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Environment

Exxon Mobil, BP, Others Face New Climate Change Suits

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Exxon Mobil Corp., BP PLC, and Chevron Corp. are some of the oil, coal and gas companies that face a new wave of climate change litigation. These latest cases are by California cities and counties alleging the energy producers' emissions amount to public nuisances under state law.

The suits, filed by Marin and San Mateo counties and the cities of San Francisco, Oakland and Imperial Beach, are expected to be the first of many, as public officials in other states increasingly look to the courts, not the federal government, to protect their communities from sea level rise, attorneys told Bloomberg Law.

Some legal experts said this latest set of suits, sparked in large part by the Trump administration's reversal of climate change initiatives, have their basis in state law similar to nuisance claims recently upheld in high-profile lead paint litigation.

The suits' state-law grounding, they said, makes them significantly different from federal climate change litigation rejected by the U.S. Supreme Court several years ago.

Proponents also said advancements in the ability to trace carbon dioxide and other pollutants to a relatively small group of companies could bolster the claims.

''We are at the dawn of what is a massive wave of litigation,'' said Carroll Muffett, president and CEO of the Center for International Environmental Law, an environmental advocacy organization in Washington. ''While it began in California, I don't think it's going to end there,'' he said.

But defense attorneys, while acknowledging that more suits are in the offing, remain generally skeptical of the odds of any of the litigation gaining much traction.

The new public nuisance suits amount to ''lawless exercises in standardless liability that lie beyond the power of courts to adjudicate,'' said Richard Faulk with Davis Wright Tremaine LLP in Washington. Many courts ''have already condemned'' such efforts, he said.

'Wave of the Future' Climate change public nuisance suits are ''the wave of the future,'' Professor Michael Burger, executive director of the Sabin Center for Climate Change Law at Columbia Law School in New York, told Bloomberg Law.

While the companies could be found liable for hundreds of millions of dollars in damages in the California suits, ''it's unlikely that would make a dent in their pocketbooks,'' Burger said.

More litigation will be required ''to put real pressure on industry to get behind significant greenhouse gas regulation,'' he said. ''That doesn't happen if there are only suits in one state.''

James May, a professor at Widener University Delaware Law School in Wilmington, Del., agreed that the California suits are only the beginning.

''I would anticipate there will be filings in other states, regardless of what happens in the California cases,'' May, who's co-director of Widener's Environmental Rights Institute, said.

May said he would look to states that have shown an interest in addressing climate change, including New York, Maine, Massachusetts, Oregon and Washington, as likely locations for upcoming litigation.

''The potential significance of these cases is huge,'' May said ''It sounds dramatic, but the world is watching.''

San Francisco and Oakland, represented by Hagens Berman Sobol Shapiro LLP in Seattle, Berkeley, Calif., and Newton Centre, Mass., filed their suits in September.

Those suits came on the heels of the San Mateo, Marin and Imperial Beach claims filed in July by Sher Edling LLP in San Francisco.

Trump Effect The latest suits are driven by a number of factors, including the Trump administration's retreat from efforts to combat climate change such as withdrawal from the Paris accord, a premise even some defense attorneys agree with.

''We have a tone deaf administration that rejects climate change,'' defense attorney William Ruskin with the Law Office of William A. Ruskin, PLLC in Rye Brook, N.Y., told Bloomberg Law. ''In frustration, people are turning to the courts.''

Burger agreed that the political climate is a factor driving the litigation.

''The obvious answer is the election of Trump ground climate change action to a halt,'' Burger said.

''We are seeing the federal government abdicate its responsibility,'' he said. ''When there's a large regulatory gap, one way to fill it is through litigation.''

May said the failure to address climate change in the U.S. outside of the courtroom leaves few alternatives to litigation.

''The politically blue states have taken action, but that can only go so far,'' May said.

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''Historically, the common law provides a cause of action to get into court.''

'It's Not Going Away' But defense counsel are critical of the public nuisance suits, which they say unfairly target companies for engaging in legal activity.

''To make a handful of companies responsible for billions in damages for climate change is inherently lawless and unprincipled,'' Ruskin said.

Ruskin defends industrial companies and manufacturers in products liability, toxic tort, and environmental actions.

The suits, he said, ''respond to a failure of government to address climate change.''

''But as extreme as Trump is to the right, it's an equally disturbing result on the other end of the spectrum,'' he said. ''There's a big social problem, and a lack of funds to address it so we turn to people whose product was perfectly legal.''

Ruskin, too, predicts more such suits in other states.

''Of course there will be copycat cases. If a city attorney or AG is running for election, these are popular cases,'' he said.

''The plaintiffs' bar will keep hammering,'' he said. ''It's not going to go away.''

Ruskin said, however, the plaintiffs' assertions that they can quantify the carbon dioxide and methane emissions attributable to each defendant ''is a lot of smoke and mirrors.''

''It's like claiming if you have a million dairy cows, each of which emits methane, you can somehow determine how much any one cow's methane releases contribute to climate change,'' he said. ''It just cannot be done. It's junk science.''

Ruskin also said he expects courts to look at the claims skeptically because both the U.S. Supreme Court, and the U.S. Court of Appeals for the Ninth Circuit, found federal common law nuisance claims barred under the Clean Air Act in *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) and *Native Village of Kivalina v. ExxonMobil Corp. 696 F.3d 849, (9th Cir. 2012)*.

But, he acknowledged, ''who knows how a state court in California is going to look at this?''

Distinguishing the Federal Rulings Professor May certainly sees some advantages for plaintiffs in having the first set of suits proceeding in the Golden State.

''The common law is a little more generous'' in California than in other states, he said, including a more lenient statute of limitations and a higher bar to preemption.

A California appeals court recently upheld, but trimmed, a high-profile lead paint public nuisance ruling against Sherwin-Williams, NL Industries and ConAgra Grocery Products.

The court affirmed liability findings in the case, but sent the suit back to a trial court to recalculate the $1.15 billion judgment against the companies.

May also said that if the climate change nuisance cases end up being moved to federal court, the Ninth Circuit, despite the *Kivalina* ruling, is overall a good circuit for a plaintiff to be in.

And there's the simple fact that California is a major greenhouse gas producer, he said.

Professor Burger, at Columbia Law School, said both *AEP* and *Kivalina* are distinguishable from the California cases.

''The analysis for whether federal legislation displaces a federal common law claim is different than the analysis for whether federal legislation preempts state law,'' he said.

''State nuisance claims for air pollution have been found to not be preempted in several important cases,'' Burger said. ''And there is nothing in the Clean Air Act to indicate that Congress expressly or implicitly intended to preempt state common law claims based on harms from climate change.''

Some federal court rulings that have found that the CAA preempts state law tort claims include *North Carolina ex rel. Cooper v. Tenn. Valley Auth.* (4th Cir. 2010), *Comer v. Murphy Oil USA* (S.D. Miss. 2012), and *United States v. EME Homer City Generation LP* (W.D. Pa. 2011).

But other federal appeals courts have found the opposite, including in *Bell v. Cheswick Generating Station* (3d Cir. 2013), *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.* (2d Cir. 2013), *Cerny v. Marathon Oil Corp.* (W.D. Tex. 2013), and *Merrick v. Diageo Ams. Supply Inc.* (6th Cir. 2015).

New Science

Vic Sher, attorney for the Marin, Imperial Beach and San Mateo plaintiffs, cites scientific advances, and new media reporting showing industry culpability, as other factors supporting the new set of climate change suits.

''In terms of science, there have been developments showing links between emissions and impacts and the attribution of them to particular corporate actions,'' Sher said. ''And investigative reporting shows what they did and didn't do.''

Muffett, of the Center for International Environmental Law, said it is now possible to ''to quantify contributions of individual corporate actors to carbon in the atmosphere.''

''Two-thirds of all industrial emissions of C02 and methane since the industrial revolution can be traced to 90 entities,'' Muffett said, citing a 2013 study by Richard Heede, co-founder of the Climate Accountability Institute in Snowmass, Colo.

''Courts aren't comfortable dealing with a million defendants. But they are comfortable dealing with 50,'' he said. ''Once we get to a constrained universe of defendants, the landscape changes completely.''

But Burger of Columbia Law School said it remains to be seen whether the alleged link between climate change and energy emissions will be sufficient to establish liability under state nuisance law.

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''There is no single, established methodology for attributing greenhouse gas emissions to fossil fuel companies based on the eventual combustion of the products they put into the market,'' Burger said.

''Plaintiffs in the California cases have offered one method. Defendants will undoubtedly challenge it in numerous ways—from the technical details to the central assumptions,'' he said.

''But courts are well equipped to figure out how responsibility should be apportioned among different actors with different types and degrees of responsibility,'' Burger said.

Other Claims As the public nuisance cases make their way through the courts, they are not the only suits pending against energy companies and other defendants over climate change.

The Ninth Circuit heard oral arguments Dec. 11 in a suit brought by children who allege the federal government has violated their constitutional right to a livable climate by failing to reduce greenhouse gases.

And, in November, a German court ruled that a Peruvian farmer may proceed with his claims that German energy utility RWE's emissions have caused glacier melt in his home town.

The RWE case is an ''important development,'' Burger said. ''It's similar to the public nuisance cases, and further along than any of these cases have gotten in the US,'' he said.

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