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Client Alert

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Ninth Circuit Climate Change Ruling Opens Door to Increased Litigation

The past three years have seen a wave of tort lawsuits brought by local governments and one state seeking to hold fossil fuel companies liable for costs resulting from climate change.[1] Whether the cases can be removed to federal court is a central issue. In all but one case,[2] plaintiffs initially filed suit in state court, asserting claims for public nuisance and other state-law causes of action. Defendants have removed the cases to federal court, and plaintiffs have fought to have the cases remanded to state court.

In a pair of opinions issued May 26, 2020, the Ninth Circuit held that the fossil fuel company defendants in two of these lawsuits, *City of Oakland v. BP p.l.c.* ("*Oakland*") and *County of San Mateo v. Chevron Corp.* ("*San Mateo*"), had failed to satisfy the requirements for removal. The same three-judge panel, in opinions authored by Judge Ikuta, determined that the *Oakland* plaintiffs' state-law claim does not arise under federal law for purposes of federal question jurisdiction and that the claim is not completely preempted by the Clean Air Act. In *San Mateo*, where the district court had granted plaintiffs' remand motion, the panel held that its review was limited to the district court's finding of no subject-matter jurisdiction under the federal officer removal statute, and it concluded that the *San Mateo* defendants had not established the criteria for federal officer removal. These opinions potentially open the door to more state court lawsuits seeking money damages from companies that have allegedly contributed to climate change.

In determining that plaintiffs' claims do not raise federal questions, the Ninth Circuit joins the Fourth Circuit, the only other appellate court to have addressed the issue.[3] Appeals in similar cases are pending before the First, Second, and Tenth Circuits.

CITY OF OAKLAND V. B.P. P.L.C.

The Ninth Circuit concluded that the district court lacked federal-question jurisdiction and thus erred in refusing to grant plaintiffs' request for remand. The three-judge panel began its analysis citing to the "well-pleaded complaint rule," which holds that federal question jurisdiction exists only "when a federal question appears on the face of the complaint."[4] The court noted that there are a few exceptions to this rule, including state-law claims that arise under federal law because "federal law is a necessary element of the … claim for relief" and state-law claims that are completely preempted by federal law.[5]

The Ninth Circuit held that plaintiffs' nuisance claim did not arise under federal law because it purportedly "does not require resolution of a substantial question of federal law."[6] In a crucial passage, the court compared the federal interests implicated by plaintiffs' claims—namely energy policy, national security, and foreign policy—to the federal government's interest in attracting able workers:

> Rather than identify a legal issue, the Energy Companies suggest that the Cities' state-law claim implicates a variety of "federal interests," including energy policy, national security, and foreign policy. **The question whether the Energy Companies can be held liable for public nuisance based on production and promotion of the use of fossil fuels and be required to spend billions of dollars on abatement is no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331**. *Cf. Empire Healthchoice*, 547 U.S. at 701, 126 S. Ct. 2121 (holding that the federal government's "overwhelming interest in attracting able workers to the federal workforce" and "in the health and welfare of the federal workers upon whom it relies to carry out its functions" was insufficient to transform a "state-court-initiated tort litigation" into a "federal case").[7]

Turning to defendants' argument that plaintiffs' claim was completely preempted by federal law, the court determined that the Clean Air Act does not meet the requirements for complete preemption. First, the court pointed to the statute's saving clause as evidence that Congress did not intend to preempt every state law cause of action within the scope of the Clean Air Act. Second, the court observed that the Clean Air Act "does not provide a federal claim or cause of action for nuisance caused by global warming" and therefore does not provide the plaintiffs with a "substitute" cause of action "that would allow the Cities to remedy the wrong they assert they suffered."[8]

The panel remanded the case to the district court, instructing it to determine whether it had any alternative basis for jurisdiction, and, if not, to remand the case to state court.[9]

COUNTY OF SAN MATEO V. CHEVRON CORP.

In its opinion affirming the district court's remand order, the Ninth Circuit panel first determined that it only had jurisdiction to review the district court's remand order "to the extent it addresses whether removal was proper" under the federal officer removal statute.[10] Declining to follow an opinion by the Seventh Circuit, *Lu Junhong v. Boeing Co,*[11] the panel concluded that it was bound by Ninth Circuit precedent in *Patel v. Del Taco, Inc.*, which held that courts lack jurisdiction to review remand orders based on federal question jurisdiction.[12] The panel also cited to the Fourth Circuit's opinion in the *City of Baltimore* lawsuit, which likewise declined to follow *Lu Junhong* and limited the scope of its review to federal officer removal.[13] (Defendants in the *City of Baltimore* case have filed a petition for certiorari asking the Supreme Court to resolve whether a court of appeals may review any issue encompassed in a district court's remand order so long as the removing defendant had premised removal, in part, on the federal officer removal statute.[14]).

Turning to whether defendants established the criteria for federal officer removal, defendants first argued that fuel supply agreements between CITGO and the Navy Exchange Service Command established "subjection, guidance or control" for purposes of § 1442(a). The panel rejected this argument, finding that the provisions of the agreement "seem typical of any commercial contract and are incidental to sale and sound in quality assurance."[15]

Second, defendants pointed to a 1944 unit agreement between Standard Oil and the U.S. Navy, under which the parties agreed to coordinate oil production operations to allow the Navy to ensure the availability of reserves in the event of a national emergency, arguing that it gave rise to a relationship where Standard Oil was "acting under" a federal officer. The panel disagreed, finding that the two parties had "reached an agreement that allowed them to coordinate their use of the oil reserve in a way that would benefit both parties" and that "Standard was acting independently," whereas removal under § 1442(d) "is allowed only when the acts of Federal defendants are essentially ordered or demanded by Federal authority."[16]

Third, defendants argued that lease agreements under which the government granted lessee energy companies the right to explore and produce oil on the Continental Shelf and, in exchange, the lessees agreed to pay rents and royalties, gave rise to federal officer jurisdiction. The panel also rejected this argument, finding that the leases did not require lessees to act on behalf of the government or under its close direction and concluding that "the leases on which the

defendants rely do not give rise to the 'unusually close' relationship where the lessee was 'acting under' a federal officer."[17]

NEXT STEPS

At this juncture, defendants in the *Oakland* and *San Mateo* lawsuits can seek a rehearing en banc from the Ninth Circuit before filing a petition for *writ of certiorari* with the Supreme Court, or they may proceed directly to filing a petition for *writ of certiorari*. Although the Supreme Court has previously denied appeals related to climate change, the outcome of pending climate change cases in the First, Second, and Tenth Circuits—as well as a pending petition for *writ of certiorari* from the Fourth Circuit's recent climate change ruling—could convince the Supreme Court to grant review, especially if a circuit split emerges.

Although the fossil fuel companies involved in these climate change lawsuits have thus far avoided discovery, the Ninth Circuit's ruling (along with the Fourth Circuit's recent ruling) increases the likelihood that these cases will proceed to discovery and further motion practice. The Ninth Circuit's ruling is also likely to embolden other local governments and states to bring climate change lawsuits. Unless the Supreme Court decides to grant certiorari in one of the pending climate change cases, the appellate battles on removal and federal jurisdiction could continue for several years.

Regardless of whether the Supreme Court intervenes to provide clarity on removal and federal jurisdiction, there are still several lines of defense left for fossil fuel companies. First, many state-based claims (e.g., nuisance and trespass) are being used against fossil fuel companies in novel ways, which some state courts may find merits dismissal based on the pleadings. Second, state courts may grant dismissals on the grounds that these lawsuits are preempted by federal law or implicate political questions of economic and foreign policy that are best left to the other branches of government or the federal government. Third, even if early motions practice is unsuccessful and discovery proceeds, there will be ample grounds to dispute plaintiffs' theories of causation as well as the qualifications, methodologies, and reliability of plaintiffs' expert witnesses.

[1] *See, e.g.*, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024–29 (N.D. Cal. 2018); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471–76 (S.D.N.Y. 2018); *Mayor and City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019).
[2] In *City of New York v. BP*, plaintiffs filed suit in federal court on the basis of diversity jurisdiction. All of the lawsuits involve state-law causes of action.
[3] *Mayor and City Council of Baltimore v. BP P.L.C.*, 952 F. 3d 452, 459 (4th Cir. 2020).
[4] *City of Oakland v. BP p.l.c.*, – F.3d –, 2020 WL 2702680, at *3 (9th Cir. 2020).
[5] *Id.* at *4–5.
[6] *Id.* at *5.
[7] *Id.* at *6 (quoting *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)).
[8] *Id.* at *7 (internal citations omitted).
[9] Earlier in its opinion, the Ninth Circuit noted the following alternative bases for federal jurisdiction, which it did not address: "[1] arises out of operations on the outer Continental Shelf, see 43 U.S.C. § 1349(b); [2] implicates actions that the Energy Companies took 'pursuant to a federal officer's directions , see 28 U.S.C. § 1442(a)(1); [3] arose on 'federal enclaves'; and [4] is related to bankruptcy cases, see 28 U.S.C. §§ 1334(b), 1452(a)." *Id.* at *2 n.2.
[10] *County of San Mateo v. Chevron Corp.*, --- F. 3d ----, 2020 WL 2703701 at *1 (9th Cir. 2020).
[11] *Id.* at *3 (citing *Lu Junhong v. Boeing Co.*, 792 F. 3d 805, 812 (7th Cir. 2015)).
[12] *Id.* at *3–5 (citing *Patel v. Del Taco, Inc.*, 446 F. 3d 996, 998 (9th Cir. 2006)).
[13] *City of Baltimore*, 952 F. 3d at 459.
[14] *BP P.L.C. et al v. Mayor and City Council of Baltimore*, Case No. 19-1189, Petition for Writ of Certiorari.
[15] *San Mateo*, 2020 WL 2703701 at *8 (citing *City of Baltimore*, 952 F. 3d at 464).
[16] *Id.* (citing H.R. Rep. No. 112-17, pt. 1, at 3 (2011)).
[17] *Id.* at *9 (citing *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007)).