Climate Lawsuits Face Setbacks as they Raise Major Public Policy Issues

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The drive to litigate public policy over climate change took some hits the last two weeks in the United States Supreme Court. First, last Monday in the case of

Mayor and City Council of Baltimore v. BP P. L. C. et al., Justice Neil Gorsuch issued a very technical ruling that sent back to the lower Fourth Circuit Court of Appeals the question of in what forum a municipality can sue an energy company for actions that the municipality claims have wrongfully contributed to climate change. Then yesterday, the Supreme Court followed that up by sending back to Federal District Courts three other lawsuits against oil and gas companies for reconsideration of proper forum in light of the

Baltimore ruling.

The plaintiffs desire to sue in state court using traditional tort doctrines like "nuisance" and the like. It is a common belief that state courts are more likely to deliver large verdicts and otherwise to side with the plaintiffs in litigation of this nature, especially if a jury is comprised of the same persons who happen to be citizens of the municipal plaintiffs. On the other hand, the energy companies claim such cases should be handled by the federal court system, which is generally considered less likely to be impacted by local considerations, better able to address and deal with the national if not global impacts, and fairer to out-of-state defendants overall.

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Baltimore case, which began in 2018, is the latest in a series of cases in which states and municipalities are suing energy companies for these alleged violations. The lawsuits follow a similar pattern. The plaintiff claims that the defendants knew their actions affected climate change yet either hid that knowledge or proceeded anyway, resulting in adverse climatic effects such as sea level rise, dangerous temperature rise, and increasingly violent weather patterns that harm the plaintiff and its citizens.

While the Supreme Court overruled the Fourth Circuit decision that the

Baltimore case must be heard in Maryland state court, it neither ordered the case to federal court – opting instead to send the issue back to the Fourth Circuit for reconsideration on certain procedural grounds – nor dismissed the case entirely, as the defendants had wished. Justice Gorsuch took pains to note the narrowness of the Supreme Court's ruling, meaning the larger issues are years from being finally resolved. However, as we saw yesterday, the

Baltimore case already is being used to force other Federal Courts to weigh in on the matter of proper forum, increasing the likelihood that the final ruling will come later from the Supreme Court.

This type of litigation is the probable outgrowth of a meeting held in La Jolla, California in 2012 called the Climate Accountability, Public Opinion, and Legal Strategies Workshop. There, a group of academics, climate scientists, public interest lawyers, representatives of interested NGOs and liberal think tanks originally got together to develop strategies to hold the energy companies responsible for climate change globally, thereby also hoping to effect

change in the public's perception of the problem. Discussion at the conference centered around using the prior tobacco industry cases, which eventually resulted in multi-billion dollar settlements, as a template for conducting similar litigation attacks against "Big Oil"

due to climate change. Subsequent meetings and the sharing of papers by conference participants, such as the Union of Concerned Scientists, have also

increasingly brought state Attorneys General together, not only among themselves, but also with plaintiffs lawyers who have been engaged to pursue cases against the energy industry similar to the tobacco industry model of a few decades back.

Specifically, as with the tobacco cases, the governmental plaintiffs have increasingly hired private law firms to handle such cases on a contingency basis and to bring claims directly against the energy companies for monetary and other relief. Arguably, the first such attack on the energy industry occurred in 2016 when the United States Virgin Islands sued ExxonMobil.

In 2017, the cities of Oakland and San Francisco, California

each filed separate lawsuits against the five largest investor-owned energy companies in the world. The Oakland and San Francisco cases were dismissed in 2018, only to be reinstated by the Ninth Circuit Court of Appeals in 2020 and returned to the federal district court, where they remain today. Other

similar cases are being pursued elsewhere around the country, in many cases as a result of the Attorneys General of various states forming coalitions starting in or around 2016.

Despite the increasing publicity and alarm about climate change within the populace overall, the cases have not all gone well for the plaintiffs. For example, the Complaint filed by the City of Oakland predicted that by 2050 "…a '100 year flood' in the Oakland vicinity is expected to occur…once every 2.3 years." Further, by 2100, because of sea level rise, the city sewer system and other property will be

threatened "with a total replacement cost of between $22 billion and $38 billion."

Unfortunately, that claim contradicts Oakland's own sworn statements in the bond prospectuses that it has issued to finance city operations. These documents indicate the "City is unable to predict when seismic events, such as sea rise or other impacts of climate change or folding from a major storm could occur, when they may occur, and if any such events occur whether they will have a material adverse effect on the business operations or financial condition of the City of the local economy."

At least Oakland and San Francisco still have claims to litigate, which is more than New York City can say. On April 1, 2021, the Second Circuit Court of Appeals dismissed New York's case, and reprimanded the City for trying to usurp a federal function. In an opinion that was clear and concise, a three-judge panel stated that global warming "is a uniquely international concern" which falls under federal law, not state law. In addition, only the United States Environmental Protection Agency has the authority to regulate domestic greenhouse gas emissions, not the court system. The

court warned: "Federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches."

From a public policy standpoint, the analogy of climate change lawsuits to those against the tobacco companies is problematic. The two classes of litigation have less in common than those supporting the analogy would have one believe. Quite simply, the tobacco industry does not provide an essential product or service like the energy industry does.

Addiction aside, smoking fundamentally is a voluntary act whose harmful effects primarily affect the very individuals using the product. Even though the tobacco cases were mainly premised on the claim that the states' taxes and economies were adversely affected by the smoking epidemic, it was still the individual choice of millions of smokers who were most directly responsible for those very same damages.

The use of energy is fundamentally different however. Even if the seashore is eroding, unless and until government and/or the economy offer us better or different choices, people do still need to put gasoline in their cars to get to work, the grocer or the doctor, and to use natural gas or oil to heat their homes. There is a lot less individual choice and voluntariness about it.

Further, despite innumerable claims that with climate change the "science is settled," even though the debate has been ongoing for decades, pinning climate scientists and policymakers down on exactly what is settled science and policy can still be very difficult, if not controversial. For example, where were those who demand an immediate end to all fossil fuel use when in the fight against the Coronavirus, nations were literally desperate to obtain fossil-fuel based Personal Protective Equipment (PPEs), which for many months were in short supply? Those critics were curiously silent when it would have meant doctors, nurses, and other staff would have been without such PPEs.

Indeed, should these energy cases prevail, and should the suing states and municipalities succeed in bankrupting the energy companies, what then? Where would that leave the United States and all of humanity? Unlike tobacco, people always need energy. Access to reliable power and energy has been responsible for the greatest increase in living standards in human history.

Outside of litigation, over the last decade, states have succeeded in seizing much power that formerly was federal and trying to shape our national energy policy on a state-by-state basis, instead of uniformly at the national level. Entities like FERC, which were established to prevent individual states from usurping the federal role in determining interstate energy policy, have been effectively neutered by states taking advantage of holes in federal statutes such as the Section 401 Water Quality Certification under the Federal Clean Water Act.

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Baltimore case, and the other climate cases bouncing around in the state and federal court systems, all raise one fundamental issue: Will we allow the federal government to set one uniform, national energy policy that will seek to balance all interests in the fairest manner possible, or will we opt to allow states and municipalities to intervene and do so on a seemingly haphazard and piecemeal basis? That question may determine American energy policy in the decades to come.

ATTORNEYS MENTIONED

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