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Legal Sidebar

Climate Liability Suits: Is There a Path to Federal Court?

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Many of the most prominent court cases related to climate change in recent years have been decided by federal courts, including the Supreme Court, based on federal law. A growing number of cases, however, allege state-law claims against fossil fuel companies in state courts. A key issue that has emerged early in that litigation is whether those state courts will ultimately consider liability related to climate change, or whether federal courts should instead assume responsibility for those claims.

On July 7, 2022, in *City and County of Honolulu v. Sunoco LP*, the United States Court of Appeals for the Ninth Circuit affirmed an order from a federal trial court returning a climate change lawsuit to Hawaii state court, where it was filed initially. The case was the fifth federal appeals court case to consider whether federal courts should hear state-law climate lawsuits since the Supreme Court's 2021 decision in *BP p.l.c. v. Mayor and City Council of Baltimore*. The Supreme Court in *BP* directed federal appeals courts to entertain a broader scope of arguments from the fossil fuel industry that climate liability suits belong in federal court—not state court.

Since *BP*, the First, Fourth, Ninth, and Tenth Circuits have considered appeals from the fossil fuel industry arguing that state-law climate lawsuits should be heard in federal court. Each court of appeals sent each case back to state court, frustrating defendants' attempts to secure a federal forum. This Legal Sidebar provides analysis of legal issues related to removal of climate liability suits and considerations for Congress.

Climate Change Liability Lawsuits

Beginning in earnest in 2018, states and local governments began suing fossil fuel companies for damages caused by climate change, raising claims under state law in state court. The plaintiffs in these suits allege that climate change caused them to suffer eroding shorelines, damage to infrastructure, and public-health impacts due to increased frequency and severity of heatwaves, floods, and other extreme weather events. To address these alleged harms, the plaintiffs raised legal theories that traditionally have been the domain of state law, such as claims of public and private nuisance, trespass, and violations of consumer protection laws that ban deceptive trade practices for failing to warn about the potential harms of producing and using fossil fuel products. They have avoided claims that would generally implicate questions of federal

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law, such as whether the defendants are required to reduce their fossil fuel production or greenhouse gas emissions.

The defendant companies have tried, so far unsuccessfully, to remove a number of these cases from state court to federal court, seeking what they expect will be a friendlier forum. In support of their efforts to remove these cases, the defendants contend that even if the plaintiffs invoke state law for their causes of action, any decision in the plaintiffs' favor will have the *effect* of regulating interstate greenhouse gas emissions—an area the defendants argue is reserved exclusively for federal jurisdiction. In addition, the defendant companies argue, any damages incurred by the plaintiffs are the result of aggregate emissions of greenhouse gases globally and over many decades. Thus, because the plaintiffs' claims necessarily implicate interstate and international emissions, the claims must be heard in federal court.

Removal Basics

A defendant generally may only remove a case from state court to federal court if that case could have been brought in federal court in the first place. Not all cases brought in state court, however, are subject to federal court jurisdiction. As courts of limited subject matter jurisdiction, the federal courts can only hear certain categories of cases outlined in the Constitution and authorized by Congress. All other cases must be brought in state court.

Pursuant to Article III, Section 2 of the Constitution, Congress authorized the federal courts to exercise jurisdiction over federal questions—that is, claims that are based on federal law (The Constitution permits and Congress has also authorized federal courts to hear cases based on what is known as "diversity jurisdiction," that is, state law disputes where the amount in controversy exceeds $75,000 and no plaintiff shares the same state citizenship as any defendant). To determine whether a plaintiff's claim is based on federal law, federal courts look to the claims presented in the plaintiff's complaint. If a question of federal law is necessary to the plaintiff's claims in the complaint, then the federal court has jurisdiction to hear the case. This is known as the "well-pleaded complaint rule." Except in certain circumstances, defenses alone, even if based on federal law, do not create federal jurisdiction.

Several statutes, including 28 U.S.C. § 1441, allow defendants to remove a case from state court to federal court. Pursuant to Section 1441, defendants can remove a case originally brought in state court to federal court so long as the case is one that could have been brought in federal court originally. As with cases brought originally in federal court, the evaluation of whether the federal court has jurisdiction to hear the case turns on whether the claims in the plaintiff's complaint are based on federal law. Once a defendant invokes removal, the federal court to which the case would be removed must determine whether the claims in the complaint establish federal jurisdiction. If so, the case stays in the federal court system. If not, the federal district court must remand the case to the state court where it was initially filed.

A different removal statute, 28 U.S.C. § 1442, provides an exception to the well-pleaded complaint rule. That statute permits a defendant federal officer (or someone who acted at the direction of a federal officer) asserting a defense based on federal law to remove a case to federal court even where the plaintiff's claim rests entirely on state law.

Until 1964, a defendant could not appeal a district court's order to remand a case to state court. A federal district court would therefore have the final word on whether the case should be heard in federal or state court. Congress amended the removal statute twice, once in 1964 and again in 2011, to permit appeals of remand orders in limited circumstances: where the defendant attempted to remove the case pursuant to a plaintiff's civil rights claim, or invocation of the federal officer removal provision. In cases where the defendant claimed any other grounds for removal, however, the statute still barred appellate review of district court orders remanding cases to state court.

BP and Removal Jurisdiction

The *BP* case ultimately shifted more of the responsibility for evaluating removal from federal district courts to the federal courts of appeals. The case arose because of a split in how federal courts of appeals handled appeals that included multiple theories of removal. Some courts held that the removal statute confined appellate review to the grounds explicitly listed in the statute, while other courts held that they could review the merits of all theories of removal, so long as one of them was either federal officer removal or civil rights.

The *BP* case started out as a suit brought in state court by Baltimore against BP and 25 other fossil fuel producers. Baltimore's claims were typical of state-law climate change cases: it alleged that some of the defendants' business practices were illegal under state law, that those practices had caused climate change that harmed the city, and that the companies should pay compensation for that harm. BP attempted to remove the case to federal district court, arguing, among other things, that it produced fossil fuels at the direction of federal officials and therefore could avail itself of the federal officer removal provision. The district court disagreed and remanded the case to state court. BP appealed to the Fourth Circuit, seeking review of *all* of its grounds for removal raised before the district court, and not only those grounds (such as federal-officer removal) that are explicitly appealable. The Fourth Circuit concluded that the removal statute only permitted it to review BP's federal officer removal arguments and affirmed the district court's remand, finding that BP did not meet the requirements for federal officer removal.

The Supreme Court disagreed, holding that appellate courts are permitted to review all grounds for removal so long as the defendant raised either federal officer removal or civil rights arguments. The Court based its decision on the removal statute's use of the word "order." The removal statute permits defendants to appeal a district court's "order remanding a case to . . . State court . . . pursuant to section 1442 [federal officer removal] or 1443 [civil rights claims]." 28 U.S.C. § 1447(d). The Supreme Court interpreted "order" to mean the entire order issued by the district court, not just the parts of the order that addressed federal officer removal or the civil rights claim.

After holding that the courts of appeals had this additional authority to consider removal arguments, the Supreme Court sent the case back to the Fourth Circuit to consider those arguments in the *BP* case. It subsequently also directed the three other courts of appeals (the First, Ninth, and Tenth Circuits) that previously remanded climate liability suits to state court based only on a review of federal officer removal arguments to revisit those decisions, but this time to review all grounds for removal raised by defendants. In each new appeal, the defendant companies raised the same seven grounds for removal.

Each circuit, however, rejected every argument for removal, again sending each case back to state court. *Honolulu v. Sunoco* is representative of those decisions, as the defendants have made similar arguments in each case and the courts of appeals have decided those arguments based on almost identical reasoning. In *Honolulu*, the Ninth Circuit found that the defendants failed to demonstrate that they produced fossil fuels at the direction of federal officials and even if they did, the defendants did not assert a plausible federal defense. The Ninth Circuit went on to find that although the defendants may have produced fossil fuels on federal property and the outer continental shelf, the defendants could not show that fossil fuels produced in those areas directly caused the plaintiffs' injuries. Although not an issue in *Honolulu*, the defendants in the four other appeals, including a Ninth Circuit case decided before *Honolulu*, also argued that federal law preempted state causes of action applied to climate change, and therefore the federal courts have jurisdiction. Courts uniformly rejected defendants' preemption argument, finding that a federal preemption defense does not establish federal court jurisdiction.

The litigation over removal so far, therefore, has shifted which courts decide the removal question in favor of the federal courts of appeals. It has not, however, shifted which courts decide the underlying question of liability under the plaintiffs' state-law theories. Like the federal district courts before *BP*, the

federal courts of appeals after *BP* have uniformly determined that state courts are the appropriate forum for those claims.

Complete Preemption: A Dead End to Federal Court?

The defendants' losses at the courts of appeals do not necessarily mark the end of their fight for a federal forum. The Supreme Court is currently reviewing a petition for certiorari filed by the defendants in the Tenth Circuit case. The defendants raise a single argument supporting removal jurisdiction. The defendants contend that federal common law (law made by federal judges in the absence of a federal statute) completely preempts state nuisance law as it applies to climate change, and therefore the federal courts have jurisdiction to hear climate lawsuits.

Complete preemption is a rare exception to the well-pleaded complaint rule. Where it does exist, federal law displaces state law entirely, such that courts will treat cases based on state law as if they were based on federal law. In the removal context, complete preemption acts to federalize claims that are nominally based on state law, making the case eligible for removal.

In order to find complete preemption Congress must speak clearly in the relevant statute. The Supreme Court has held that only where Congress clearly intends for federal law to provide the exclusive remedy is complete preemption present. As a result, the Court has identified only three statutes that completely preempt state law—none of which are relevant to plaintiffs' state-law theories. The Supreme Court has never found state law completely preempted by federal common law.

Defendants in several climate lawsuits have unsuccessfully asserted complete preemption as a basis for removal. In post-*BP* appeals, the defendant companies argued that because the plaintiffs' suits attempt to indirectly address interstate greenhouse gas emissions (an area that they argue is subject to exclusive federal jurisdiction), the federal common law of interstate pollution completely preempts state tort claims seeking redress for climate change. Each of the four circuits to address federal common law complete preemption as a basis for removal has rejected that argument, setting up the pending petition for certiorari before the Supreme Court.

The defendants' petition for certiorari implicates two related questions that the Court left undecided in the *BP* case. The first is whether federal law plays any part in suits arising from state law seeking redress for harm caused by climate change. If federal law is implicated in climate liability suits, that raises the second question of its relationship to state law. Does federal law supplant state law completely, converting any claim under state law seeking redress for climate damages into a federal question, or does federal law preempt only certain areas or applications of state tort law, leaving pockets of state law untouched? The Supreme Court could grant certiorari to consider those questions, or it could leave in place the uniform holdings of the lower courts that these cases do not involve a question of federal law.

Considerations for Congress

The dispute over federal court jurisdiction for climate liability suits is ultimately statutory. While the Constitution sets the outer bounds of federal court jurisdiction, Congress must authorize lower federal court jurisdiction by statute. The removal statute as written confers less jurisdiction than the constitutional maximum. Accordingly, Congress could amend the removal statute to permit a wider (or narrower) range of cases into federal court. It could, for example, do away with the well-pleaded complaint rule for climate liability suits by allowing a federal court to assert jurisdiction when a defendant raises a federal defense (e.g., federal preemption of state law). This change would represent a marked shift in federal court jurisdiction, however. The well-pleaded complaint rule has prevailed for more than a century, and except for the rare or narrow exceptions discussed above, has applied to all cases. Expanding federal jurisdiction also raises federalism concerns. As the Supreme Court has noted, "[a]ny advantage of giving

jurisdiction to the federal courts must be balanced against the disadvantages of taking away from the State courts causes of action rooted in state law."

Congress could also choose to narrow federal court jurisdiction to make it harder for defendants to remove climate liability suits to federal court. For example, Congress could overrule *BP* by amending the removal statute to explicitly limit appellate review to federal officer removals and removals based on civil rights claims. This change would give federal district courts, rather than federal courts of appeals, a decisive role on more removal questions.

Additionally, Congress could choose to bypass the removal question by simply stripping state courts of jurisdiction over cases that aim to address climate change. Congress has rarely exercised its power to vest federal courts with exclusive jurisdiction. Nevertheless, it has done so in areas such as federal criminal cases, bankruptcy, and patent and trademark. In each of those examples, Congress has enacted substantive federal law regulating private behavior, and it has vested the federal courts with exclusive jurisdiction over claims arising under that substantive law. Congress could do the same, for example, by enacting a comprehensive statute that regulated the marketing and sale of fossil fuels and providing for exclusive federal-court jurisdiction.

Alternatively, and presumably more controversially, Congress could pass a statute that did not attempt to regulate any private conduct, but simply vested the federal courts with jurisdiction over disputes arising under state law related to the marketing or sale of fossil fuels or the emission of greenhouse gases. This purely procedural statute would exercise what is known as "protective jurisdiction." Protective jurisdiction is controversial among scholars and judges, however, because, its detractors argue, a purely procedural statute does not provide federal substantive law to decide the case, and there would be no true federal question for the federal courts to decide. The Supreme Court has never addressed whether protective jurisdiction violates Article III of the Constitution. To try to avoid possibly overstepping its constitutional bounds, Congress could direct federal courts to fashion federal common law in climate change lawsuits. Finally, if Congress chooses any of these paths to vest federal courts with exclusive jurisdiction, it would have to do so clearly and explicitly in order to overcome the Supreme Court's presumption of concurrent state court jurisdiction over federal claims.

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