oil producers.

In contrast, the court viewed the federal Clean Air Act and international treaties and agreements that address greenhouse gas emission as constituting a legislative decision balancing emission reductions and energy production. From this perspective, allowing a plaintiff to invoke state tort law would upset this balance and result in a "patchwork" of obligations under the laws of the various states.

In light of these larger issues, the court's focus was not on whether the city's complaint adequately alleged the elements of nuisance and trespass under New York State law, but rather whether state law was displaced. This could result from application of federal common law, or from adoption of a federal statute that occupied the field. The Second Circuit concluded that both grounds existed.

The Second Circuit held that federal common law displaced state common law claims to limit air emissions because state tort law claims would conflict with federal interests. The court pointed to the need for a uniform rule of decision nationally, and the interest of each state in regulating activity within its borders. A damages verdict in favor of the city under New York law would affect the conduct of greenhouse gas emitters in multiple states and internationally, and indirectly regulate their emissions. Damages awarded based on tort claims against out-of-state emitting facilities would upset the balance between preventing global warming and energy production, economic growth, foreign policy and national security.

The court's determination that federal common law displaced state tort law did not conclude the analysis. Where Congress enacts a statute that "speaks directly to the question" the common law answers, the statute displaces federal common law. The court cited existing precedent holding that provisions of the Clean Air Act addressing emissions displace federal common law nuisance suits for abatement of interstate emissions of greenhouse gases. The court concluded that damages claims are likewise displaced. The Clean Air Act left the balancing of interests to the U.S. Environmental Protection Agency, not to courts implementing common law.

This result is similar to the holding of the Supreme Court in *International Paper v. Ouellette*, 479 U.S. 481 (1987). That case involved the analogous question of whether a party owning property in Vermont harmed by a wastewater discharge from New York could bring its claim against the New York discharger under Vermont tort law. The Supreme Court concluded that the Clean Water Act preempted claims other than those based on that act or the law of the host state due to the need for a clear statutory standard to govern a facility's wastewater discharges. Here, the Second Circuit employed similar rationale to bar use of a state's own tort law against out-of-state emitters of greenhouse gases.

Like the Supreme Court in *Ouellette*, however, the Second Circuit recognized that Congress is free to authorize states to apply their own laws to in-state or out-of-state emitters notwithstanding the federal interest in uniform standards. In the Clean Air Act, Congress enacted a states' rights savings clause allowing states to enforce their own emission standards that are at least as stringent as a federal standard. The court held that these state-specific standards could be applied only to in-state sources of pollution. This limitation was fatal to the city's claim which sought to apply New York State nuisance standards to sources of emissions located nationally and internationally.

The Second Circuit's decision, while well-reasoned, did not analyze the legislative history of the Clean Air Act generally or the savings clause in particular. As with the Clean Water Act, the Clean Air Act allows variations in uniformity among emission controls to the extent that the host state elects to impose requirements more stringent than federal law. To be sure, allowing application of the tort law of the injured state as well as the host state would

introduce further variability. But it would also provide incentives for more aggressive air emission reductions. It is difficult to conclude from the language of the savings clause alone that Congress did not authorize the involvement of injured states in this manner. Nevertheless, absent further Congressional action to clarify the savings clause, the Second Circuit's view is likely to carry the day.

Finally, the court turned to claims against foreign producers not regulated by the Clean Air Act. The court held that the federal common law displaced state tort claims against all sources of emissions and that federal claims against foreign producers were precluded by the serious foreign policy considerations that should be left to the political branches.

The Second Circuit's opinion regarding air emissions, like the *Ouellette* decision regarding wastewater discharges, leaves an important opening for plaintiffs. The state-law savings clause allows state law to be applied to sources of emissions located within the host state. Potentially plaintiffs such as the city could pursue claims against domestic producers by applying to each producer the law of the state hosting its facility. And claims based on the laws of host states could likely be brought in the courts where the injured plaintiff is located.

In addition, climate action by the EPA and other federal agencies, and legislation imposing a carbon tax or other mechanisms to internalize the externalities of greenhouse gas emissions, may be forthcoming. The Second Circuit's decision is a setback for climate advocates, but it is not the death knell.

Kenneth J. Warren *is a founding partner of Warren Environmental Counsel and has been practicing environmental law for more than 35 years. He is a former chair of the American Bar Association section of environment, energy and resources, where he led the section's 10,000 members. He is a Fellow of the American College of Environmental Lawyers. He can be reached at* kwarren@warrenenvcounsel.com.