Local actors seek climate change damages from the biggest fossil fuel companies through state law litigation

In the wake of *West Virginia v. EPA* and the Supreme Court's deregulatory trend, state action remains an avenue for climate change adaptation and mitigation. While the specter of the major questions doctrine hampers most federal agency actions to address climate change, it leaves untouched state and local authority. It also leaves untouched the litigation that has been bubbling up in state courts against the fossil fuel industry. For those unfamiliar, localities and even a few states have filed suits against the likes of Exxon Mobil, Chevron, Shell, and BP—those so-called oil and gas supermajors—for their role in our current climate crisis. Individuals, too, have brought state law cases. For a broad overview these types of cases, see great earlier posts by my Legal Planet colleagues Dan Farber and Richard Frank.

For my own part, I am interested in the creative tort lawsuits localities are bringing against oil companies for damages. Under the umbrella of common law, these cases involve claims of nuisance, failure to warn, design defect, negligence, trespass, products liability and more. The theory is that rather than directly prevent oil and gas companies from drilling for fossil fuels that contribute to climate change, these lawsuits can impose financial costs on the largest companies that previously did not internalize the true costs of climate change. For example, Chevron does not factor the enormous costs associated with the increased risk and severity of wildfires in California due to climate change in its cost of doing business. By forcing Chevron and other supermajors to internalize these costs, companies are disincentivized, even if only slightly, from continuing to produce fossil fuels to the detriment of the planet. While outright production bans are often out of the reach of these localities (though not impossible—see the ongoing success of advocates in Los Angeles to phase out oil and gas drilling within the County), especially for activities outside their geographic boundaries, these lawsuits may hold producers responsible for the impacts localities feel. At the very least, cities and counties could recoup some of the costs they are forced to spend on climate adaptation measures, such as building sea level rise defenses, or other costs incurred because of climate change, such as loss of tourist revenue.

But localities must first establish that courts have jurisdiction to hear the cases. A court must both have personal jurisdiction (the power to bind parties to a judgment) and subject matter jurisdiction (the ability to hear the type of claim at issue). Personal jurisdiction is determined by the level of connection between the parties and the jurisdiction within which the court is located; subject matter jurisdiction is practically a question of whether a state or federal court can and should hear the case.

Without meeting the requirements of jurisdiction, a claim can be either kicked to another court, or dismissed entirely. And because these climate change cases are brought pursuant to the common law of particular states, remaining in the plaintiff's home state is critical. Even if plaintiffs prevail in establishing jurisdiction, these procedural mechanisms have undoubtedly slowed the pace of litigation. While the first of these climate change litigation claims were brought in 2017, it is only very recently that some cases have moved to the merit stage in assessing whether defendants owe localities damages.

Personal jurisdiction

Because plaintiff localities consent to the exercise of jurisdiction by the court they have chosen to file in, the relevant issue is whether the court has power over the defendant. In climate change cases, the defendants are the oil and gas companies. While the "reach" of a court over defendants depends on a particular state's laws (for both state courts and federal courts sitting in the given state), there are constitutional due process limits to when a state has personal jurisdiction over defendants. But while fossil fuel companies have largely made arguments that they have not acted sufficiently within a state to suddenly be hauled into court in that state, a Supreme Court opinion issued just last year found there is no strict causal link requirement for (specific) personal jurisdiction. A defendant's actions in a state do not have to be the but-for cause for the plaintiff's harm; they need only be related. In the context of climate change litigation this is a reason to celebrate. The ruling opens the way for fossil fuel companies' actions in other states and countries (for example, oil drilling in Mexico) to be the basis of city and county harms in establishing personal jurisdiction, preventing the claims from being dismissed before litigation can even begin. And although motions to dismiss for lack of personal jurisdiction rely on the particular arguments being brought before a court and the relevant law of the state—which can be more restrictive than constitutional limits—many of the climate change lawsuits filed in the past few years have succeeded in moving past this hurdle.

Subject matter jurisdiction

The next jurisdictional hurdle for climate change plaintiffs to clear is subject matter jurisdiction. In contrast to personal jurisdiction, the question is not whether a claim will be entirely dismissed from the state, but rather whether defendants can remove a claim that was initially filed in state courts to be litigated in a federal court (usually of the same state) instead. Either way the claim will still be litigated; the strategic concern is how either court will receive the issue. In the case of local climate change litigation, localities have fought to keep the matter in state courts while defendants have sought to elevate the matter to federal courts.

The potential reasons Big Oil defendants prefer to litigate in federal court are numerous. The first is that federal court is presumed to be more favorable to their interests than state court. There are the usual reasons federal courts are posited as being more friendly to defendants: the larger geographic range from which federal juries are pulled from, suggesting lower damages will be awarded if the plaintiff prevails, and the familiar rules of civil procedure, such as federal limits on the amount of discovery. For the climate change cases in particular, the hope is that federal courts will be more amenable to the arguments grounded in federal law; for example that these cases, although brought under state law, are preempted by either a so-called federal common law, which largely no longer exists, or the Clean Air Act. The thrust of the argument is that climate change is a global issue that should be left for federal policy, rather than state courts. Given the current dysfunction of Congress, and the beginning of the dismantling of the administrative state by the Supreme Court, that would functionally mean climate change is a global issue that ultimately cannot be addressed, which makes little sense for society and more sense for the pocketbooks of fossil fuel defendants.

So far, these arguments have been unsuccessful. Federal courts (most recently in the district of D.C.) and circuits (specifically the First, Third, Fourth, Ninth, and Tenth circuits) around the country have largely held that these climate change cases, brought as they are under theories of state law, should be adjudicated in their respective state courts. In the removal context, where a state law climate change case is filed in state court only to be "removed" to federal court, the circuits have generally agreed that removal was improper and "remanded" the cases back to state court.

The dangerous potential that the Supreme Court will shut down yet another avenue to address climate change

The Supreme Court may yet weigh in again on the issue of subject-matter jurisdiction in the context of the removal of these climate change cases. Defendants in these cases have called for the Supreme Court to reconsider the various circuit court holdings, citing an earlier Second Circuit holding from 2021 to make the case that there is a "circuit split," although by initially filing in a federal court the case is easily distinguished. A circuit split, when different federal courts of appeals come to opposite or conflicting rulings on the same legal issue, is a longstanding reason for the Supreme Court to take up an issue—circuit splits mean an opportunity for the nation's highest court to definitively resolve an issue, to better ensure consistency in the law. The Supreme Court's invitation for the Solicitor General to file a brief on the petition for writ of certiorari seeking review of the Tenth Circuit's opinion suggests the petition may be granted. Because the litigation stems from state law, the Supreme Court would likely not weigh in on the substance of the cases; rather, it would

determine the procedural question of what is appropriate for federal courts to hear in the first place. There is the danger, however, that should the Supreme Court hear a case it may overstep by making a substantive ruling before the issue has been properly adjudicated by the lower courts.

It is an unfortunate reality that important litigation can be tied up in procedural issues before getting to the meat of the claims. On the bright side, having largely gotten over the hump of both personal and subject-matter jurisdiction, cases have begun addressing the merits of the claims being brought. In a Hawaii trial court decision this year addressing the defendant's motion to dismiss the case for failure to state a claim, the court was able to address the actual arguments that the plaintiffs brought forth. Although a procedural motion, a motion to dismiss for failure to state a claim requires that the court examine substantive arguments to a limited extent. In this case, the court found that the climate change lawsuit was an "unprecedented case," but still a tort case based on longstanding and traditional state law causes of action. As the court continues to trial, we will see how the issues play out before a court for the first time.