

## The Widening Circuit Split On State Court Climate Claims

By **Matthew Blaschke, Rachel Rubens and Oliver Thoma**

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In its October term, the U.S. Supreme Court is presented with the opportunity to answer whether climate change lawsuits brought by state attorneys general and municipalities belong in federal or state courts. Whether the high court will choose to take this opportunity remains an open question.

Nevertheless, a circuit split exists — and may widen — as to whether climate change lawsuits brought under state law claims are actually governed by federal common law, such that federal question jurisdiction exists to support removal to federal court.

### **Petition to Supreme Court to Resolve Circuit Split on State Climate Change Lawsuits**

On June 8, energy company defendants filed a petition for a writ of certiorari asking the Supreme Court to review *Board of County Commissioners of Boulder County v. Suncor Energy (Boulder)*, a Feb. 8 decision from the U.S. Court of Appeals for the Tenth Circuit holding there was no federal removal jurisdiction in a climate change case brought by Colorado municipalities, alleging purportedly state-law claims for nuisance, trespass, unjust enrichment, civil conspiracy and consumer protection.

Boulder[1] is one of two dozen lawsuits[2] nationwide filed by state attorneys general and municipalities seeking billions of dollars in damages for adaptation costs — e.g., sea walls — public health costs, and disgorgement from alleged consumer fraud.

Under purported state law theories of nuisance, trespass and consumer fraud, these lawsuits principally allege that the energy company defendants misled the public about the risks of global climate change from fossil fuel use, and should thus be held accountable for the impacts of global climate change in the respective states and municipalities.

Despite the plaintiffs alleging state law claims, the energy company defendants argue that federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse gas emissions on the global climate, even when labeled as arising



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under state law.

The energy company defendants argue that the Supreme Court should hear the Boulder case to resolve a circuit split on this issue. Following the Tenth Circuit's February opinion, holding no federal removal jurisdiction, the First, Fourth and Ninth Circuits reached similar opinions in climate change cases pending before them, as discussed below.

### **Conflict 1: Whether Federal Common Law Governs Climate Change Claims Alleged Under State Law**

The energy company defendants argue that the circuit split is twofold. First, in *City of New York v. Chevron Corp.*,<sup>[3]</sup> the U.S. Court of Appeals for the Second Circuit held in 2021, in response to a Rule 12(b)(6) motion to dismiss, that New York City's purportedly state-law based climate change claims were displaced by federal common law, which was subsequently displaced by the Clean Air Act or otherwise barred by foreign policy concerns.

Because the New York plaintiffs declined to file a petition for review by the Supreme Court, the Second Circuit opinion was left unchallenged. Notably the Second Circuit rejected New York's argument that the Clean Air Act's displacement of federal common law allowed state laws previously displaced to "snap back into action."

On the other side of the split, the U.S. Court of Appeal for the First Circuit (in *State of Rhode Island v. Shell Oil Products. Co. LLC*), the U.S. Court of Appeals for the Fourth Circuit (in *Mayor and City Council of Baltimore v. BP PLC*), the U.S. Court of Appeals for the Ninth Circuit (in *County of San Mateo v. Chevron Corp.*) and the U.S. Court of Appeals for the Tenth Circuit (in *Boulder*) sought to distinguish *City of New York* because it was originally filed in federal court.

These courts contend that the Clean Air Act's displacement of federal common law does allow state law claims to snap back into action — particularly because the Clean Air Act did not completely preempt state law claims.<sup>[4]</sup>

Additionally, on June 14, 2021, the Supreme Court declined the opportunity to squarely address whether federal question jurisdiction exists in climate change lawsuits alleged under state law, issuing a single-sentence order in *City of Oakland v. BP PLC*<sup>[5]</sup> denying the energy companies' petition for a writ of certiorari. This case presented a different procedural posture, however.

In *City of Oakland*, the U.S. District Court for the Northern District of California had denied the remand motion and dismissed the case based on Rule 12(b)(6), holding that climate change claims were displaced by federal common law and the Clean Air Act, and that additional concerns of the executive's foreign affairs power and the political question doctrine meant such claims lacked a basis in law.

The Supreme Court's denial of certiorari in *City of Oakland* closely followed its May 2021 opinion in *BP PLC v. Mayor and City Council of Baltimore*,<sup>[6]</sup> which vacated similar rulings in the First, Fourth, Ninth and Tenth Circuits that failed to address the merits of federal common law as a basis for federal question removal. Thus, it seems the high court wanted the circuit courts to rule on this question before weighs in.

The energy company defendants claim the Tenth Circuit and its sister circuits have conflated the merits question — i.e., whether a party can obtain a remedy under federal common law — with the jurisdictional question — i.e., whether federal common law supplies the rule of decision in the first

instance.

The energy companies cite to other federal circuit court opinions, outside of the climate change context, that have recognized that federal common law provides a ground for federal removal jurisdiction.

### **Conflict 2: Whether Federal Common Law Provides a Basis for Federal Question Jurisdiction When Plaintiffs Allege State Law Claims**

The second aspect of the split highlighted by the energy company defendants' June 8 petition is over whether a district court has federal question jurisdiction, under Title 28 of the U.S. Code, Section 1331, over claims artfully pleaded under state law but necessarily governed by federal common law.

The Tenth Circuit and its sister circuits have held that federal common law cannot provide a basis for federal question jurisdiction under the well-pled complaint rule, and that the artful pleading doctrine only applies in complete preemption contexts not applicable in climate change lawsuits. However, the energy company defendants cite to Eighth Circuit and Fifth Circuit opinions to support the opposite proposition.

In *In re: Otter Tail Power Co.*,<sup>[7]</sup> the U.S. Court of Appeals for the Eighth Circuit affirmed the removal of putative state law claims because they were governed by federal common law. Similarly, in *Sam L. Majors Jewelers v. ABX Inc.*,<sup>[8]</sup> the U.S. Court of Appeals for the Fifth Circuit upheld the removal of putative state law claims on the ground that they were governed by federal common law.

### **How Second, Third and Eighth Circuit Rulings Could Further Widen the Circuit Split**

Energy companies are also awaiting rulings in the Third Circuit and the Eighth Circuit, where three-judge panels recently held hearings on energy company defendants' appeals of district court remand decisions.

On March 15, a three-judge panel on the U.S. Court of Appeals for the Eighth Circuit heard argument in *State of Minnesota v. American Petroleum Institute Inc.*, a climate change case brought by the Minnesota attorney general.<sup>[9]</sup> The panel appeared unconvinced by Minnesota's arguments in favor of state court jurisdiction based on alleged state law claims for intrastate conduct.

As in the Second Circuit's New York decision, the judges expressed skepticism that the allegations relied on by Minnesota were purely intrastate. For instance, Judge David Stras observed that Minnesota's complaint:

mentions the words greenhouse gas, air pollution emissions, and climate change more than three hundred times, while at the same time — from what I can tell — there's only a single alleged misstatement from David Koch supporting the claim. So, I don't quite know how you can say that this is not about interstate pollution.<sup>[10]</sup>

During a June 21 hearing in *State of Delaware v. BP America Inc.* in the U.S. Court of Appeals for the Third Circuit, involving a similar climate change lawsuit brought by the Delaware attorney general, the panel seemed split as to whether federal jurisdiction was proper. For instance, one of the judges on the panel, Judge Stephanos Bibas, asked the energy company attorney: "Unless there's complete preemption, why can't they [the plaintiffs] cast this as a state law tort?"

But Judge Bibas pushed back on Delaware's attorney's claim that the case is about misrepresentations made in Delaware, saying: "[T]he use of fossil fuels is itself something you're complaining about. ... You're seeking to drag the entire world into Delaware court." [11]

Meanwhile, the U.S. Court of Appeals for the Second Circuit is set to hear oral argument this fall in *State of Connecticut v. Exxon Mobil Corp.*, a climate change lawsuit filed in state court by Connecticut's attorney general alleging only violations of state consumer protection laws. [12]

Likewise, the City of New York plaintiffs filed a new lawsuit in New York Superior Court on April 22, 2021, asserting only consumer protection causes of action based on the same underlying allegations as the original lawsuit: that the defendants allegedly engaged in a campaign to mislead the public about climate change. [13] In November 2021, that litigation was stayed pending the outcome of *Connecticut v. Exxon*. [14]

The Second Circuit, Third Circuit and Eighth Circuit rulings may further widen the split regarding whether climate change lawsuits should be heard in state or federal courts when purported state law claims are pled.

### **Why the Supreme Court May Reach Its Decision After the September Long Conference**

Thus far the Supreme Court has declined to answer the prudential question of whether climate change cases allegedly brought under state law causes of action belong in federal or state court. But the rising tide of climate change opinions in the federal circuits means that the high court will soon have to decide whether to wade into the merits of federal jurisdiction.

In *Boulder*, Boulder's response to the energy company defendants' petition is currently due Aug. 10. Thus, it seems possible that the Supreme Court could decide whether to grant the petition and hear the case following the long conference on Sept. 28, right before the October term begins.

Meanwhile, should the Second, Third or Eighth Circuits issue opinions that conflict with the First, Fourth, Ninth and Tenth Circuits, then the chances drastically increase that the Supreme Court finally determines whether climate change lawsuits belong in federal or state court.

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***Disclosure: King & Spalding formerly represented defendants in *City of Oakland v. BP PLC*, a case discussed in this article, and currently represents defendants in *Rhode Island v. Shell Oil Products Co.* and *Vermont v. Exxon Mobil Corp.*, cases cited in footnote 2.***

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[1] *Bd. Of County Comm'rs of Boulder County et al. v. Suncor Energy U.S.A. Inc. et al.*, 25 F.4th 1238 (10th Cir. 2022).

[2] See *Mayor and City Council of Baltimore v. BP PLC*, 31 F.4th 178 (4th Cir. 2022); *County of San Mateo*

v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022) (appeal consolidating six actions); Rhode Island v. Shell Oil Products Co., Civ. No. 19-1818, 2022 WL 1617206 (1st Cir. May 23, 2022); City & County of Honolulu v. Sunoco LP, No. 21-15313 (9th Cir.) (argued Feb. 17, 2022) (consolidating two actions); Minnesota v. American Petroleum Institute, No. 21-1752 (8th Cir.) (argued March 15, 2022); City of Hoboken v. Exxon Mobil Corp., No. 21-2728 (3d Cir.) (argued June 21, 2022); Delaware v. BP America Inc., No. 22-1096 (3d Cir.) (argued June 21, 2022); Connecticut v. Exxon Mobil Corp., No. 21-1446 (2d Cir.) (oral argument tentatively scheduled for week of Sept. 19, 2022); Anne Arundel County v. BP PLC, Civ. No. 21-1423 (D. Md.); City of Annapolis v. BP PLC, Civ. No. 21-772 (D. Md.); City of New York v. Exxon Mobil Corp., Civ. No. 21-4807 (S.D.N.Y.); City of Oakland v. BP PLC, Civ. No. 17-6011 (N.D. Cal.) (consolidating two actions); County of Charleston v. Brabham Oil Co., Civ. No. 20-3579 (D.S.C.); District of Columbia v. Exxon Mobil Corp., Civ. No. 20-1932 (D.D.C.); Pacific Coast Federation of Fishermen's Associations Inc. v. Chevron Corp., Civ. No. 18-7477 (N.D. Cal.); Vermont v. Exxon Mobil Corp., Civ. No. 21-260 (D. Vt.).

[3] City of New York v. Chevron Corp. et al., 933 F.3d 81 (2d Cir. 2021).

[4] Rhode Island v. Shell Oil Prods. Co., LLC, 35 F.4th 44 (1st Cir. 2022); BP P.L.C. et al. v. Baltimore, 31 F.4th 178 (4th Cir. 2022); Cnty. Of San Mateo v. Chevron Corp. et al., 32 F.4th 733 (9th Cir. 2022); Cnty. Of Boulder, 25 F.4th 1238.

[5] Chevron Corp. et al. v. City of Oakland, 141 S. Ct. 2776 (2021) (declining to review City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020)).

[6] BP P.L.C. et al. v. Baltimore, 141 S. Ct. 1532 (2021).

[7] In re Otter Tail Power Co., 116 F.3d 1207 (8th Cir. 1997).

[8] Sam L. Majors Jewelers v. ABX Inc. et al., 117 F.3d 922 (5th Cir. 1997).

[9] William Allison, 8th Circuit Zeroes In On Federal Nature of Minnesota Climate Lawsuit, Energy In Depth: Climate and Environment (March 18, 2022), <https://eidclimate.org/8th-circuit-zeroes-in-on-federal-nature-of-minnesota-climate-lawsuit/>.

[10] William Allison, 8th Circuit Zeroes In On Federal Nature of Minnesota Climate Lawsuit, Energy In Depth: Climate and Environment (March 18, 2022), <https://eidclimate.org/8th-circuit-zeroes-in-on-federal-nature-of-minnesota-climate-lawsuit/>.

[11] P.J. D'Annunzio, Oil Cos. Urge 3rd Circ. To Keep Climate Change Suit Federal, Law360 (June 21, 2022), <https://www.law360.com/articles/1504502/oil-cos-urge-3rd-circ-to-keep-climate-change-suit-federal>.

[12] Connecticut v. ExxonMobil Corp., Letter to Second Circuit Court of Appeals from Connecticut Attorney General, Case No. 21-1446, Dkt. 146 (May 25, 2022).

[13] City of New York v. ExxonMobil Corp. et al., Complaint, Case No. 1-21-cv-04807, Dkt. 1 (N.Y. Super. Ct. April 22, 2021).

[14] City of New York v. ExxonMobil Corp. et al., Order, Case No. 1-21-cv-04807, Dkt. 58 (N.Y. Super. Ct. Nov. 12, 2021).