

With the Supreme Court's refusal to take up the issue, the lawsuits against the oil industry are heading back to state court. That's where the plaintiffs wanted those cases from the beginning, but it's by no means the last of the issues they will confront. The oil companies will fight a scorched earth campaign, spending millions to contest every possible issue. Here are some of the major issues we can expect them to raise.

Does a state court have jurisdiction to hear claims against out-of-state oil companies? The Constitution limits a state court's authority to cases that have "minimum contacts" with the state. That means that corporations can be sued only in their home states or in states that have some relation to the case itself. For example, any suit against Chevron can be brought in California, its home state. But to hear climate lawsuits against other companies, the plaintiffs would need to show that the lawsuits have enough of a relationship to California to justify suing here. The legal doctrine in this area is murky, but the plaintiffs have a good argument based on the fact that they are California entities, the harm to them is occurring here, and the companies' activities in California contribute to the harm. Given the confused precedents, however, it's hard to be completely certain about the outcome.

Are the companies protected by the First Amendment? Many of the claims are based at least in part on allegations of misrepresentations by the companies regarding climate science in order to promote their sales of fossil fuels. The companies are likely to argue that these claims are barred by the First Amendment for two reasons. First, they will argue that they can't be held liable for failing to disclose their knowledge of the causes of climate change because there was uncertainty about the topic and it was controversial. There are Supreme Court cases that give broad protection against "compelled speech." The plaintiffs will argue that these precedents don't apply, and that in any event the companies' were engaged in deceptive conduct, not just failure to disclose.

That brings us to the second argument that companies could make, that any deception claims relate to speech intended to influence the political process and that political speech is exempt from liability even if it is false. The Supreme Court gives more protection to what it considers public discourse rather than commercial speech like advertising. The boundary between those two categories is somewhat blurry. It would be helpful if the plaintiffs can show that the companies were also motivated by a desire to improve their image and increase sales, not merely to influence the political process.

Are the lawsuits preempted by federal law? In their efforts to get the cases into federal court, the oil companies argued that federal law bars state lawsuits about climate change. The arguments come in two forms.

One tries to combine two lines of precedent to argue that state liability rules were preempted by federal liability rules, but that the federal liability rules themselves were displaced by the Clean Air Act so no basis for liability remains. That argument has always struck me as too clever by half, but that doesn't mean that all judges will agree. I don't expect this argument to win in state court.

The other argument is that the Clean Air Act itself eliminates state lawsuits for interstate pollution. That seems flatly wrong to me, but there's one federal court opinion that provides support. In arguing against federal jurisdiction over the climate cases, the Justice Department argued that even if these arguments were valid, that wouldn't be a basis for moving the cases to federal court. That leaves the door open to raising the same arguments in state court as defenses. As I've said, I don't think either argument holds water, but the companies are sure to push them strongly in the state court litigation.

Is there a clear enough connection between the companies' conduct and the harm to the plaintiffs? In order to obtain damages, the plaintiffs must show that their harm in the form of sea level rise and other impacts was caused by the conduct of the oil companies. The chain of causation is something like this: oil company conduct increased their sales; the increased sales caused the emission of additional carbon; the additional carbon contributed meaningfully to climate impacts; and the climate impacts rather than other factors caused specific harm to the plaintiffs (harm due to extreme weather, the need to build new sea walls, etc.). The oil companies will contest each link in this chain, and they will also argue that the chain as a whole is too indirect and attenuated to be a basis for liability.

In other words, we are nowhere near the end of this litigation, but we have at least seen the end of the beginning. The plaintiffs' lawyers have their work cut out for them. But every day these cases continue, the risks to the oil companies grow, something that their investors and lenders are well aware of.