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The Future Of Climate Suits After Justices' Baltimore Ruling

By **Oliver Peter Thoma** (June 10, 2021, 5:29 PM EDT)

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In the past several years, state attorneys general and municipalities have brought more than 20 lawsuits seeking to hold fossil fuel energy companies liable for billions of dollars in damages allegedly resulting from global climate change.

These lawsuits seek to recover alleged damages associated with adaptation costs — e.g., building sea walls to mitigate potential rising sea levels — and the increases in public health costs associated with higher air temperatures, flooding and air pollution. If the courts allow these types of claims to advance, significant other follow-on litigation is likely to be filed.

All but one of the pending lawsuits have been filed in state court, resulting in a heated battle over whether federal or state courts are the proper forum. Another hotly contested battle is whether plaintiffs' novel state-law claims (1) are preempted by federal statutes or displaced by federal common law, and (2) raise nonjusticiable political questions that should be resolved by the executive and legislative branches.

This article analyzes recent developments in this important area of law, focusing on the U.S. Supreme Court's recent decision in BP PLC v. Mayor and City Council of Baltimore, and some other cases that might come before the court soon. There are a number of pathways for the Supreme Court, in its next few terms, to determine the proper forum for climate change lawsuits, and to decide whether such claims are displaced, preempted and/or raise nonjusticiable political questions.

Until the Supreme Court answers these fundamental questions, climate change litigation will continue to be shrouded in uncertainty.

How the Supreme Court Has Reinvigorated Debate Over the Proper Forum for Climate Litigation

On May 17, the Supreme Court addressed whether Title 28 of the U.S. Code, Section 1447(d), allows appellate review of a federal district court's entire remand order when a party appeals the order on federal officer removal (Section 1442) or civil rights (Section 1443) grounds.[1]

A 7-1 opinion, authored by Justice Neil Gorsuch, held that the U.S. Court of Appeals for the Fourth Circuit erred in limiting its review to only federal officer removal grounds, but declined to consider additional grounds for removal, such as whether climate change claims inherently raise a question of

federal law under Section 1331. Instead, the court remanded the case for the Fourth Circuit to consider in the first instance the additional removal grounds raised by the energy company defendants.

Although the Supreme Court's Baltimore opinion did not settle whether climate change lawsuits belong in federal or state court, the court vacated the judgments and issued remand orders in similar lawsuits pending in the U.S. Court of Appeals for the First Circuit, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Tenth Circuit, directing each of the courts to reconsider all grounds of removal raised by the energy company defendants.[2]

This ruling was significant because each of these circuits had limited review to federal officer removal, and had held that the energy companies failed to meet the federal officer removal standard.[3] Thus, Baltimore was a major victory for energy company defendants who have fought to have these cases litigated in federal court.

How the Supreme Court Could Address Climate Change Issues in the October 2021 Term

The Supreme Court could potentially address whether climate change claims raise a question of federal law under Section1331, if it grants energy company defendants' petition for a writ of certiorari in two lawsuits brought by the city of Oakland, California, and the city and county of San Francisco.[4]

The Oakland plaintiffs filed suit in California state court, asserting a single cause of action for public nuisance under California law against five energy companies, based on their production, sale and promotion of fossil fuels.

After defendants removed the case to federal court, the U.S. District Court for the Northern District of California denied the plaintiffs' motion to remand to state court, holding that their claims were "necessarily governed by federal common law."[5] The court observed that "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making."[6]

Even though the district court certified its order for immediate appellate review, the Oakland plaintiffs filed an amended complaint adding a cause of action for public nuisance under federal common law. The district court then dismissed the case for failure to state a claim, finding that the plaintiffs' 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."[7]

The Ninth Circuit reversed, holding that the plaintiffs' public nuisance claim did not arise under federal law, because it purportedly "does not require resolution of a substantial question of federal law."[8] The Ninth Circuit also held that the Oakland plaintiffs' decision to amend their complaint did not waive their remand arguments, and the amended pleading did not give the district court federal jurisdiction.

The energy companies filed their petition for a writ of certiorari asking the Supreme Court to address (1) whether state law tort claims alleging harm from global climate change are removable because they arise under federal law, and (2) whether a plaintiff is barred from challenging removal on appeal after amending its complaint to add a federal common law claim and litigating the case to final judgment in the district court — e.g., a motion to dismiss that is granted.

The Oakland plaintiffs opposed the petition. The Supreme Court will likely soon announce whether it will hear the case during its upcoming October 2021 term.

How a Second Circuit Ruling Created a Circuit Split on Climate Change Claims

On April 1, the U.S. Court of Appeals for the Second Circuit issued its long-awaited opinion affirming the district court's dismissal of New York City's climate change lawsuits against several major energy companies.[9] Unlike the plaintiffs in other climate changes, New York brought its claims in federal district court.

The U.S. District Court for the Southern District of New York had granted the defendants' motion to dismiss for failure to state a claim, holding that New York's claims could be pursued only under federal law, not under state law. The district court found that any federal common law nuisance and trespass claims based on domestic emissions were displaced by the Clean Air Act, and any claims based on foreign emissions were barred by the presumption against extraterritoriality, and the need for judicial caution in the face of serious foreign policy consequences.

The Second Circuit's opinion affirming the district court's dismissal order held that New York's state law claims were displaced by federal common law. The Second Circuit recognized the difficulty in tracing greenhouse gas emissions from specific emitters and tracing the effects of greenhouse gases to a particular state, so any attempt to impose one state's laws "for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet … over the past several hundred years" is untenable.[10]

Following the logic of Justice Ruth Bader Ginsburg's Supreme Court majority opinion in American Electric Power Co. v. Connecticut, the Second Circuit held that federal common law displaced New York's state law claims, and that the Clean Air Act preempted any federal common law claims for domestic emissions.[11]

For foreign emissions, the Second Circuit held that although the Clean Air Act does not apply to foreign emissions, "foreign policy concerns foreclose New York's proposal here to recognize a federal common law cause of action targeting emissions emanating from beyond our national borders."[12] The Second Circuit noted that "federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches."[13]

New York City's deadline to file a petition for a writ of certiorari with the U.S. Supreme Court has not yet expired, and it seems likely that the city will seek the high court's review. The Second Circuit's decision establishes a circuit split with the Ninth Circuit's Oakland decision as to whether state law nuisance suits for climate change are displaced by federal common law, which the energy companies cited to in their May 24 reply brief in support of their petition for a writ of certiorari in Oakland.[14]

A circuit split increases the likelihood — but does not guarantee — that the Supreme Court will decide to hear the Oakland case. Similarly, the fact that there are over 20 similar climate change lawsuits pending that raise the same issues also increases the likelihood that the Supreme Court could decide to grant review in the Oakland case.

Conclusion

Until the Supreme Court weighs in on the viability of climate change lawsuits, these issues will continue to percolate back up to the Supreme Court, because of the billions of dollars in damages claimed by the climate change plaintiffs. It thus appears inevitable that the Supreme Court will weigh in on the viability

of climate change lawsuits.

But whether it will choose to do so piecemeal — addressing issues narrowly such as federal jurisdiction, without speaking to the merits of displacement, preemption or nonjusticiable political question — is anyone's guess.

The Baltimore opinion could shorten the timeline for the Supreme Court to address whether state or federal court is the proper forum for state law-based climate change lawsuits. Had the Supreme Court rejected the energy company defendants' arguments on the scope of appellate review, the energy company defendants would have been forced to engage in discovery and trials, and exhaust their appeals in state courts across the country before reaching the Supreme Court again.

However, whether the Supreme Court will decide to hear the Oakland case in its October term is not certain. The court's narrow holding in Baltimore could suggest that it prefers further development in the lower courts before answering the question of whether federal or state courts are the proper forum for these cases, especially so soon after Oakland.

It is possible that climate change litigants might have to wait until the First, Fourth, Ninth and Tenth Circuits reevaluate other grounds for federal jurisdiction after Baltimore before the Supreme Court will weigh in again. Similarly, even if the Supreme Court hears the Oakland case, it could limit its holding to whether the Oakland plaintiffs waived their challenge to federal jurisdiction by amending their complaint to add a federal common law nuisance claim after their motion for remand to state court was denied — which would not impact the pending First, Fourth, Ninth and Tenth Circuit cases.

While the First, Fourth, Ninth and Tenth Circuits wrestle with the question of federal jurisdiction on remand from the Baltimore opinion, the related state court proceedings — which have been active since remand from federal court — must determine whether to let the federal circuit courts decide whether federal jurisdiction exists, and even whether such claims are cognizable or displaced.

For instance, the Maryland state court overseeing the remanded Baltimore case issued a stay of proceedings on May 25, until the Fourth Circuit can issue its opinion on remand from the Supreme Court's Baltimore opinion.[15] This decision may encourage similar rulings to stay proceedings in other remanded state court climate change lawsuits — especially if the U.S. Supreme Court grants the pending petition for a writ of certiorari in Oakland for its October term.

On the other hand, state courts might choose to resume litigation until the federal circuit courts, or even the Supreme Court, say otherwise — especially if the Supreme Court decides not to hear the Oakland case.

Overall, the future of climate change litigation remains uncertain until the Supreme Court resolves the disputes over the proper forum for climate change lawsuits — and whether such claims are displaced, preempted and/or raise nonjusticiable political questions best left to the legislative and executive branches.

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information purposes and is not intended to be and should not be taken as legal advice.

[1] BP PLC v. Mayor and City Council of Baltimore, 141 S. Ct. 1532 (2021).

[2] Shell Oil Prod. Co. v. Rhode Island, No. 20-900, 2021 WL 2044535, at *1 (U.S. May 24, 2021); Chevron Corp. v. San Mateo County, CA, No. 20-884, 2021 WL 2044534, at *1 (U.S. May 24, 2021); Suncor Energy Inc. v. Bd. of County Comm'rs of Boulder County., No. 20-783, 2021 WL 2044533, at *1 (U.S. May 24, 2021).

[3] Rhode Island v. Shell Oil Prod. Co., 979 F.3d 50 (1st Cir. 2020); County of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020); Bd. of County Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020).

[4] Pet. in Chevron Corp. et al. v. City of Oakland, California et al., No. 20-1089 (U.S. Jan. 8, 2021).

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

[6] Id. at 3.

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

[8] City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), opinion amended and superseded on denial of reh'g, 969 F.3d 895, 906 (9th Cir. 2020).

[9] City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

[10] Id. at 92.

[11] Id. at 89–100 (citing Am. Elec. Power Co. v. Connecticut (AEP), 564 U.S. 410, 421–29 (2011)).

[12] Id. at 101.

[13] Id. at 102.

[14] Reply Br. in Chevron Corp. et al. v. City of Oakland, California et al., No. 20-1089 (U.S. May 24, 2021).

[15] May 25, 2021, Order, Mayor and City Council of Baltimore v. BP PLC et al., Case No. 24-C-18-004219, Circuit Court for Baltimore City.