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Do Climate Change Nuisance Suits Belong In Federal Court?

By **Carol Wood, Tracie Renfroe and Nate Bilhartz** (June 16, 2020, 5:56 PM EDT)


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The past three years have seen a wave of tort lawsuits seeking to hold fossil fuel companies liable for the societal costs of adapting to climate change.[1] Cities, counties and one state have asserted novel claims for public nuisance, along with other state law causes of action, arguing that fossil fuel companies should be required to pay for the costs of infrastructure projects undertaken to mitigate climate change's effects.

Whether the plaintiffs' claims are governed by federal law, and whether these lawsuits can be removed to, and litigated in, federal court, are important issues. In a pair of opinions issued May 26, the U.S. Court of Appeals for the Ninth Circuit held that the defendants in two of these lawsuits, City of Oakland v. BP PLC and County of San Mateo v. Chevron Corp., had failed to meet the requirements for removal.

These opinions potentially open the door to many more lawsuits asking state courts to hold the fossil fuel industry liable for damages related to climate change. This article reviews several active nuisance lawsuits, and discusses the direction that similar cases may take.

The Recent Ninth Circuit Decisions

City of Oakland v. BP

The cities of Oakland and San Francisco filed twin lawsuits in California state court, each asserting a single claim for public nuisance. The suits were subsequently related. The defendant companies removed the cases to federal court, and the district court denied remand, finding that the cities' claims were "necessarily governed by federal common law."[2]

The cities filed an amended complaint adding a federal common law claim, and the defendants successfully moved to dismiss. The court concluded that the cities' federal common law claims were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems."[3]

The cities appealed to the Ninth Circuit, which held that the district court erred in exercising federal question jurisdiction, concluding that the plaintiffs' claims did not fall within any exception to the well-pleaded complaint rule.[4] Applying the four-part Grable test, the appellate court determined that the cities' nuisance claims could not be litigated in federal court because they did "not require resolution of a substantial question of federal law."[5]

In a crucial passage that downplays the significance of the issues at stake, the court compared the federal interests implicated by the plaintiffs' claims — energy policy, national security and foreign policy — to the federal government's interest in attracting able workers:

The question whether the Energy Companies can be held liable for public nuisance … 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 … (holding that the federal government's "overwhelming interest in attracting able workers to the federal workforce" … was insufficient to transform a "state-court-initiated tort litigation" into a "federal case").[6]

The Ninth Circuit also determined that the Clean Air Act does not completely preempt the cities' public nuisance claims. The panel pointed to the statute's saving clause as evidence that Congress did not intend to preempt state law causes of action within the act's scope, and it observed that the Clean Air Act does not provide plaintiffs with a substitute cause of action.[7]

On these grounds, the panel remanded the case to the district court, instructing it to determine whether any alternative basis exists for exercising federal jurisdiction — and, if not, to return the case to state court. The Ninth Circuit has granted the defendants until July 9 to file a petition for rehearing en banc.

County of San Mateo v. Chevron

The county of San Mateo, along with other California counties and cities,[8] filed suit in California state court, asserting claims for public and private nuisance, strict liability, negligence and trespass under California law. The defendants removed to federal court.

The district court granted remand, finding that the county's claims were neither displaced by federal common law nor completely preempted by federal statute.[9] The defendants appealed to the Ninth Circuit.

In its opinion affirming remand, the Ninth Circuit limited its review to the federal officer grounds for federal jurisdiction, based on circuit precedent.[10] The panel first noted that the federal rules prohibit review of a remand order based on lack of subject matter jurisdiction.[11]

The defendants argued that the district court's remand order was based on a merits determination (i.e., "'federal common law d[id] not govern the [Counties'] claims'"), rather than a lack of subject matter jurisdiction. But the panel rejected the argument.[12]

The panel next considered whether the "exception clause" of Section 1447(d) permitted it to review the entire remand order, and not just the portion relating to federal officer removal.[13] Deepening a split in authority, the panel declined to follow an opinion from the U.S. Court of Appeals for the Seventh Circuit, Lu Junhong v. Boeing Co., and concluded that it was bound by an earlier Ninth Circuit decision in Patel v. Del Taco Inc., which held more generally that courts lack jurisdiction to review remand orders based on federal question jurisdiction.[14]

The panel then turned to whether the federal officer removal statute applied. The defendants first argued that fuel supply agreements between Citgo Petroleum Corp. and the Navy Exchange Service Command established that their actions were subject to the "guidance or control" of federal officers. The panel rejected this argument, suggesting that the provisions of the agreement "seem typical of any commercial contract."[15]

The defendants also argued that a 1944 unit agreement between Standard Oil Co. of California and the U.S. Navy, under which the two landowners agreed to coordinate oil production operations, gave rise to a relationship where Standard Oil was acting under a federal officer. The panel disagreed, finding that Standard Oil was acting independently.[16]

The panel also rejected the significance of lease agreements under which the government granted rights to the defendants to produce oil on the continental shelf, in exchange for rents and royalties. The panel concluded that the leases did not require lessees to act under a federal officer for purposes of the removal statute.[17]

As in Oakland, the Ninth Circuit has set a deadline of July 9 for the defendants to file a petition for rehearing en banc.

Other Pending Cases

City of New York v. BP

The city of New York filed suit in federal court on the basis of diversity jurisdiction, asserting claims for public nuisance, private nuisance and trespass under New York law.

The court granted the defendants' motion to dismiss, and held that (1) the city's claims were governed by federal common law, (2) the Clean Air Act displaced any federal common law claims relating to domestic emissions, and (3) any federal common law claims relating to foreign emissions were barred by the presumption against extraterritoriality.[18]

The court reasoned that "[w]idespread global dispersal [of greenhouse gases] is exactly the type of 'transboundary pollution suit' to which federal common law should apply."[19] Regarding displacement of claims arising from domestic emissions, the court observed that "Congress has expressly delegated to the [U.S. Environmental Protection Agency] the determination as to what constitutes a reasonable amount of greenhouse gas emission."[20]

With respect to foreign emissions, the court reasoned that "[t]o litigate … an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. government."[21]

The city appealed to the U.S. Court of Appeals for the Second Circuit on July 26, 2018. Oral arguments were held on Nov. 22, 2019, but the Second Circuit has not yet issued its decision.

City of Baltimore v. BP

The city of Baltimore filed suit in state court, bringing causes of action for public and private nuisance, strict liability, negligence, trespass and violations of the Maryland Consumer Protection Act. The defendants removed to federal court, and the city moved to remand.

The court granted remand, rejecting each of the eight proffered grounds for removal. The court called the defendants' assertion that the plaintiffs' state-law claims were governed by federal common law a "cleverly veiled preemption argument."[22]

The court also criticized the district court's decision to deny remand in Oakland on the basis that the claims were governed by federal common law, arguing that the ruling was "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction."[23]

Rejecting the defendants' complete preemption arguments, the court noted that "[c]omplete preemption is rare," and found that the defendants' reliance on the foreign affairs doctrine was "inapposite in the complete preemption context."[24] The court likewise found the argument that the Clean Air Act completely displaced the city's claims unpersuasive, pointing to the savings clause in the act as "unequivocally demonstrat[ing] that Congress did not intend the federal causes of action … to be exclusive."[25]

Turning to federal officer removal, the court found that the facts asserted by the defendants in support of federal officer jurisdiction — namely, that the federal government purchased oil from one of the 26 defendants and "broadly regulated" extraction on the outer continental shelf — were insufficient to meet the requirements of Section 1442, concluding, "this attenuated connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal." [26]

The defendants appealed to the U.S. Court of Appeals for the Fourth Circuit, which affirmed on March 6. Like the Ninth Circuit in San Mateo, the Fourth Circuit determined that the scope of its review did not extend beyond federal officer removal, citing an earlier Fourth Circuit opinion, Noel v. McCain.[27]

The Fourth Circuit then concluded that "the relationship between Baltimore's claims and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products is too tenuous to support removal."[28]

The defendants filed a petition for certiorari on March 31, asking the U.S. Supreme Court to resolve whether an appellate court may review any issue encompassed in a district court's remand order, so long as removal was premised, in part, on the federal officer statute.[29]

Boulder County v. Suncor

Boulder County filed suit in state court, asserting claims for nuisance, trespass, unjust enrichment and violation of the Colorado Consumer Protection Act, later adding a claim for civil conspiracy. The defendants removed, and the district court granted remand, finding the court's opinion on dismissal in Oakland not persuasive, and agreeing with the approach taken by the district courts in the San Mateo and Baltimore cases.[30]

The defendants appealed to the U.S. Court of Appeals for the Tenth Circuit, which heard oral arguments on May 6. The parties are awaiting a decision.

State of Rhode Island v. Chevron

The state of Rhode Island filed suit in state court, bringing claims for nuisance, strict liability, negligence, trespass, impairment of public trust resources and violations of Rhode Island's Environmental Rights Act. The defendants removed to federal court, and the plaintiffs moved successfully to remand.

As in Baltimore, the court viewed the argument that the plaintiffs' state law claims were "necessarily governed by federal common law" as close to a "complete preemption" argument, and found that it must be "Congress, not the federal courts, [who] initiates this extreme and unusual mechanism."[31]

The district court also found that the Clean Air Act did not completely preempt the plaintiffs' claims, reasoning that a statute "that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress's extraordinary preemptive power."[32]

The court likewise rejected the defendants' other arguments for removal, which included Grable jurisdiction and federal officer jurisdiction.[33] The defendants appealed to the U.S. Court of Appeals for the First Circuit. No date has been set for oral argument.

Conclusion and Next Steps

The decisions highlight the challenges presented by this novel type of litigation. No one can reasonably dispute that climate change presents questions of national importance that implicate important federal interests. Similarly, how to respond to climate change raises difficult policy questions that, under our system of government, should be made by Congress and the executive branch, not by state courts.

Nonetheless, existing legal doctrine often makes it difficult to remove claims to federal court. Cities, counties and some states are increasingly using state court litigation as a venue for achieving regulatory and policy goals that otherwise could not be achieved through political processes. In the context of climate change, their novel nuisance and other state law claims are carefully designed to keep these cases in state court by taking advantage of limits in existing legal doctrine governing when a case can be removed to federal court.

While appeals remain pending before the First, Second and Tenth Circuits, the Ninth Circuit's recent rulings are likely to pave the way for more climate change lawsuits to be filed against the fossil fuel and possibly other industries.[34] The defendants in the Oakland and San Mateo case could seek a rehearing en banc from the Ninth Circuit, or they could proceed directly to filing a petition for writ of certiorari with the U.S. Supreme Court.

Unless and until the Supreme Court agrees to review one of the pending climate change cases and provides more guidance to litigants, the lower courts will likely remain divided, and appellate battles on removal and federal jurisdiction could continue for several years.

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[1] See e.g., City of Oakland v. BP PLC, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018); City of New York v. BP PLC, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), appeal docketed, No. 18-2188 (2d Cir. 2018); Mayor and City Council of Baltimore v. BP

PLC, 388 F. Supp. 3d 538 (D. Md. 2019); Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (USA) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019).

[2] People of the State of California v. BP PLC, Nos. C 17-06011 WHA< C 17-06012 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018).

[3] City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1024, 1029 (N.D. Cal. 2018).

[4] City of Oakland v. BP PLC, No. 18-16663, 2020 WL 2702680, at *4-5 (9th Cir. May 26, 2020).

[5] Ibid. ("whether, by virtue of this claim, a federal issue is '(1) necessarily raised, (2) actually disputed, (3) substantial and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress'") (citing Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L.Ed.2d 257 (2005)).

[6] Id. at *6.

[7] Id. at *6 ("When a federal statute has a saving clause of this sort, Congress did not intend complete preemption"), 7 ("[The Clean Air Act] does not provide a federal claim or cause of action for nuisance caused by global warming … that would allow the Cities the remedy the wrong they assert they suffered").

[8] In an order dated Feb. 14, 2018, the San Mateo lawsuit was related to five other lawsuits: City of Imperial Beach v. Chevron Corp., County of Marin v. Chevron Corp., County of Santa Cruz v. Chevron Corp., City of Santa Cruz v. Chevron Corp. and City of Richmond v. Chevron Corp.

[9] County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937–38 (N.D. Cal. 2018).

[10] County of San Mateo v. Chevron Corp., Nos. 18-15499, 18-15502, 18-15503, 18-16376, 2020 WL 2703701, at *1 (9th Cir. May 26, 2020).

[11] Id. at *2 (citing Briscoe v. Bell, 432 U.S. 404, 413 n.13, 97 S.Ct. 2428, 53 L.Ed 2d 439 (1977)).

[12] Ibid. ("The district court ordered remand based on its view that the cases were 'improperly removed to federal court' because… the Energy Companies failed to show that 'the case[s] … fit[] within one of a small handful of small boxes' providing for subject-matter jurisdiction. Put simply, the district court concluded that it 'lack[ed] subject matter jurisdiction.'").

[13] Ibid.

[14] Id. at *3, 4–5 (citing Lu Junhong v. Boeing Co., 792 F. 3d 805, 812 (7th Cir. 2015) and Patel v. Del Taco Inc., 446 F. 3d 996, 998 (9th Cir. 2006)). The panel also cited to the Fourth Circuit's opinion in the Baltimore lawsuit, discussed below, which likewise declined to follow Lu Junhong and limited the scope of its review to federal officer removal. Id. at 4 (citing Mayor and City Council of Baltimore v. BP PLC, 952 F. 3d 452, 459 (4th Cir. 2020)).

[15] Id. at *8 (citing Baltimore, 936 F. 3d at 464).

[16] Id. at *8 (whereas removal under § 1442(d) "is allowed only when the acts of Federal defendants are essentially ordered or demanded by Federal authority") (citing H.R. Rep. No. 112-17, pt. 1, at 3 (2011)).

[17] Id. at *9 ("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") (citing Watson v. Philip Morris Cos., 551 U.S. 142, 153 (2007)).

[18] City of New York v. BP PLC, 325 F.Supp. 3d 466, 471-476 (S.D.N.Y. 2018).

[19] Id. at 471 (citing Native Village of Kivalina v. ExxonMobil Corp., 696 F. 3d 849, 855-58 (9th Cir. 2012) and People of the State of California, 2018 WL 1064293 at *3 ("[T]he transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution")). Judge Alsup and Judge Chhabria had both discussed Kivalina in their orders on remand. Judge Alsup reasoned that under Kivalina, the Clean Air Act only displaces federal common law when the claims relate to domestic emissions of greenhouse gases, whereas Judge Chhabria determined that the holding in Kivalina was not confined to particular sources of emissions.

[20] Id. at 473.

[21] Id. at 476.

[22] Mayor and City Council of Baltimore v. BP PLC, 388 F. Supp. 3d 538, 555 (D. Md. 2019). The court agreed with the plaintiffs that "this argument is no more than an ordinary preemption defense," which means that it "does not allow the Court to treat the City's public nuisance claim as if it had been pleaded under federal law for jurisdictional purposes."

[23] Baltimore, 388 F. Supp. 3d at 557. The court further noted that the Oakland ruling "has been harshly criticized by at least one law professor" for "disregard[ing] and transgress[ing] the venerable rule that the plaintiff is the master of her complaint," for essentially applying the doctrine of complete preemption while leaving Congressional intent "out of the picture," and for being "out of step with prevailing doctrine." Id.

[24] Baltimore, 388 F. Supp. 3d at 561 ("the Supreme Court has … found complete preemption in regard to only three statutes"), 562 ("there is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine").

[25] Baltimore, 388 F. Supp. 3d at 563.

[26] Baltimore, 388 F. Supp. 3d at 568-69.

[27] Mayor and City Council of Baltimore v. BP PLC, 952 F. 3d 452, 459 (4th Cir. 2020).

[28] Baltimore, 952 F. 3d at 468.

[29] BP P.L.C. et al v. Mayor and City Council of Baltimore, Petition for a Writ of Certiorari.

[30] Boulder County, 405 F. Supp. 3d at 961.

[31] Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 148 (D.R.I. 2019).

[32] Rhode Island, 393 F. Supp. 3d at 149 (internal citations omitted).

[33] Rhode Island, 393 F. Supp. 3d at 152 (internal citations omitted).

[34] There are already several other lawsuits against fossil fuel companies asserting state-law nuisance claims in addition to the cases described above. See, e.g., King County v. BP PLC et al, Case No. C18-758-RSL (W.D. Wash. 2018); Pacific Coast Federation of Fishermen's Associations Inc. v. Chevron Corp., Case No. 3:18-cv-07477-VC (N.D. Cal. 2018); City and County of Honolulu v. Sunoco LP, Case No. 1-CCV-20-0000380 (Haw. Cir. Ct. 2020).