Fossil Fuel Climate Change Claims

I. General Foundation of Claims

Although the lawsuits present a variety of state-specific legal claims, they all rest on the same thematic foundations:

Climate change is expensive, and states, counties, and cities want help paying for it. The nation's largest oil companies sued in recent cases (including Chevron, ExxonMobil, BP, Shell, Citgo, Phillips, Marathon, Getty) have together extracted, advertised, and sold a substantial percentage of the fossil fuels burned globally since the 1960s. This activity has released an immense amount of greenhouse gas into the Earth's atmosphere, changing its climate and leading to all kinds of displacement, death, extinctions, and destruction.

Defendants understood the consequences of their activity decades ago, when transitioning from fossil fuels to renewable sources of energy would have saved a world of trouble. But instead of sounding the alarm, Defendants went out of their way to becloud the emerging scientific consensus and further delay changes—however existentially necessary—that would in any way interfere with their multibillion-dollar profits. All while quietly readying their capital for the coming fallout.

Plaintiffs seek to relieve the damage Defendants have and will continue to inflict upon property and natural resources. Casualties are expected to include manmade infrastructure, roads, bridges, railroads, dams, homes, businesses, and electric grid; the location and integrity of coastlines and waterways, along with the wildlife who call it home; the mild summers and the winters that are already barely tolerable; the fiscal health, as vast sums are expended to fortify before and rebuild after the increasing and increasingly severe weather events; and the citizens themselves, who will be injured or worse by these events.

II. What to Avoid

To avoid removal to federal court, claims of displacement (i.e., that the claims are the same and therefore "displaced" by state or federal regulations such as the Clean Air Act), or the difficult challenge of proving specific damage caused by emissions from any defendant's products, plaintiffs should not assert any violation of regulation, contract, or permit, nor seek any remedy that would regulate or impose liability on defendants for their own greenhouse gas emissions or anyone else's.

III. It's All About Deception

Rather, plaintiffs should assert that each defendant's campaign of deception and denial contributed to the climate crisis which has and will continue to inflict damage upon plaintiffs. The claims can be asserted under theories of well-settled state tort law including public nuisance, failure to warn, product liability, and, where available, a state's unfair business practices/consumer protection statutes. Requested remedies can

include compensatory damages, establishment of abatement funds to finance adaptation measures, disgorgement of profits, and other forms of equitable or financial relief.

IV. Seize on Available Inferences to Establish Causation

Where possible, reliance can be placed on precedents from other types of public deception cases, such as tobacco, lead, and opioids, where public reliance is inferred thereby rendering it unnecessary to prove actual reliance because of the nature and severity of the defendant's conduct.

V. Causes of Action

A. Public Nuisance

The recent case of The State of Oregon vs. Monsanto (filed in 2018, settled for nearly $700M in 2022 after jury selection) provides helpful guidance to pleading a public nuisance claim under Oregon law.

The State alleged that Monsanto knew since 1937 that PCBs are toxic and knew since the 1950s that PCBs escaped into the environment where they would persist and destroy the natural environment. Monsanto caused hundreds of millions of pounds of PCBs to enter and contaminate land, waters, and natural resources in Oregon, and concealed the harmful effects of PCBs from consumers and government entities. Notably, Monsanto ceased production of PCBs in 1977 and never manufactured, used, or disposed of PCBs in Oregon.

The State alleged 6 causes of action, including a claim for public nuisance. The public nuisance claim survived multiple challenges by Monsanto.

Under Oregon law, there are two ways to establish a claim for public nuisance: (1) as a nuisance per se, occasioned by a defendant's violation of a statute that defines such a violation as a public nuisance; and (2) as a public nuisance, which requires the plaintiff to plead and prove four elements (substantial interference; unreasonable interference; culpable conduct; and causation).

The court found that the State established its claim under both. First, it satisfied the requirements of ORS 468B.025 relating to discharge of waste into state waters (not applicable here). Second, it established all elements of common law public nuisance, including causation which Monsanto asserted could not be proven because the PCBs passed through the hands of one or more third parties before interfering with the State's property or resources. The court, however, concluded that:

"…Defendants knew that the PCBs would inevitably wind up polluting Oregon's waters through the normal, ordinary use of Defendants' customers. That is, the allegations are that it was Defendants' sale of these products into Oregon that inexorably led to the pollution giving rise to the claimed public nuisance. These allegations, if proven, would

be sufficient to prove causation, as well as the other required elements for a public nuisance claim."

The foregoing analysis indicates that, for a common law public nuisance claim, general causation (i.e., whether the conduct is capable of causing the allege harm), not specific causation (i.e., whether the conduct actually caused plaintiff's specific injury) will suffice.

B. Failure to Warn/Negligence/Defective Product

These claims can and have served as vehicles for public deception claims in various jurisdictions.

In Oregon, all claims relating to product defects, including design, inspection, failure to warn, and failure to instruct, no matter how the claims are labelled, are governed by ORS 30.920, known as the Oregon Products Liability Statute ("OPLS"). In State of Oregon v. Monsanto, defendant asserted that all the State's causes of action, based on product defects, were governed by the OPLS and failed to state a claim for relief, specifically failure to establish specific causation.

The state didn't allege causes of action for negligence, strict products liability or failure to warn. Instead, it alleged causes of action for public nuisance, purpresture (encroachment on public land—rejected on other grounds), trespass, and unjust enrichment. The court found that these claims were outside the OPLS because the State alleged the PCBs caused damage to fish, wildlife and related habitats. The State did NOT allege it was injured by the defect which caused the PCBs to be dangerous to consumers and users.

This appears to indicate that, outside the OPLS, general causation, not specific causation, will suffice.

C. Violation of State Unfair Business Trade Practices/Consumer Protection Statutes

Most states have Unfair Business Trade Practice/Consumer Protection Statutes which proscribe public deception as it relates to products or business practices within or affecting the state. Many statutes provide for relaxed standards for establishing causation, such as general causation as opposed to specific causation, once the violative conduct is proven.

In Oregon, Unlawful business trade practices are codified under ORS 646.607 and ORS 646.608. Only a district attorney or attorney general may bring action for the tactics listed in ORS 646.607, while an individual, district attorney, or attorney general may bring an action for tactics listed in ORS 646.608.

This appears to be the most applicable tactic appearing in ORS 646.607:

A person engages in an unlawful trade practice if in the course of the person's business, vocation or occupation the person:

(1) *Employs any unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation.*

The following provision of ORS 646.608 confirms that "failure to disclose a fact" is actionable as an unfair business trade practice:

(1) *A representation under subsection (1) of this section or ORS 646.607 (Unlawful business, trade practices) may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.*

Other provisions relating to claims under the Oregon statute:

ORS 646.750 --Investigative demand by Attorney General

ORS 646.775 ---Actions by Attorney General

ORS 468B.025 –Water Quality--Prohibited activities