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WHAT YOU NEED TO KNOW ABOUT Climate Tort Litigation

PRO POINTS

- **Local governments are facing increasing costs from climate change:** rising sea levels, flooding, drought, forest fires, damage from more extreme weather and public health costs of warming.
- **In an effort to cover their bills, an increasing number of cities, counties and states are suing fossil fuel companies for damages under state nuisance, liability and consumer laws.**
- **The future of the lawsuits will depend heavily on whether they proceed in state courts, or if the companies successfully bump them up to federal court.** The Supreme Court will rule on that venue question in the coming months.
- **If the suits move forward, those filed so far could theoretically add up to hundreds of millions or even billions of dollars in liabilities for the companies.**

HOW WE GOT HERE

In recent years, climate change has transformed from what most people considered to be a danger for the future into a costly problem for the present that is weighing on budgets of many counties, cities and states.

That has spurred a series of lawsuits — at least 16, with more expected — seeking damages not under federal law but instead through state tort claims against the companies that produce the fossil fuels causing climate change. Even before laws were written specifically for the environment, tort claims such as nuisance and trespass were used to go after polluting companies for contaminated air, water or soil. But common law claims are seen as riskier when it comes to climate change as greenhouse gases affect the entire globe, unlike conventional pollutants that can settle into a specific area and be traced to a specific source. Some states are also adding in novel claims under their consumer protection laws.

Early efforts at climate tort litigation two decades ago ended in failure, with the Supreme Court's 2011 ruling in *American Electric Power v. Connecticut* that said the Clean Air Act's authorization of EPA action on greenhouse gases displaces any federal common law claims stemming from carbon dioxide emissions. (Though environmentalists still considered that ruling a victory for reaffirming EPA's duty to regulate greenhouse gases.) But an increasing number of states and cities believe that state-level claims could still lead to victory in court.

The fossil fuel companies being targeted by these suits are trying to have these lawsuits nipped in the bud as well, each time bumping the lawsuits from state to federal courts. Those cases have mostly been remanded back to the state courts; the four appellate courts that have weighed in so far have agreed with that outcome.



Climate change lawsuits are making their way through federal courts

State and local governments have filed 17 lawsuits seeking to hold fossil fuel companies liable for the climate crisis.



Year lawsuit filed	City, county and state plaintiffs (map)	Defendant(s)	Progress through federal courts		
			DISTRICT	CIRCUIT	SCOTUS
2017	1	More than three dozen fossil fuel companies	Remand*	Remand	Cert. pending**
	2	BP, Chevron, ConocoPhillips, Exxon Mobil, Royal Dutch Shell	Dismissed	Remand	Cert. pending
2018	3	† BP, Chevron, ConocoPhillips, Exxon, Shell	Dismissed	Dismissed	
	4	Exxon and Suncor	Remand	Remand	Cert. pending
	5	BP, Chevron, ConocoPhillips, Exxon, Shell			
	6	More than a dozen fossil fuel companies	Remand	Remand	Cert. pending
2020	7	More than two dozen fossil fuel companies	Remand	Remand	Arguments held
	8	More than a dozen fossil fuel companies	Remand		
	9	Exxon	Remand		
	10	American Petroleum Institute, Exxon, Koch, Flint Hills	Remand		
	11	Exxon, Shell, Chevron, BP			
	12	API, Exxon, Shell, BP, Chevron, ConocoPhillips			
	13	More than a dozen fossil fuel companies			
	14	More than two dozen fossil fuel companies			
	15	Exxon			
2021	16	More than a dozen fossil fuel companies	Remand		
	17	More than two dozen fossil fuel companies			
Pending	18				
	19				

† Filed first in federal court; others filed first in state courts *Remand: Sent back to state court **Certiorari pending: Petition for review of lower court decision

Source: Reporting by Alex Guillén



WHAT'S NEXT

Technically, the litigation that reached the Supreme Court for oral arguments in January is focused on an anodyne legal question about the scope of what issues federal law allows appellate courts to consider when reviewing these sort of remand orders. But the fossil fuel companies urged the justices to take their ruling beyond that basic issue and directly declare that climate tort litigation belongs in federal courts, where such claims almost certainly would fail. The justices didn't seem particularly inclined to go that far, with Clarence Thomas noting that it felt like they were "smuggling in" an additional legal issue.

Much will depend on the Supreme Court's eventual ruling, expected by June or July.

If the court rules in favor of the city of Baltimore, the climate tort suits could continue forward. Cases in California, Colorado, Maryland, Rhode Island and Hawaii have already been remanded back to state courts, where most would likely be heard following additional litigation on the specifics of each case. It remains an enormous open question whether those suits will find success at the state level, an outcome that will rely heavily on being able to prove that emissions connected to the companies have harmed the states or localities. And if any do succeed, what kind of damages can they get from the companies?

If the high court rules in favor of the fossil fuel companies, that still may not spell the end of these lawsuits.

One option, which justices across the ideological spectrum seemed wary of, was to go so far as to directly declare these sort of cases to be federal in nature rather than have the lower courts take a second pass at their review. Such a ruling would make pursuing this sort of litigation much harder, but states and localities might still be able to find winning strategies based on state law, even before a federal court.

A more restrained option is for the Supreme Court to rule that the appellate courts can and should review fossil fuel companies' full breadth of reasons for removing the suits to federal court. Should that happen, after reviewing the details alleged in each individual case, the circuits could still end up sending the suits back to state courts or could find that they properly belong in federal courts. In theory, if the circuits act differently, the Supreme Court might have to step in a second time in a few years.

But even if the lawsuits end up in federal courts, judges will then have to decide whether to apply state or federal law. Going with state laws, which are traditionally where most common law tort claims — and especially the public nuisance claims at the heart of many of these suits — are applied, could keep the climate litigation alive. Although some experts argue the plaintiffs could still make their case under federal law, it would undoubtedly be a big win for the fossil fuel companies, which enjoy more protections under federal law.



One climate tort suit, brought by New York City, was filed directly in federal court, but has been dismissed by both district and appellate courts as being preempted under federal law by EPA's authority. But the three-judge panel that ruled against the city in March said its ruling is consistent with the others because of the key procedural difference — New York filed directly in federal court, whereas all the other litigants filed in state courts first. That means in all the other cases, the judges were faced with a "heightened standard" that comes with the state-federal jurisdictional fight, but the 2nd Circuit said because New York filed directly in federal court, it could weigh the oil companies' preemption argument "on its own terms."

POWER PLAYERS

- **The Supreme Court:** Eight justices will play the deciding role in whether and how these climate lawsuits can move forward. The immediate legal question isn't the type that necessarily breaks down along ideological lines, so it's possible the court will broadly agree on an outcome or break into unusual coalitions.
- Notably, **Justice Samuel Alito** is recused from this case, apparently because of holdings in some of the companies involved. Should the court deadlock 4-4, it would leave the 4th Circuit ruling in place without setting a formal Supreme Court precedent. However, it is unclear whether any other case could allow Alito to return and cast the necessary ninth vote, given his financial holdings likely would involve most of the suits filed to date.
- **Sher Edling:** The San Francisco law firm Sher Edling is involved in the bulk of the climate lawsuits filed so far, either directly representing smaller localities or providing consulting for larger cities and states. Partner Vic Sher argued the Baltimore case before the Supreme Court. A longtime environmental litigator, in 2009 he helped New York City secure a \$105 million win against ExxonMobil over drinking water contamination by the gasoline additive MTBE.
- **Fossil fuel groups** have framed the growing list of climate lawsuits as a coordinated attack orchestrated by Sher Edling — and noted that its contingency fee agreements mean the firm could make tens of millions of dollars off these suits.