HUNTON& WILLIAMS

CASE HIGHLIGHT

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Hunton & Williams Mounts Successful Defense in Unprecedented Global Warming Cases

On September 15, 2005, the U.S. District Court for the Southern District of New York granted a motion to dismiss two lawsuits filed against five electric utilities (American Electric Power, Cinergy, Southern Company, Xcel Energy, and Tennessee Valley Authority) alleging that the carbon dioxide emissions from those companies' electric generating facilities constituted a "nuisance" under common law. In rejecting the claims, Judge Loretta A. Preska wrote: "Cases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases."

Eight states (New York, California, Connecticut, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin), New York City, and three land trusts filed the lawsuits in July 2004 against the five utilities. The lawsuits made unprecedented claims, namely that the utilities were contributing to an alleged nuisance of global warming due to their power plants' carbon dioxide emissions. The suits asked the court to force the utilities to reduce those emissions.

Working jointly with other counsel, Hunton & Williams attorneys Norm Fichthorn, Shawn Regan, and Allison Wood filed and briefed motions to dismiss the cases, arguing, among other things, that the suits impermissibly sought to circumvent policies set by Congress and the President to address global climate change concerns and would violate separation of powers principles. Granting the judicial relief requested by the plaintiffs would undermine the policy choices made by the political branches. Congress and the President have established United States global climate change policy as promotion of research and pursuit of international negotiations, precluding unilateral imposition of mandatory emission controls. As a result, the court lacked power to hear these cases.

Judge Preska agreed with the arguments made by the utilities, noting that "[t]he scope and magnitude of the relief Plaintiffs seek reveal the transcendently legislative nature of this litigation." The court rejected plaintiffs' argument that the case was "a simple nuisance claim of the kind courts have adjudicated in the past," finding that no "pollution-as-public-nuisance-case" before "has

touched on so many areas of national and international policy." Judge Preska cited the extensive "past and current actions (and deliberate inactions) of Congress and the Executive within the United States and globally in response to the issue of climate change" and "their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat."

After noting that courts have "'an unflagging duty' to . . . refrain from resolving questions of high policy, which are for the political branches," Judge Preska—quoting from the utilities' brief—outlined "just a few of the difficult 'initial policy determinations' that would have to be made by the elected branches before any court could address these issues." These "political questions" include whether "the societal costs of reducing such emissions [should] be borne by just a segment of the electricity-generating industry and their industrial and other consumers?" and "[w]hat are the implications for the nation's energy independence and, by extension, its national security?" Judge Preska stated that resolving these cases would have required her, in effect, to legislate on numerous policy issues, including the level at which the utilities' carbon dioxide emissions should be capped, the appropriate schedule for emission reductions, an assessment of alternative energy resources, and decisions implicating pending international negotiations, the nation's energy supply, and national security.

Because these cases presented political questions beyond the court's jurisdiction, Judge Preska dismissed all of the plaintiffs' claims.