Insurer Implications As 3 Climate Suits Return To State Courts

By **José Umbert and Jason Reeves** (April 26, 2022, 4:28 PM EDT)

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After years of litigation over the proper venue for climate change lawsuits, several federal courts of appeal have recently sent those cases to state courts across the nation, where they are now set to move forward. This development has potentially significant consequences for the energy company defendants and their liability reinsurers.

Climate Change Lawsuits

Over the last few months, three federal appellate courts have issued decisions affirming district courts' orders remanding climate change lawsuits back to state courts.[1]

On Feb. 8, the U.S. Court of Appeals for the Tenth Circuit **decided** Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc. On April 7, the U.S. Court of Appeals for the Fourth Circuit **decided** Mayor and City Council of Baltimore v. BP PLC. And on April 19, the U.S. Court of Appeals for the Ninth Circuit **decided** County of San Mateo v. Chevron Corp.

These lawsuits, and many other similar suits, were filed starting in 2017 by state and local governments around the country, primarily in state court.

The government entities sued oil and gas companies, including Chevron, ExxonMobil Corp., BP, Royal Dutch Shell PLC and others — referred to as the carbon majors[2] — alleging in essence that defendants "have contributed significantly to the changing climate" in their jurisdictions "by producing, marketing, and selling fossil fuels," even though they "knew these activities would change the climate dramatically," and that they "concealed and/or misrepresented the dangers associated with the burning of fossil fuels."[3]

The plaintiffs assert, for instance in the Baltimore matter, that they have suffered climate change-related injuries as a result of the carbon majors' conduct, including sea level rise and associated impacts, and increased frequency and severity of extreme weather events such as flooding, which have caused, among other things, infrastructure damage and public health illnesses.[4]

Based on these allegations, the government entities have asserted several causes of action sounding in tort against defendants, all under state law, such as public and private nuisance, failure to warn, design defect, and trespass.[5]

Facing a proliferation of climate change lawsuits, the targets of these suits have turned to their liability insurers. Energy companies generally have large, multilayered insurance programs, providing hundreds of millions — and sometimes billions — of dollars in liability insurance for, among other things, property damage and bodily injury caused to third parties. The existence of coverage for climate lawsuits under these insurance programs will turn upon the specific policy terms, conditions, limitations and exclusions, including pollution

exclusions.

Forum Battles

For the last five years, climate change lawsuits have been mired in fierce forum battles over the proper venue to hear the cases.

Taking Baltimore as an example, the city filed its complaint in the Circuit Court for Baltimore City in July 2018, and the defendants removed the case to the U.S. District Court for the District of Maryland citing eight separate grounds. The federal district court rejected each of those eight theories and remanded the case to the Baltimore City state court. The defendants appealed, but in March 2020, the Fourth Circuit affirmed the decision.

The circuit court held that it only had authority to review one of the eight asserted bases for removal; the seven other grounds were outside of the appellate court's jurisdiction. And, with respect to the single reviewable basis for removal, the so-called federal officer removal statute, the Fourth Circuit held that defendants failed to satisfy the requirements of that provision.[6]

At that point, the U.S. Supreme Court stepped into the fray. It held that the Fourth Circuit should have reviewed all eight bases for removal rejected by the district court, vacated its decision, and sent the case back to the appellate court so that it could consider the other theories of removal raised by the carbon majors.[7]

In addition, the Supreme Court granted certiorari in other cases, including Boulder and San Mateo, vacated the circuit courts' judgments, and asked them to further consider the cases in light of the Baltimore decision.[8]

Following the court's mandate, the appellate courts evaluated all of the bases for removal at issue in their cases and held that none of them permitted the exercise of federal jurisdiction. Consequently, all three federal circuits affirmed the respective district courts' remand orders sending the climate change lawsuits back to state court.

Because climate change lawsuits pose an existential threat to energy companies, it is not surprising that defendants are represented by many of the largest law firms in the world and will spare no expense in defending these cases.

The targets of climate change lawsuits are therefore likely to turn to their liability insurers to defend them or reimburse defense costs incurred in connection with these suits. Depending upon the language of specific liability insurance policies, defense costs may represent a significant potential exposure for liability insurers.

Recent Appellate Decisions

The appellate courts have rejected the defendants' argument that federal jurisdiction exists because federal common law governs claims related to climate change, holding that any federal common law in this area was displaced by the Clean Air Act.[9] The courts have further held that the Clean Air Act did not completely preempt the government entities' state law claims, thus shutting down another avenue for the carbon majors to establish federal jurisdiction.[10]

In addition, the courts have concluded that removal to federal court was not justified based on the presence of a substantial federal question, because a federal issue was not

necessarily raised by the plaintiffs' complaints, as required to support federal jurisdiction.[11]

Further, the circuit courts rejected each of the other grounds advanced by the defendants for federal jurisdiction, holding, among other things, that any control exercised by federal officers over the defendants' operations was insufficient to trigger federal officer removal jurisdiction; that there was no viable claim of federal enclave jurisdiction based on the defendants' activities on military installations; and that federal jurisdiction did not exist based on the defendants' activities in the outer continental shelf pursuant to federal leases.[12]

The courts also rejected the defendants' assertions of bankruptcy and admiralty jurisdiction.[13]

Importance of Rulings

The carbon majors may seek review of these decisions by the U.S. Supreme Court, which would be discretionary. But as noted above, the Supreme Court has already provided input on these cases and did not take the opportunity directly or in obiter to curtail the lawsuits. Subject to such potential appeals, the courts' rulings, and others that will likely follow them, put an end to years of litigation over the removal to federal court of the climate change lawsuits.

The significance for the future of climate change litigation of plaintiffs being permitted to proceed in state court cannot be overstated. Climate change plaintiffs' claims have finally cleared threshold hurdles that have, until now, prevented their cases from proceeding and being considered on their merits.

State and local governments have fought hard to be able to pursue their cases in state court because they believe that state judges, often elected by residents of those communities, will be more receptive to their claims of environmental damage than federal courts. That is one reason parallel greenwashing and securities climate change lawsuits[14] are being advanced under state consumer and securities laws.[15]

The implications for insurers are also significant. State court litigation increases the likelihood that the carbon majors — and corporations in other industries — will eventually be found liable for the consequences of climate change.

Astronomical judgments are not beyond the realm of possibility. Subject to coverage considerations, liability insurers — and ultimately their reinsurers — may be asked to foot the bill, which could easily rip through defendants' insurance, to the extent it provides coverage.

The case of City of New York v. Chevron Corp. shows that proceeding in a state versus federal venue can indeed be critical to the outcome of climate change lawsuits. Unlike the plaintiffs in the other cases discussed here, the city brought its state law claims against the energy companies in the U.S. District Court for the Southern District of New York.

The federal district court granted the defendants' motions to dismiss the action under Federal Rule of Civil Procedure 12(b)(6), concluding that the Clean Air Act displaced the city's common-law claims with respect to domestic greenhouse gas emissions, and that judicial caution counseled against permitting the city to bring claims based on foreign emissions.[16]

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed, and held that a lawsuit seeking to recover damages for the harms caused by global greenhouse gas emissions could not proceed under New York law.[17]

Significantly, the court distinguished other climate change lawsuits — including Boulder, Baltimore and San Mateo — on the grounds that those cases were originally brought in state court, and therefore the courts could only consider whether federal-question jurisdiction was present. In contrast, New York was filed in federal court in the first instance, and the court was thus free to fully address the carbon majors' preemption arguments.[18]

As the Second Circuit put it, "the devil is in the (procedural) details."[19]

The merits of the climate change lawsuits will now be considered by state courts, where the plaintiffs have better chances to progress their cases. The energy companies will undoubtedly respond to the complaints with motions to dismiss, but in our view state judges are more likely to allow these actions to move past the pleading stage than their federal counterparts.

Additionally, the denial of a motion to dismiss generally cannot be appealed, and therefore the lawsuits will not be further delayed by interlocutory appeals.

While fighting the jurisdictional issues has likely been expensive, the carbon majors' legal fees — and potential defense costs under their liability policies — will increase exponentially once the lawsuits move into the discovery process in a number of courts across the nation.

Conclusion

Having climate change litigation move forward in state courts has huge implications for the insurance industry, as it significantly increases reinsurers' potential exposure.

First, plaintiffs are more likely to succeed on their claims, and obtain hefty judgments against the carbon majors. Further, while such a judgment may be years away, defense costs may present an immediate concern for insurers as the cases go into the discovery stage.

And there is now a green light with a blueprint for how to successfully assert these claims in more favorable forums. What additional climate change lawsuits must now be anticipated?

Reinsurers should pay close attention to these developments. And even more importantly, they should continue to develop a strategy for assessing and responding to climate change risks. Litigation will continue, not only in the U.S. but also overseas, and will likely not be limited to the carbon majors but will reach other industries that contribute to greenhouse gas emissions: heat, meat, transport and finance.

Reinsurers should address these issues proactively, for example with endorsements expressly excluding climate change claims, clear claims control clauses in their reinsurance contracts, and bespoke climate change liability products.

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[1] Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022) ("Boulder"); Mayor and City Council of Baltimore v. BP P.L.C., No. 19-1644, 2022 WL 1039685 (4th Cir. Apr. 7, 2022) ("Baltimore"); County of San Mateo v. Chevron Corp., Nos. 18-15499, 18-15502, 18-15503, 18-16376, 2022 WL 1151275 (9th Cir. Apr. 19, 2022) ("San Mateo").

[2] The term "Carbon Majors" collectively refers to U.S. and international energy companies such as Chevron, ExxonMobil, BP, Shell and others, which have been named as Defendants in Baltimore and the other cases cited.

[3] Boulder, 25 F.4th at 1247.

[4] Baltimore, 2022 WL 1039685 at *1.

[5] See Boulder, 25 F.4th at 1248; Baltimore, 2022 WL 1039685 at *2; San Mateo, 2022 WL 1151275 at *3.

[6] Baltimore, 2022 WL 1039685 at *2-3. The Boulder and San Mateo cases were similarly remanded to the Boulder County District Court and several California Superior Courts. Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020); County of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020).

[7] BP P.L.C. v. Mayor & City Council of Baltimore, –– U.S. –––, 141 S. Ct. 1532, 1538, 1543, 209 L.Ed.2d 631 (2021).

[8] Boulder, 25 F.4th at 1246; San Mateo, 2022 WL 1151275 at *4.

[9] Boulder, 25 F.4th at 1258-1260; Baltimore, 2022 WL 1039685 at *8-10.

[10] Boulder, 25 F.4th at 1263-65; Baltimore, 2022 WL 1039685 at *16-18; San Mateo, 2022 WL 1151275 at *6.

[11] Boulder, 25 F.4th at 1266-67; Baltimore, 2022 WL 1039685 at *11-14; San Mateo, 2022 WL 1151275 at *4-5.

[12] Boulder, 25 F.4th at 1253-54, 1271-75; Baltimore, 2022 WL 1039685 at *18-19, 21-22; 28-34; San Mateo, 2022 WL 1151275 at *7-8, 11, 13-15.

[13] Baltimore, 2022 WL 1039685 at *22-23, 25-26; San Mateo, 2022 WL 1151275 at *16-18.

[14] See Minn. Big Oil Climate Suit Follows Big Tobacco Blueprint (Law360, Jan. 4, 2022); Why Climate Plaintiffs Are Filing Securities, Consumer Suits (Law360, Mar. 15, 2022).

[15] Greenwashing lawsuits allege that Carbon Majors use advertising and promotional materials intended to convey a false impression that a company is more environmentally responsible than it really is and so to induce consumers to purchase its products. Lawsuits based on state securities or consumer protection laws allege economic harm resulting from

Carbon Majors' failure to be sufficiently candid with investors and customers about the impact their practices have on the climate change crisis. Id.

[16] City of New York v. Chevron Corp., 993 F.3d 81, 88-89 (2d Cir. 2021) ("New York").

[17] Id. at 91-93.

[18] Id. at 93-94. See also Boulder, 25 F.4th at 1262 (discussing New York).

[19] Id.