CONFRONTING CLIMATE DAMAGE

By || **KATIE JONES**

In 2015, investigative journalists published shocking reports about newly discovered documents showing that major fossil fuel companies had a sophisticated understanding of climate change—and their products' role in causing it—as early as the 1970s.[1] One company, for example, recognized in internal memos more than 40 years ago that global warming could have "catastrophic" effects.[2]

But rather than warn the public, oil and gas companies allegedly concealed and misrepresented the climate impacts of their products and sought to cast doubt on the science, causes, and effects of global warming. We are starting to feel those effects in rising sea levels with more frequent coastal flooding, rising temperatures with hotter extremes, and stronger and more destructive storms—all of which strain public resources and infrastructure, and disproportionately

Climate change deception suits against oil and gas defendants have reached SCOTUS on jurisdictional grounds as some cases are proceeding on the merits in state courts.

impact low-income and marginalized communities.[3]

Since 2017, more than two dozen states and municipalities across the country have filed lawsuits against major oil and gas companies for damages or civil penalties.[4] Some of these cases assert purely tort claims, some purely statutory consumer protection claims, and some both.[5] All, however, rest squarely on what the Fourth Circuit in the City of Baltimore's case called the defendants' "promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign."[6] This new wave of litigation shares some key legal theories with tobacco, opioid, lead paint, and other cases aimed at holding companies accountable for the harmful effects of their products caused by the companies' deception.

Each case alleges that fossil fuel industry defendants have known for decades that their products produce greenhouse gas pollution that would have perilous consequences for the planet and its people.[7] Based on internal scientific findings, the plaintiffs allege, these companies then invested heavily to protect their assets and infrastructure from rising seas, stronger storms, and other climate change harms.[8]

But rather than warn the public, plaintiffs say, these companies and their trade organizations mounted a disinformation campaign to discredit the scientific consensus on climate change, create doubt in the minds of the public about the climate impacts of burning fossil fuels, and delay the transition to a lower-carbon future.[9] This deception inflated the market for fossil fuels, according to the plaintiffs, which—in turn—drove up greenhouse gas emissions, accelerated global warming, and brought about devasting climate changes.[10]

Today, as public awareness about climate change has finally caught up to the industry's knowledge of the dangers posed by their fossil fuel products, the plaintiff states and municipalities allege companies have shifted their efforts to "greenwashing," or misleading consumers by creating the false impression that they are more environmentally responsible than they really are. This deceptive conduct forms the basis of the complaints under state nuisance, trespass, failure to warn, and consumer protection law.

Jurisdictional Tug of War

These climate deception cases have been filed largely in state court, and the fossil fuel industry defendants have tried—and uniformly failed—to remove them to federal court. The cases assert purely state law causes of action, and the First, Third, Fourth, Eighth, Ninth, and Tenth Circuits have unanimously affirmed decisions remanding them to state court.[11]

After the Tenth Circuit rejected the oil and gas companies' arguments in *Suncor Energy Inc. v. Board of County Commissioners of Boulder County*, the defendants filed a petition for certiorari with the U.S. Supreme Court—and have since filed similar petitions in the other cases.[12] Their primary argument is that the cases arise under federal common law for purposes of removal jurisdiction, and that holdings to the contrary conflict with the Second Circuit's opinion affirming dismissal on the merits in *City of New York v. Chevron Corp.*[13]

But as the municipalities have pointed out in opposing cert, *City of New York* was filed initially in federal court and thus the Second Circuit addressed the "preemption defense on its own terms, not under the heightened standard unique to the removability inquiry."[14] Because a federal preemption defense is not sufficient to remove a case to federal court under the well-pleaded complaint rule, *City of New York* does not conflict with the five circuits that have rejected federal removal jurisdiction for these state law climate cases. The Supreme Court asked the United States to weigh in on the question, and in its brief, the Solicitor General emphasized that the state law claims "should not be recharacterized as claims arising under federal common law" and concluded that the petition should be denied.[15]

The Court recently denied the defendants' cert petitions, ending their jurisdictional gambit and allowing the cases to move forward in state court.[16]

Cases Proceeding on the Merits

As the jurisdictional battles play out in federal court, some climate deception cases are proceeding on the merits. To date, two state courts have denied motions to dismiss, moving the cases forward to discovery. In the first, Massachusetts prevailed over an oil company's attempt to dismiss the state's statutory consumer protection and securities fraud case.[17] In the second, a Hawaii state court denied motions to dismiss Honolulu's common law claims for nuisance, trespass, and failure to warn.[18] These cases illustrate several of the defendants' major themes—personal jurisdiction, federal preemption, and free speech—and the courts' opinions show why those defenses are unlikely to be successful in these or other similar cases.

First, courts have rejected attempts to dismiss climate deception cases on personal jurisdiction grounds, relying on the Supreme Court's 2021 decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*.[19] In that case, the Court held that, generally speaking, a court has personal jurisdiction over

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an out-of-state defendant when the defendant purposefully availed itself of the privilege of doing business in the forum and the plaintiff's claims arise out of or relate to the defendant's activities in the forum.[20]

The Massachusetts court had an easy time finding personal jurisdiction over the oil company because the consumer deception claims arose from advertisements at its gas stations in Massachusetts.[21] So did the Hawaii court, which observed that there was "little daylight between the forum and the underlying controversy" because the complaint alleged that the defendants' in-state activities included selling fossil fuels, failing to warn Hawaii consumers about the climate impacts of fossil fuels, and disseminating false and misleading information about climate change in Hawaii.[22]

In reaching this conclusion, the court rejected the defendants' attempts to transform the relatedness prong of specific jurisdiction into a more stringent causation test, explaining: "*Ford* made clear the U.S. Supreme Court has not and does not require a showing that a plaintiff's claim occurred due to or because of a defendant's in-state conduct."[23]

As to preemption, the defendants argued in *Honolulu* that either federal common law or the Clean Air Act preempted the state law claims.[24] The Hawaii state court rejected the first theory of preemption because the defendants failed to identify a significant conflict between a uniquely federal interest and the operation of state law—a precondition for applying federal common law.[25] And in any event, the Supreme Court has held that the Clean Air Act displaced any federal common law relating to greenhouse gas emissions, rendering that body of judge-made law a nullity.[26]

Cases allege that **fossil fuel industry defendants have known for decades that their products produce greenhouse gas pollution** that would have perilous consequences.

For similar reasons, the Hawaii state court found no statutory preemption by the Clean Air Act, noting the statute concerns the regulation of air pollution, not the "timely and accurate disclosure of harms from fossil fuels emissions."[27] So the court concluded that nothing in the *Honolulu* lawsuit could interfere with the goals or implementation of the Clean Air Act because the public entities only sought damages for harms caused by the defendants' concealment and misrepresentation of the climate impacts of their fossil fuel products. Indeed, so long as the "defendants make the disclosures and stop concealing and misrepresenting the harms [of their products], *[d]efendants can sell all the fossil fuels they are able to without*

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incurring any additional liability" under the plaintiffs' complaint.[28] The harm, in other words, stems from the deception, not the emissions alone.

As to the free speech argument, the fossil fuel companies have sought to recast the cases as attempts to chill their constitutional rights, invoking anti-SLAPP laws[29] to try to get the cases dismissed. Specifically, the defendants claim their advertisements and other public statements about climate change constitute "petitioning" activity protected as political speech by the First Amendment.[30]

Though the Massachusetts and Hawaii courts both denied these motions,[31] additional attempts in other cases are expected, as anti-SLAPP laws vary state to state. Critically, even meritless anti-SLAPP motions can significantly delay progress on the merits, since many anti-SLAPP laws allow immediate interlocutory review and put a freeze on discovery throughout the appeal.[32]

Causation and Attribution

The defendants in these cases have tried to deflect blame by arguing that climate change is a global phenomenon caused by aggregate greenhouse gas emissions over time and across geographies. But the mere fact that multiple contributors exist, even many or myriad contributors, does not answer the legal question of defendants' responsibility.

However, to prevail on the merits, plaintiffs who have raised tort claims must demonstrate that the fossil fuel companies' alleged deceptive marketing and failure to warn are a "substantial factor" in causing their harms.[33] The percentage of responsibility to be allocated to the companies is a distinct question to be resolved at a later stage in litigation. Developments in the emerging field of attribution science provide a range of methodologies that might factor into such allocation.[34] Notably, plaintiffs who have raised statutory consumer protection claims may not have to prove a causal connection between defendants' actions and local climate impacts at all.[35]

As the Hawaii state court in *Honolulu* observed in denying the motion to dismiss, although the causes of action "seem new due to the unprecedented allegations involving causes and effects of fossil fuels and climate change," they are "in fact common."[36] "Common law historically tries to adapt to such new circumstances."[37] The common law has adapted to hold companies accountable in the tobacco, opioid, and lead paint contexts; climate deception litigation represents the next step for this important area of state common law and consumer protection law. T

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NOTES

1. *See* Neela Banerjee et al., *Exxon: The Road Not Taken*, Inside Climate News, Oct. 28, 2015, https://insideclimatenews.org/book/exxon-the-road-not-taken; Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. Times, Oct. 9, 2015, https://graphics.latimes.com/exxon-arctic; *see also* Benjamin Franta, *Early Oil Industry Knowledge of CO_2 and Global Warming*, 8 Nature Climate Change, 1024–25 (2018).
2. *See* Lisa Song, Neela Banerjee, & David Hasemyer, *Exxon Confirmed Global Warming Consensus in 1982 With In-House Climate Models*, Inside Climate News, Sept. 22, 2015, https://tinyurl.com/2srcemcb (quoting Exxon internal memo from 1981).
3. *See, e.g.*, U.S. EPA, *Climate Change and Social Vulnerability in the United States*, Sept. 2021, https://tinyurl.com/pjccnpbd.
4. Chris McGreal & Alvin Chang, *How Cities and States Could Finally Hold Fossil Fuel Companies Accountable*, The Guardian, June 30, 2021, https://tinyurl.com/2p9xj4v4.
5. *See, e.g.*, *Delaware v. BP Am. Inc.*, No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020) (both tort claims and statutory consumer protection claims); *District of Columbia v. Exxon Mobil Corp.*, No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020) (statutory consumer protection claims only); *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-380 (Haw. Cir. Ct. Mar. 9, 2020) (tort claims only).
6. *Mayor & City Council of Baltimore v. BP PLC*, 31 F.4th 178, 233 (4th Cir. 2022).
7. *See, e.g.*, Compl. at 4, 70–104, *Delaware v. BP Am. Inc.*, No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020).
8. *See, e.g., id.* at 4, 142–48.
9. *See, e.g., id.* at 4, 132–35, 183–89.
10. *See, e.g., id.* at 148–52.
11. *Mayor & City Council of Baltimore*, 31 F.4th at 238, *cert. denied*, 2023 WL 3046229 (Apr. 24, 2023); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 713 (3d Cir. 2022), *cert. pending*, No. 22-821 (filed Feb. 27, 2023); *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1113 (9th Cir. 2022), *cert. denied*, 2023 WL 3046227 (Apr. 24, 2023); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 61 (1st Cir. 2022), *cert. denied*, 2023 WL 3046229 (Apr. 24, 2023); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 764 (9th Cir. 2022), *cert. denied*, 2023 WL 3046226 (Apr. 24, 2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1275 (10th Cir. 2022), *cert. denied*, 2023 WL 3046222 (Apr. 24, 2023); *Minnesota v. Am. Petroleum Inst.*, 2023 WL 2607545 (8th Cir. Mar. 23, 2023). In addition, the Second Circuit is reviewing an order granting remand in a similar case. *See Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal filed*, No. 21-1446 (2d Cir. June 9, 2021).
12. *See id.*
13. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d. Cir. 2021).
14. *Id.* at 94.
15. Brief of the United States at 1, 7, *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1275.
16. *See Shell Oil Prods. Co. v. Rhode Island*, 2023 WL 3046229 (Apr. 24, 2023); *BP P.L.C. v. Mayor & City Council of Baltimore*, 2023 WL 3046224 (Apr. 24, 2023); *Chevron Corp. v. San Mateo Cnty.*, 2023 WL 3046226 (Apr. 24, 2023); *Sunoco LP v. City & Cnty. of*

Honolulu, 2023 WL 3046227 (Apr. 24, 2023); *Suncor Energy (U.S.A.) Inc. v. Bd. of Comm'rs of Boulder Cnty.*, 2023 WL 3046222 (Apr. 24, 2023).

17. Mem. of Dec. & Order on Def.'s Mot. to Dismiss Am. Compl., *Commonwealth v. Exxon Mobil Corp.*, 2021 WL 39493456, at *1 (Mass. Super. Ct. June 22, 2021).
18. Mot. to Dismiss Under 12(b)(2), *Honolulu*, No. 1CCV-20-380 (Haw. Cir. Ct. Mar. 31, 2022); Mot. to Dismiss Under 12(b)(6), *id.* (Mar. 29, 2022).
19. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021); *see also* Todd A. Smith & Allyson C. Cox, *Where Might* Ford *Take Us?*, Trial, Feb. 2022, at 18.
20. *Ford Motor Co.*, 141 S. Ct. at 1025.
21. *See* Mem. of Dec. & Order on Def.'s Mot. to Dismiss Am. Compl., *Commonwealth*, 2021 WL 39493456, at *7.
22. Mot. to Dismiss Under 12(b)(2) at 4, *Honolulu*, No. 1CCV-20-380.
23. *Id.*
24. *See* Mot. to Dismiss Under 12(b)(6) at 5, 8, *Honolulu*, No. 1CCV-20-380.
25. *See id.* at 9.
26. *Id.* at 8 (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011)).
27. *Id.* at 7.
28. *Id.* at 3.
29. "SLAPP" is an acronym for "strategic litigation against public participation." SLAPP suits are generally "meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 577 (Cal. 1999) (Baxter, J., concurring and dissenting) (citation omitted). "The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans." *Id.* at 576 (citation omitted). In response to SLAPP suits, legislatures enacted anti-SLAPP statutes, which provide "procedural remedies to allow for prompt exposure and dismissal of such abusive lawsuits." *Id.* at 577.
30. *See Commonwealth v. Exxon Mobil Corp.*, 187 N.E. 3d 393, 394 (Mass. 2022); Dkt. 585 at 4, *Honolulu*, No. 1CCV-20-380.
31. *See Commonwealth*, 187 N.E. 3d, at 401; Dkt. 585 at 5, *Honolulu*, No. 1CCV-20-380.
32. *See, e.g.*, *Commonwealth*, 187 N.E. 3d at 399 (explaining that a special motion to dismiss under Mass. Gen. Laws ch. 231 §59H stays or limits discovery and is also immediately appealable).
33. *See, e.g.*, Mot. to Dismiss Under 12(b)(6) at 4, *Honolulu*, No. 1CCV-20-380.
34. *See, e.g.*, Richard Heede, *Accounting for Carbon and Methane Emissions 1854-2010 Methods & Results Report* (2019); Michael Burger, Jessica Wentz, & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 Colum. J. Env't L. 60, 203–09 (2020).
35. Under certain state consumer protection laws, actions brought by an attorney general require no showing of actual injury. *See, e.g.*, D.C. Code Ann. §28-3909(a) (West 2020) (providing that an action under the Consumer Protection Procedures Act by the Attorney General "shall not be required to prove damages").
36. Mot. to Dismiss Under 12(b)(6) at 11, *Honolulu*, No. 1CCV-20-380.
37. *Id.*