

Global Warming Nuisance Lawsuits

EXECUTIVE SUMMARY

- A rash of global warming lawsuits seek to turn our constitutional structure on its head.
- Instead of debating the complex issues surrounding global warming in Congress or the Executive Branch, a number of liberal-leaning cities have resorted to the courts.
- These cities allege that five energy companies should be held liable under the tort of public nuisance for “the national and international phenomenon of global warming.”
- This is not the first global warming lawsuit. In fact, the United States Supreme Court recently held that an American energy company could *not* be held liable in tort for greenhouse gas emissions because the Clean Air Act regulates these emissions and displaces federal common law.
- Plaintiff cities’ public nuisance claim fails almost every element. The challenged extraction and production activity, for example, was not “unauthorized”—but encouraged by federal and state law. Causation is also absent given that billions of intervening third parties—many residing in the plaintiff cities—actually controlled the fossil fuels at the time of combustion.
- Whatever one thinks of global warming, legislation through litigation on this international issue is an extremely poor fit.

MORE INFORMATION

Introduction

Twelve cities and counties (“the cities”) have filed suit against five energy companies alleging worldwide harms. **According to plaintiffs**, these energy companies should be held liable for the impacts of the international phenomenon of global warming including “the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands.”

These are issues of national and international significance. It is thus hardly surprising that a number of federal laws and international agreements address this very topic. The Executive branch and congressional legislators are surely in a better position to balance regulation with the interests of advancing and preserving economic, industrial, and social development. And they are in the best position to bring *all* of the players to the table including greenhouse gas-emitting giants India and China.

Yet a few left-leaning cities, located mostly on the Coasts, have decided to take matters into their own hands. Dissatisfied with the democratic process, they have resorted to the favored-tool of the plaintiffs’ bar: legislation through litigation. This transparent attempt to change national energy policy should be cut off at the pass. Courts are in the business of interpreting statutes; they have no constitutional authority to make national (and international) energy policy decisions.

The cities base their claims on public nuisance law—the plaintiff bar’s most recent darling. Their 50-some page **original complaint** is remarkably short on the law—just over one page. And for good reason. Until very recently, public nuisance required *criminal* activity. Yet these cities target production activity that is sanctioned by every state and the federal government. Indeed, states and localities often offer tax and other incentives to induce fossil fuel exploration and investment in their local economies.

Moreover, this is not the first time that localities have tried to sue energy companies for global warming. Just a few years ago, the Supreme Court made clear that energy

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companies cannot be held liable for the effects of global warming because the Clean Air Act directly addressed the issue of greenhouse gas emissions and displaced any federal common law nuisance claim.

Why Public Nuisance Law is a Poor Fit

The Supreme Court has already held that states and localities may not change federal energy policy by pleading federal common law tort claims. In no uncertain terms a *unanimous* Supreme Court **held** “that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.” Congress, by “delegat[ing] to [the] EPA the decision whether and how to regulate carbon-dioxide emissions,” had “displace[d] federal common law.” Writing for the entire Court, Justice Ginsburg explained that, as a result, federal courts “have no warrant to employ the federal common law of nuisance to upset the agency’s expert determination” regarding the reasonable level of greenhouse gas emissions. Congress “designated an expert agency, here, [the] EPA, as best suited to serve as primary regulator of greenhouse gas emissions,” and the EPA “is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”

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The plaintiffs make three arguments to avoid this clearly on-point Supreme Court precedent. First, plaintiffs assert *state* law tort claims. But as the California District Court held federal common law necessarily governs public nuisance claims because “[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable” and “the extent of any judicial relief should be uniform across our nation.” That means plaintiffs claim sound, if at all, in federal common law.

Yet federal common law is itself an odd creature. As the Supreme Court famously held in *Erie R. Co. v. Tompkins*, **304 U. S. 64**, 78 (1938), “There is no federal general common law.” Nevertheless, the Supreme Court has **recognized** a “new” federal common law, which allows federal courts to fill in the “statutory interstices” of legislation “where Congress has so directed.”

Even this new form of federal common law is on thin ice. It is, of course, primarily the “the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest.” *TVA v. Hill*, **437 U. S. 153**, 194 (1978). As a result, where Congress has legislated on an issue, the federal courts common law-making power disappears.

A unanimous Supreme Court in *American Elec. Power Co. v. Connecticut* (“AEP”) has already **concluded** that Congress delegated to the EPA through the Clean Air Act the authority to regulate greenhouse gas emissions. As a result, there should be no federal common law regarding global warming at all. Congress has displaced emissions claims precisely **because** “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues in this order.”

As the district court in the case **recognized**, the plaintiff cities try to skate around the AEP decision by focusing on an “earlier moment”—“the production and sale of fossil fuels, not their combustion.” But plaintiffs do not, indeed cannot, allege harm based on the *production* of fossil fuels. Rather, those fuels release greenhouse gases only upon *combustion* by a third party, like any resident of the plaintiff cities who operates a vehicle. To find for the cities, a judge would first have to find that emissions themselves were a public nuisance, but Congress delegated emissions regulatory authority to the EPA, not courts.

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In a nod to the tobacco litigation, the plaintiff cities argue that this case is different from AEP because the energy companies engaged in collusive, deceptive marketing. Plaintiffs **claim** that the “Defendants promoted massive use of fossil fuels by misleading the public about global warming by emphasizing the uncertainties of climate science and through the use of paid denialist groups and individuals.” These cities allege that the five energy companies knew about the dangers of global warming and nevertheless continued collusively to market and sell products.

But in a recent hearing, a federal judge found that it was the plaintiffs’ allegations that were misleading. Judge William Alsup **expressed dismay** at the plaintiffs’ fast and loose claim of collusion. When the judge learned that plaintiffs’ “smoking gun” document was an internal summary of a *publicly available* report, he reprimanded their attorney, **explaining** that he had read the lawsuit to allege the existence of “a conspiratorial

document within the defendants about how they knew good and well that global warming was right around the corner.”

The judge **continued**,

“I said: ‘OK, that’s going to be a big thing. I want to see it.’ Well, it turned out it wasn’t quite that. What it was, was a slide show that somebody had gone to the IPCC [Intergovernmental Panel on Climate Change] and was reporting on what the IPCC had reported, and that was it. Nothing more. So [the companies] were on notice of what [the] IPCC said from that document, but it’s hard to say that they were secretly aware. By that point they knew. Everybody knew everything in the IPCC.”

In response to Judge Alsup’s ire, plaintiffs **amended their complaint** to clarify that the alleged smoking-gun document merely “summarized findings” of the publically available IPCC report.

The Ins And Outs of Public Nuisance Law

Historically, public nuisance law was reserved for criminal activity. The Restatement of Torts recently expanded public nuisance to include activity which creates an “an unreasonable interference with a right common to the general public.” But to date, the tort has not been used to punish activity that is sanctioned by federal law. In the understatement of the decade, plaintiffs have **conceded** that “[a]pplying federal common law to producer-based cases would extend the scope of federal nuisance law well beyond its original justification.” The public nuisance claims should be dismissed for no less than four reasons.

First, in an omission fatal to their public nuisance claim, plaintiffs do not allege that the production of fossil fuels was unauthorized. Public nuisance claims typically fail where a statute either expressly or implicitly authorizes the defendant’s conduct. Numerous federal statutes encourage fossil fuel production. So does the California Public Utilities Code, which **requires** the Public Utilities Commission to “encourage, as a first priority, the increased production of gas in this state.”

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Second, one of the core elements of a nuisance claim is the requirement that a defendant be able to “abate,” or stop, the activity giving rise to the alleged nuisance. To abate a nuisance, the defendant must be in control of the activity. But here, the energy companies do not control fossil fuels during combustion—the alleged cause of increasing global temperatures. Indeed, the City of Oakland **concedes** that “use of fossil fuel” by others—including residents of Oakland—is the “primary source of greenhouse gas pollution that causes global warming.”

The billions of intervening third parties—fossil fuel users—make causation particularly difficult for plaintiffs to establish. As the Northern District of California **found** in a prior global warming lawsuit against Exxon Mobile, there is “no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, or group at any particular level.”

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Tort causation is also difficult to establish because plaintiffs have sued only *half* of the top ten global producers of oil. They have sued none of the 100s of smaller producers. Asking a handful of companies to pay the price for global harms allegedly caused by billions of individuals and hundreds of companies and governments is contrary to United States policy. In 1997, for example, the United States Senate **adopted** a 95-0 resolution providing that the United States “should not be a signatory” to any agreement at the Kyoto conference “or thereafter” which would exempt developing countries from mandatory emissions reductions or “result in serious harm to the U.S. economy.”

Third, the remedy sought by the plaintiff cities here also makes clear that this is no ordinary public nuisance lawsuit. The Restatement of Torts provides that damages are only available for harm that has *already* occurred. San Francisco and Oakland claim that the energy companies contributed to a global warming-induced sea level rise presently harming them, but a recent bond prospectus from San Francisco asserts that the city has suffered no harm from global warming—and indeed, that even future effects are speculative. The prospectus claims that San Francisco is “unable to predict whether sea level rise or other impacts of climate change or flooding from a major storm will occur.” Plaintiffs nevertheless request a pot of money—a so-called

“abatement fund” of billions of dollars that they can spend on pet projects—and, of course, attorneys’ fees.

Separation of Powers Problems

The poor fit with public nuisance law is hardly surprising given that plaintiffs seek to regulate (and punish) the worldwide production of fossil fuels *through the courts*.

The case-by-case regulation sought by plaintiffs **would require courts** “to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development.” The appropriate

policy equilibrium for national and international issues is a decision for Congress. Indeed, the Supreme Court has **held** that some policy decisions of this magnitude are outside “the proper—and properly limited—role of the courts in a democratic society.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

Conclusion

This is not the first, the second, or even the third time that plaintiffs have sued energy companies over alleged harms associated with global warming. This case should meet the same fate as all the others: prompt dismissal, because the questions raised by global warming are appropriately addressed to Congress and the Executive branch. Indeed, the Supreme Court has held that Congress has delegated the regulation of greenhouse gas emissions to the EPA thus displacing federal common law public nuisance claims. Further, abatement of the alleged nuisance is impossible because the harm plaintiffs allege does not occur until combustion by billions of unrelated third parties, like the residents of plaintiff cities. Causation is lacking for the same reason. And the challenged production activity is encouraged, not prohibited, by state and federal law. At the end of the day, plaintiffs fail to satisfy nearly every element of a public nuisance claim. And for good reason. This debate belongs in the halls of Congress and in international diplomatic negotiations—not the federal courts.

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