The latest chapter in American climate change litigation has been launched by local governments–and one state–across the U.S. against domestic and international fossil fuel companies. These lawsuits have been brought under one of the oldest and most venerable legal doctrines–state common law. They seek compensation from the energy industry for the myriad, adverse effects of climate change on those governments and their residents. And this litigation is–slowly but surely–gaining considerable legal and political traction.

This important development in the history of climate change litigation began in 2017, when three local governments in California filed parallel lawsuits against scores of American and foreign oil, natural gas and coal companies. The lawsuits seek money damages from those corporations based on their energy products' deleterious climate change impacts (in particular. sea level rise, more intense coastal storms and flooding) that, in turn, are already causing financial damage and safety risks to those jurisdictions and their residents.

Those cases were quickly followed by parallel lawsuits the cities of San Francisco and Oakland brought against the energy industry. Over the succeeding two years, this litigation trend has mushroomed, with comparable lawsuits being filed by the State of Rhode Island; the cities of New York and Baltimore; King County, Washington; Boulder County, Colorado; the cities of Santa Cruz and Richmond, California; and other local jurisdictions. Still more such cases are expected to be brought by other states and local governments in the near future.

The lawsuits, virtually all of which have been filed in state courts across the nation,

share a common feature: they are based exclusively on state common law theories including public and private nuisance, trespass, negligence, product defect, and failure to warn.

At this point, a bit of legal background is required: in its 2011 decision in *American Electric Power v. State of Connecticut*, the U.S. Supreme Court unanimously held that the federal Clean Air Act displaces *federal* common law-based lawsuits seeking to address climate change concerns. Critically, however, the justices declared they were *not* deciding the distinct question of whether *state* common law claims are similarly displaced by the CAA, leaving that issue to future resolution by lower courts.

And it's precisely that set of state law-based theories that the plaintiff local governments and Rhode Island are currently asserting against the fossil fuel industry in courts across the country.

The gist of these lawsuits is that the fossil fuel industry:

- is directly responsible for over 20% of global greenhouse gas emissions over the past half-century;
- has profited immensely from the production and sale of the fossil fuels that have caused this pollution;
- have known for many years of the causal connection between their products' GHG emissions and climate change;
- have nonetheless systematically concealed and denied those critical facts to the public; and
- that their actions have "substantially contributed to a wide array of dire climate-related effects" that pose a clear and present danger to the government plaintiffs and their constituents.

To be sure, some of the specific allegations in these lawsuits vary from case to case. For example, the actions brought by coastal jurisdictions–like the first complaints filed by the California local governments–focus on the projected hazards and economic damage posed by rising ocean waters and intensified coastal storms. The Colorado case, by contrast, targets changes in the hydrologic cycle, public health consequences and other impacts. The specific common law theories advanced also vary somewhat from state to state: some jurisdictions, for example, don't recognize the doctrine of public nuisance, so that particular cause of action is omitted. Similarly, the details of state product liability law vary from state to state,

and the various lawsuits reflect those differences.

But the similarities among the cases far outweigh the differences. All of the lawsuits filed to date are thoroughly documented, predicated on detailed climate science principles, sweeping in their allegations against the energy industry and ambitious in their objectives. As Vic Sher, one of the lead attorneys in many of the lawsuits brought on behalf of the government plaintiffs, observes:

"All these cases seek damages from the fossil fuel industry for losses suffered by communities and businesses dealing with climate change-related impacts. They would compensate communities for the very real–and daunting–costs of adapting to and mitigating the impacts of climate change."

The energy company defendants have mounted a vigorous legal counterattack, initially on procedural grounds: they have sought to transfer ("remove," in legal parlance) each and every case filed in state court to federal court–believing that the industry stands a better chance of prevailing on the merits before federal judges. While the assigned federal judge in two of the cases has determined that those lawsuits were properly removed to federal court, the federal jurists in the majority of the cases have ordered them transferred back to the state courts for resolution. Many of the lawsuits are currently on appeal before federal Courts of Appeals across the nation for resolution of this threshold federal-vs.-state court question.

In the majority of cases in which the federal courts have remanded the lawsuits back to state court, the energy defendants–in addition to appealing the propriety of those remands–have asked the federal appellate courts to halt proceedings on the merits in the state courts while their federal appeals are pending. To date, those stay requests have been unavailing: in the litigation brought by the city of Baltimore, for example, after the federal district court remanded the case to the Maryland state court in a strongly-worded decision, both the U.S. Fourth Circuit Court of Appeals and the U.S. Supreme Court rejected the energy defendants' stay requests.

To be sure, when the state and local governments' cases reach the merits of their state common law claims, they will confront some formidable obstacles. First, the government plaintiffs face the challenge of demonstrating the requisite causation between the defendant industry's business activities and the environmental and public safety harms the plaintiffs allege. Second, the defendants will doubtless argue that they have simply introduced their energy products into the U.S. stream

of commerce, and that is the millions of intervening institutional and individual actors who have used those products to generate energy, manufacture products, power their vehicles and heat their homes that are at least equally responsible for the GHG emissions at issue.

However, those industry defenses are not insurmountable. Attorneys for the government plaintiffs note that climate science has advanced dramatically in recent years. They appear confident their government clients can overcome industry's causation/attribution defenses, given the current sophistication of the relevant science. And the industry's efforts to foist responsibility for GHG emissions from the products they've manufactured and marketed to intervening parties may well be overcome by the damning revelations the government plaintiffs identify in their lawsuits: the complaints document the fact that the defendant companies commissioned private studies as far back as the 1960's that identify the inextricable link between fossil fuel GHG emissions and climate change–at the same time those companies were carrying out an extensive (and expensive) campaign of climate change-related misinformation targeting the public, media and government decision-makers.

These climate change lawsuits will no doubt be protracted and hard-fought. But the governments plaintiffs have the better of the scientific and policy arguments. Moreover, the state common law theories they assert are both powerful and seemingly applicable to the energy industry's course of conduct here. And, significantly, the governments' legal counsel in these cases are savvy, experienced and tough; the corporate law firms retained by the energy industry defendants have a formidable legal battle on their hands.

One final point: the fossil fuel industry's public relations machine asserts that these climate change lawsuits are radical and unprecedented. Not so. The state and local governments bringing these lawsuits are in fact standing on the shoulders of some major public health and environmental litigation victories achieved over the past 30 years. Those earlier lawsuits–like the currently-pending climate change cases–seemingly faced long legal odds and drew harsh industry criticism when they were launched. One prominent example is the tobacco litigation successfully pursued by a bipartisan coalition of state attorneys general in the 1980's and `90's against the tobacco industry. Earlier in this decade, Northern California local governments relied on state common law theories to obtain a sweeping court judgment against the former manufacturers and marketers of lead paint, to compensate for the adverse public health impacts associated with that toxic

product. Over the past few decades, municipalities and their counsel have recovered hundreds of millions of dollars in tort actions against oil and gas companies responsible for MTBE contamination of public groundwater supplies. And state and local governments are currently utilizing the same state common law theories being asserted in the pending climate change litigation to recover damages from the pharmaceutical companies responsible for the opioid crisis plaguing the nation.

In sum, the climate change cases being litigated by American state and local governments against the fossil fuel industry are neither spurious nor ill-conceived. They are, to the contrary, in the finest tradition of U.S. public interest “impact litigation.” More importantly, they may well succeed.

After all, isn’t it high time the energy industry be required to internalize the profound public health, safety and environmental costs associated with their GHG-ladened products, rather than forcing those costs onto government and the public as the industry has been allowed to do for decades?