Lowenstein Sandler

Circuit Courts Give Climate Change Litigation New Life in State Court

By Norman W. Spindel, Mark S. Heinzelmann, and Zachary L. Berliner

For years, climate change litigation in the United States has been reduced to a series of lengthy jurisdictional battles concerning whether such litigation belongs in state or federal court. More often than not, local regulatory authorities file these actions in state court, but the defendants reflexively remove them to federal court, where they can press their federal preemption arguments and where the risk of local bias is far lower. These threshold procedural questions can take years to resolve as the cases work their way through the federal appellate process. As a result, the substance of climate change claims is rarely addressed, much less resolved one way or the other.

But in four recent decisions—*Baltimore*,[1] *Oakland*,[2] *San Mateo*,[3] and *Suncor*[4]—the U.S. Courts of Appeals for the Fourth, Ninth, and Tenth Circuits all resolved the threshold jurisdictional question in favor of keeping climate change litigation in state court, signaling that these cases could be four of the earliest state climate change actions in the United States to proceed to discovery, dispositive motions, and, eventually, a trial. Of course, the defendants in those cases may elect to petition the U.S. Supreme Court for a writ of certiorari, as did the defendants in *Baltimore*.[5] And should the Supreme Court grant such a petition, then courts and litigants would receive some much-needed and definitive guidance on the proper venue of these claims. Either way, it appears that state-court climate change litigation has found new traction.

These four cases were initiated when their namesake cities and counties sued several energy companies in state court under state nuisance and other state-law theories. The public entities claim that the unlawful nuisance stems from the companies' production and promotion of fossil fuels, which are alleged to have exacerbated global warming, causing costly environmental and infrastructure damage within the plaintiffs' borders. Unsurprisingly, in all four cases, the energy companies removed to federal court, and the public entities then moved to remand to state court. The plaintiffs argued that their lawsuits—which are based solely on state law—do not belong in federal court.

In *Baltimore*, *San Mateo*, and most recently *Suncor*, the district courts granted the remand motions for lack of subject matter jurisdiction, and the Fourth, Ninth, and Tenth Circuits, respectively, affirmed on appeal. The circuit courts noted that, under federal law, they ordinarily cannot review a district court's remand for lack of subject matter jurisdiction. The only exception was the energy companies' argument that they were acting under a federal officer's direction via contracts with the federal government (a combination of fuel-supply contracts, petroleum-reserve agreements, and offshore-drilling leases).[6] However, in all three cases, the circuit courts rejected this argument. The circuit courts consistently reasoned that the contracts did not require the energy companies to perform basic governmental functions or implement federal law under the federal government's close direction. Rather, the courts held that the contracts were simply arm's-length business arrangements and/or meant for regulatory compliance. Such activities do not meet the standard for federal-officer subject matter jurisdiction.

---

[1] *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020) (decided on March 6, 2020).
[2] *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020) (decided on May 26, 2020).
[3] *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) (decided on May 26, 2020).
[4] *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, --- F.3d ---, 2020 WL 3777996 (10th Cir. July 7, 2020).
[5] *BP P.L.C. v. Mayor and City Council of Baltimore*, Docket No. 19-1189, SUPREMECOURT.GOV (last updated Jul. 15, 2020), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1189.html.
[6] 28 U.S.C. § 1447(d)(2) allows appellate review of a remand to state court only if the case was initially removed to federal court under one of two statutes: 28 U.S.C. § 1442 or 28 U.S.C. § 1443. 28 U.S.C. § 1442 is the only exception relevant here. It allows removal of actions "against or directed to . . . [t]he United States or any agency thereof or any officer *(or any person acting under that officer)* . . . ." *Id.* (emphasis added).

In *Oakland*, on the other hand, the Ninth Circuit came to a similar result by reversing the district court's denial of a motion to remand. Significantly, the circuit court held that the state-law nuisance claim—the sole claim in that case at the time of removal[7]—does not arise under or involve federal law, thus dictating that the matter should have remained in state court. However, the court remanded the case to the district court to consider other possible bases for jurisdiction. It instructed that if the district court finds it had no jurisdiction over the state-law claim at the time of removal, the case must be returned to state court.

In apparent recognition of the procedural uncertainties faced by the governmental plaintiffs in *Baltimore*, *Oakland*, *San Mateo*, and *Suncor*, few additional state-law climate change cases have been filed nationwide. Indeed, most states, including New Jersey, have no such litigation currently pending. Yet the recent, consistent decisions from the Fourth, Ninth, and Tenth Circuits likely dispel much of this uncertainty. And there may be more clarity to come, as cases with virtually identical facts and jurisdictional issues are awaiting decisions by the First[8] and Second Circuits.[9] In light of these decisions, will local and state governmental bodies be more willing to enter the fray? It remains to be seen, but it may be more likely now than ever before. Yet one thing is clear—climate change litigation is not going away anytime soon.

---

[7] Although after removal the cities amended their complaint to add a *federal* nuisance claim, the court noted that the district court's ability to hear the case is based on the complaint *at the time of removal*—which, in this case, included only a state nuisance claim. The court also concluded that the complaint was amended shortly enough after removal that remanding to *state* court would not be inefficient or unfair.
[8] *See Rhode Island v. Chevron Corp.,* Docket No. 19-1818, U.S. CLIMATE CHANGE LITIGATION DATABASE (last updated July 6, 2020), http://climatecasechart.com/case/rhode-island-v-chevron-corp/.
[9] *See The City of New York v. BP p.l.c.,* Docket No. 18-2188, U.S. CLIMATE CHANGE LITIGATION DATABASE (last updated June 17, 2020), http://climatecasechart.com/case/city-new-york-v-bp-plc/.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

NORMAN W. SPINDEL
Senior Counsel
T: 973.597.2514
nspindel@lowenstein.com

MARK S. HEINZELMANN
Associate
T: 973.422.2946
mheinzelmann@lowenstein.com

ZACHARY L. BERLINER
Associate
T: 973.422.6434
zberliner@lowenstein.com