Simpson Thacher

Climate Change Alert

February 2025

In This Issue

"The team is exceptional—their drafting is incredible and they are on top of every detail."

– *Chambers USA* 2024 (quoting a client)

U.S. Supreme Court *Certiorari* Petitions

Alabama v. California, No. 158 (U.S.)

Sunoco LP v. City and County of Honolulu, Nos. 23-947; 23-952 (U.S.)

Climate Change Claims Dismissed

City of New York v. BP p.l.c., No. 18-2188 (2d Cir.)

Mayor & City of Baltimore v. BP p.l.c., No. 24-C-18-004219 (Md. Cir. Ct.)

Delaware v. BP America Inc., No. N20C-09-097 (Del. Super. Ct.)

Motions to Dismiss Denied

Board of County Commissioners of Boulder County v. Suncor Energy USA, Inc., No. 2024SA206 (Colo.)

City of Annapolis v. BP P.L.L.cc, No. C-02-CV-21-000250 (Md. Cir. Ct.)

Fuel Industry Climate Cases, JCCP No. 5310, No. CJC-24-005310 (Cal. Super. Ct., San Francisco Cnty.)

Pending Motions to Dismiss

Anne Arundel County v. BP, No. C-02-CV-21-000565 (Md. Cir. Ct.).

Minnesota v. American Petroleum Institute, No. 62-CV-3837 (Minn. Dist. Ct.).

Connecticut v. Exxon Mobil Corp., No. HHD-CV20-6132568-S (Conn. Super. Ct.).

District of Columbia v. Exxon Mobil Corp., No. 2020 CA 002892 (D.C. Super. Ct.).

Platkin v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct., Somerset Cnty.).

Bucks County v. BP p.l.c., No. 2024-01836-0000 (Penn. Ct. C.P.).

Municipality of San Juan, Puerto Rico v. Exxon Mobil Corp., No. 3:23-cv-01608 (D.P.R.).

State of Rhode Island v. Shell Oil Products Company, et al., No. 1:18-cv-395.

Upcoming Decisions

Town of Carrboro, North Carolina v. Duke Energy Corp., No. 24CV003385-670 (N.C. Super. Ct.)

County of Multnomah v. Exxon Mobil Corp., No. 23CV25164 (Or. Cir. Ct., Multnomah Cnty.)

Shoalwater Bay Indian Tribe v. Exxon Mobil Corp., No. 2:24-cv-158 (W.D. Wash.) and ***Makah Indian Tribe v. Exxon Mobil Corp.,*** No. 2:24-cv-157 (W.D. Wash.)

Coverage Litigation

In Climate Change Coverage Suit, Hawaii Supreme Court Rules That Reckless Conduct Can Be An "Occurrence" And That Greenhouse Gases Are Pollutants Within Scope Of Pollution Exclusion

Other Notable Climate Change Litigation Developments

Summary

Simpson Thacher is tracking the status of litigation filed by state and local governments seeking redress for the growing effects of climate change. This inaugural Alert summarizes the largest pending climate change lawsuits and recent motion practice in these matters.

The climate change suits detailed here are pled against some of the world's largest oil and gas companies and related industry trade organizations in an effort to hold those entities accountable for their alleged contributions to climate change. Many of the cases discussed herein allege that these defendants have known about the negative consequences of fossil fuels for decades but have worked together, either separately or conjunctively, to mislead the public as to the effects of fossil fuel products on the environment in an effort to maintain profits and continue their business practices unimpeded.

Although some of the suits vary in their details, most allege similar—and robust—factual allegations as well as similar causes of action. For example, many of the cases detail scientific studies funded by fossil fuel entities that identified deleterious effects of greenhouse gas emissions and fossil fuel extraction. The cases allege that, decades ago, fossil fuel entities obtained scientific confirmation that fossil fuel products accelerate climate change and increase the likelihood of catastrophic natural disasters. As detailed below, the majority of these cases include claims for public and private nuisance, negligence, consumer fraud, trespass, theories of conspiracy (*e.g.*, the Racketeer Influenced and Corrupt Organizations ("RICO") Act), and deceptive and unfair trade practices. While some of these causes of action initially appear to be a novel fit for such allegations, they reflect an apparent growing consensus among states and local governments that third parties should be held responsible for the impacts of climate change, even if creative legal strategies are required to support these efforts.

It remains to be seen in many instances whether these climate change lawsuits will survive the motion to dismiss stage. As explained in more detail in this Alert, the United States Supreme Court may soon weigh in on the future of these cases. To date, a few of the cases have been dismissed already; some motions to dismiss have been denied; and many more motions to dismiss are pending. In the matters dismissed to date, the decisions employ similar rhetoric, relying on theories of preemption and finding the suits non-justiciable because they involve political questions given the global effects of climate change.

This Alert is the first in what will be a regular quarterly series on this subject.

U.S. Supreme Court *Certiorari* Petitions

Alabama v. California, No. 158 (U.S.)

The U.S. Supreme Court is currently evaluating whether to hear a suit brought by a coalition of attorney generals in 19 states, led by the Alabama Attorney General, challenging the ability of other states to pursue climate change claims against fossil fuel companies. The case arises from a unique procedural posture: co-Plaintiffs went directly to the U.S. Supreme Court without litigating their claims before a trial or intervening appellate court.

The defendant states—California, Connecticut, Minnesota, New Jersey, and Rhode Island—are actively pursuing climate change claims against defendants in the fossil fuel industry, as discussed in further detail below in this Alert. The Alabama Attorney General and co-Plaintiffs argue that these state-initiated climate change suits should be enjoined because federal law, and in particular the Clean Air Act, precludes state-law claims related to injuries from climate change. The Alabama Attorney General also raises separation of powers and Commerce Clause claims, arguing that the Defendants states should not be permitted through litigation to "set emissions policy well beyond their borders."

The *Alabama certiorari* petition generated substantial interest from *amici*, with dozens of interested parties filing briefs advocating for and against the Supreme Court's review. At the U.S. Supreme Court's request, the U.S. Solicitor General's Office filed an *amicus curiae* brief on December 10, 2024. The U.S. Solicitor General urged the Supreme Court not to hear the cases, arguing that the U.S. Supreme Court lacks jurisdiction to intervene. The Clean Air Act does not preempt the underlying climate change suits, in the U.S. Solicitor General's view, because the Clean Air Act regulates pollution only, not deception and misstatements underlying the allegations in the climate change suits.

We expect the U.S. Supreme Court to decide early this year whether it will accept *certiorari* in *Alabama*. It is also possible that the U.S. Solicitor General's Office may amend its submissions to argue in favor of review and preemption under the new presidential administration.

Sunoco LP v. City and County of Honolulu, Nos. 23-947; 23-952 (U.S.)

On January 13, 2025, the U.S. Supreme Court declined to review a climate suit brought by the City and County of Honolulu filing suit against fossil fuel companies including Sunoco, Aloha Petroleum Ltd., ExxonMobil, Shell, Chevron, and BHP Group. The City and County's First Amended Complaint sought relief for climate change harms under theories of failure to warn, negligence, and trespass, and sought compensatory damages and equitable relief. The district court denied Defendants' Motions to Dismiss on multiple grounds, concluding that (1) specific jurisdiction in Hawaii is proper because Defendants are alleged to have engaged in tortious acts in Hawaii and have extensive contacts in Hawaii; and (2) federal common law does not preempt Plaintiffs' state law claims. Preemption does not apply, the district court concluded, because the Clean Air Act displaced federal common law without reaching the same subject now at issue in the Plaintiff's claims, which challenge the promotion and sale of fossil-fuel products. The Hawaii Supreme Court affirmed on all grounds.

Defendants sought *certiorari* with the U.S. Supreme Court, asking the Court to decide whether federal law precludes state-law claims seeking redress for injuries caused by climate change. By declining *certiorari*, the U.S. Supreme Court left in place the Hawaii Supreme Court's ruling affirming denial of the motions to dismiss. The case should therefore return to the trial court for discovery and further litigation.

Climate Change Claims Dismissed

The following cases have been decided in fossil fuel companies' favor at the motion to dismiss stage, including on the preemption grounds.

City of New York v. BP p.l.c., No. 18-2188 (2d Cir.)

On January 9, 2018, New York City commenced one of the earliest suits in the present climate change line of cases. Filed in the Southern District of New York, the suit sound climate-change related damages from five of the largest fossil fuel companies. New York City alleged that Defendants were responsible for over 11% of all carbon and methane pollution from industrial sources since the Industrial Revolution. The City asserted state law causes of action for public and private nuisance as well as illegal trespass on City property. Critically, the City did not seek to hold the Defendants liable for the effects of emissions released in New York and sought damages, instead, for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet.

On July 19, 2018, the Court granted Defendants' motion to dismiss the Complaint, explaining that federal common law governed the City's claims because the claims were "ultimately based on the 'transboundary' emission of greenhouse gas emissions" and required a uniform standard of decision. The Court rejected the City's argument as to the fact that the City's claims were not governed by federal common law because the City based liability on Defendants' production and sale of fossil fuels, not Defendants' direct emissions of greenhouse gases. The Court emphasized that regardless as to the manner in which the City framed its claims, it was clear that the City sought damages for global-warming related injuries resulting from greenhouse gas emissions—which is explicitly governed by federal common law. Further, the Court explained that to the extent the City brings nuisance and trespass claims against Defendants for domestic greenhouse gas emissions, the Clean Air Act displaces any federal common law claims because Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emissions. As such, the Court rejected the City's argument that if the Clean Air Act displaced the federal common law claims, state law claims should become available, noting that such an argument is "illogical." In short, in dismissing the suit, the Court held that litigating an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon matters "within the purview of the political branches." The Court reiterated the Supreme Court's holding in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1399 (2018) which noted that when an action may have significant and foreign implications, "recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."

On April 2, 2021, the United States Court of Appeals for the Second Circuit affirmed the New York District Court's dismissal in *City of NY v. Chevron Corp.,* 993 F. 3d 81 (2d. Cir. 2021). The appellate court agreed with all three grounds of decision articulated by the district court, echoing the "need for judicial caution in the face of delicate foreign policy considerations."

Mayor & City of Baltimore v. BP p.l.c., No. 24-C-18-004219 (Md. Cir. Ct.)

On July 20, 2018, the Mayor and City Council of Baltimore filed suit in the Circuit Court for Baltimore City against fossil fuel entities, alleging that Defendants have known for years that unrestricted production of fossil fuel products creates greenhouse gas pollution that warms the planet and changes the climate. The City sought to recover under state law theories of public and private nuisance, products liability, trespass, and violations of a state consumer protection statute.

As in the New York City suit, Defendants moved to dismiss the City's Complaint, arguing that the City's claims are preempted by federal common law and the City's state law claims are preempted by the Clean Air Act because they raise non-justiciable political questions.

On July 10, 2024, the Court granted Defendants' Motions to Dismiss, finding that the City's claims involving deceptive promotion and marketing were simply "artful pleading." Notably, the Court explained that Plaintiffs' claims against the fossil fuel companies were largely preempted, emphasizing that "Baltimore's complaint is entirely about addressing the injuries of global climate change and seeking damages for such alleged injuries." As such, the Court explained that since the City sought damages for alleged harms involving interstate and international emissions, those claims cannot be governed by state law because global pollution-based complaints were never intended by Congress to be handled by individual states, noting that federal law governs disputes involving air and water in their ambient state. As to the Clean Air Act and preemption, the Court explained that the Clean Air Act speaks directly to the domestic emissions at issue in the case, which displace the City's state and federal common law claims. In dismissing the City's Complaint, the Court explained "that [the City's effort] to address and hold Defendants accountable for a deceptive misinformation campaign is simply a way to get in the back door what they cannot get in the front door." The Court dismissed the City's Complaint in its entirety, including both state and federal causes of action.

Thereafter, on August 8, 2024, the City of Baltimore filed a Notice of Appeal to the Appellate Court of Maryland. The appeal is currently underway.

Delaware v. BP America Inc., No. N20C-09-097 (Del. Super. Ct.)

On September 10, 2020, the State of Delaware and the Delaware Attorney General filed a lawsuit against a number of fossil fuel entities. Delaware sought relief under theories of products liability, nuisance, trespass, and Delaware-specific consumer protection statutes.

On May 18, 2023, Defendants moved to dismiss. On January 9, 2024, the Court granted in part and denied in part, holding that the state common law claims that sought damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution were preempted by the Clean Air Act. In the Court's view abatement of greenhouse gas emissions are "uniquely federal interests" such that state law is preempted and replaced." The Court found that the Clean Air Act did not preempt all the claims at issue, however, and distinguished claims related to air pollution originating from sources within Delaware as not preempted. Nonetheless, the Court dismissed even Delaware-specific allegations upon concluding that Delaware "failed to specifically identify [] misrepresentations for each individual defendant" and dismissed all claims regarding the alleged misrepresentations. Additionally, the Court found that Delaware sufficiently set forth a claim for failure to warn but declined to resolve the anti-SLAPP issues at the Motion to Dismiss stage based on such a limited record.

Delaware now seeks an order of partial judgment to permit it to take an immediate appeal on the preemption question. The Motion for Partial Judgment was fully briefed as of December 9, 2024, which is currently under the Court's consideration.

Motions to Dismiss Denied

Board of County Commissioners of Boulder County v. Suncor Energy USA, Inc., No. 2024SA206 (Colo.)

On April 17, 2018, the City of Boulder, the Boards of County Commissioners of Boulder, and San Miguel County filed a lawsuit against Exxon Mobil and Suncor Energy to recover damages and other related relief for Defendants' alleged role in causing climate change.

Defendants sought dismissal asserting that Plaintiffs' claims should be dismissed because they are governed by federal common law, preempted by federal common law, impair the federal foreign affairs power, violate the separation of powers doctrine, violate the Commerce Clause and the Due Process Clause, amongst other claims. On June 21, 2024, the Court granted in part and denied in part the Motion to Dismiss, finding that Defendants' arguments as to preemption lacked merit and were not preempted by federal common law or the Clean Air Act. The Court emphasized that the Clean Air Act does not contain an express preemption clause, and, in the Court's view, Congress did not intend to "occupy" the entire field of greenhouse gas emissions (leaving space for state regulation). The Court also rejected the Defendants' other arguments, which argued that the complaint violated the Commerce Clause, the Due Process Clause, and other related clauses.

Defendants petitioned the Colorado Supreme Court for permission to appeal the question of whether federal law precludes state law claims for injuries allegedly caused by global climate change. The Court granted review and ordered briefing. A ruling from the Colorado Supreme Court remains pending.

City of Annapolis v. BP P.L.L.cc, No. C-02-CV-21-000250 (Md. Cir. Ct.)

On February 22, 2021, the City of Annapolis, Maryland filed suit against various fossil fuel entities. The City sought relief under theories of public nuisance, private nuisance, and products liability.

Defendants filed a Motion to Dismiss for failure to state a claim upon which relief could be granted and for lack of jurisdiction. Specifically, Defendants argued that they were not subject to general or specific jurisdiction in Maryland because the claims did not arise out of or relate to the Defendants' alleged contacts with Maryland. Defendants also argued that they cannot be liable for any purported misrepresentations as to the connection between oil or gas products and climate change, denying that they had knowledge that use of fossil fuel products contributed to climate change.

On May 16, 2024, the Court denied the Motions to Dismiss as to jurisdictional grounds and deferred ruling on the substantive claims until trial and/or until further dispositive motions are considered and after facts are discovered which can or cannot support the allegations. The Court granted the Motion to Dismiss with respect to the punitive damages claim, however, finding that the City did not sufficiently plead malice, ill will, or fraud necessary to support a punitive damages recovery. Discovery is currently underway.

Fuel Industry Climate Cases, JCCP No. 5310, No. CJC-24-005310 (Cal. Super. Ct., San Francisco Cnty.)

On September 15, 2023, the State of California, through its Attorney General, filed a Complaint against fossil fuel producers and industry trade associations. The Court consolidated the matter with eight other actions filed by local governmental entities in California. Plaintiffs seek to recover under theories of public nuisance, untrue or misleading advertising, unlawful, unfair, or fraudulent business practices, strict products liability, and negligent products. After significant briefing on jurisdiction, the Court entered a mixed ruling allowing claims against the majority, but not all, of the defendants to go forward.

The Court concluded that the majority of the Defendants are subject to jurisdiction in California because the claims arise out of or relate to the Defendants' extensive contacts with California, which includes the sale and promotion of fossil fuel products in California. Further, the Court explained that Plaintiffs, who were California residents, suffered harms in California as a result of Defendants' actions. As such, the Court permitted Plaintiffs' suit to proceed.

As to a few Defendants headquartered and operating outside of California, however, the Court found jurisdiction improper. Those Defendants— Hess Corporation, Occidental Petroleum Corporation, and CITGO Petroleum Corporation—argued that they are not subject to specific jurisdiction in California because they do not conduct fossil fuel product-related business in the State of California. Defendants emphasized that they do not market fossil-fuel related products in California, but, instead, engage in extraction and sales to industrial and/or utility customers. The Court agreed, concluding that Plaintiffs' claims "do not arise out of or relate to" any contacts by these Defendants with the State of California.

The Court found it insufficient for Plaintiffs to show that Defendants made sales into the State of California, especially where those sales were made to industrial and/or utility customers, and not to consumers. Notably, any such industrial and/or utility sales by Defendants did not involve deceptive advertising or marketing to consumers—the root of Plaintiffs' allegations. Defendants in other climate change suits are likely to emphasize this same distinction, given the Court's acceptance of the argument in this case and resulting dismissal of some of the Defendants.

The Court also considered, and rejected, a motion by Chevron to dismiss the suit pursuant to anti-SLAPP (Strategic Litigation Against Public Participation). The anti-SLAPP statute enables courts—early in the litigation process—to dismiss and/or strike certain claims brought against those engaged in the business of selling or leasing goods or services when those claims "risk chilling 'continued participation in matters of public significance.'" Chevron argued that anti-SLAPP applied on the grounds that the statements attributed to it involved climate change, a matter of public concern. Those statements included Chevron marketing its gasoline as having "cleaning power" that "minimizes emissions" and Chevron emphasizing its "cleaning" technology. The Court rejected Chevron's efforts to apply anti-SLAPP to these statements. The Court found that Chevron's challenged statements were primarily commercial in nature (and thus, unprotected under anti-SLAPP), even if Chevron also sought to influence public opinion on climate change. As such, the Court denied Chevron's motion to strike and allowed Plaintiffs' allegations premised on Chevron's statements to remain in the case. This matter is still ongoing.

Pending Motions to Dismiss

The following climate change cases are currently pending at the motion to dismiss stage. The fossil fuel Defendants raise related arguments in these cases, including that the claims: (1) are preempted by the Clean Air Act, which Defendants argue should exclusively control claims related to air pollution; (2) impair the federal foreign affairs power, which provides that state law claims must give way if they impair the effective exercise of the Nation's foreign policy; (3) violate the separation of powers doctrine because a state court's judgment on the legality of production and extraction of fossil fuels is beyond the role of the courts; (4) violate the Commerce Clause because common law environment tort claims are imposing liability for greenhouse gas emissions are tantamount to state regulation, which would have the practical effect of controlling conduct outside of state boundaries; (5) raise non-justiciable political questions involving vital questions of public policy; (6) are barred by the applicable statute of limitations relating to any purported misrepresentations; and (7) are barred by the Strategic Lawsuit Against Public Participation (anti-SLAPP) because the claims arise from an act in furtherance of the right of advocacy on issues of public interest.

Anne Arundel County v. BP, No. C-02-CV-21-000565 (Md. Cir. Ct.).

County of Anne Arundel (located in Maryland) seeks relief under theories of public and private nuisance, strict liability for failure to warn, negligence, trespass, and Maryland-specific consumer protection statutes. As of October 25, 2024, Defendants' Motions to Dismiss were fully briefed and under submission in the Maryland Circuit Court. Notably, earlier briefing in the case found sufficient contacts with Maryland to satisfy personal jurisdiction, and dismissed Plaintiff's claim for punitive damages.

Minnesota v. American Petroleum Institute, No. 62-CV-3837 (Minn. Dist. Ct.).

The State of Minnesota seeks relief under theories of consumer fraud, products liability, and deceptive trade practices. As of November 20, 2024, Defendants' Motions to Dismiss were fully briefed and under submission in the Minnesota District Court.

Connecticut v. Exxon Mobil Corp., No. HHD-CV20-6132568-S (Conn. Super. Ct.).

The State of Connecticut seeks relief under theories of fraud and unfair and deceptive trade practices, in violation of Connecticut-specific consumer protection statutes. Specifically, Connecticut argues that ExxonMobil's commercial speech on climate denial and its corresponding skepticism constitutes deceptive trade practices, including ExxonMobil's statements as to greenwashing. Motion to Dismiss briefing is currently underway.

District of Columbia v. Exxon Mobil Corp., No. 2020 CA 002892 (D.C. Super. Ct.).

The District of Columbia seeks relief under the District of Columbia Consumer Protection Procedures Act. Upon the filing of the Complaint, Defendants removed the case to federal court, asserting various theories of federal subject-matter jurisdiction. In November 2022 the District Court for the District of Columbia remanded the case back to the Superior Court for the District of Columbia. As of April 22, 2024, the Defendants' Motions to Dismiss were fully briefed.

Platkin v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct., Somerset Cnty.).

The State of New Jersey seeks recovery under theories of public and private nuisance, products liability, and New Jersey-specific consumer protection statutes. Briefing on the Motions to Dismiss is still underway, with the Parties filing supplemental authority in support of their respective Motions to Dismiss. Consolidation motions are pending to combine this case with similar complaints filed by the City of Hoboken, Mercer County and Hudson County.

Bucks County v. BP p.l.c., No. 2024-01836-0000 (Penn. Ct. C.P.).

Bucks County (located in Pennsylvania) seeks relief under theories of strict products lability, negligent products liability for failure to warn, public and private nuisance, trespass, and civil conspiracy. As of December 5, 2024, the briefing on Defendants' Joint Preliminary Objections to the Complaint had been completed.

Municipality of San Juan, Puerto Rico v. Exxon Mobil Corp., No. 3:23-cv-01608 (D.P.R.).

The Municipality of San Juan, Puerto Rico seeks relief in federal court under theories of fraud, deceptive and unfair business practices, RICO, antitrust violations, products liability, private nuisance and unjust enrichment. Motion to Dismiss briefing is currently underway, with Defendants filing both joint and individual Motions to Dismiss. Additionally, a consolidation motion is pending to combine this case with a similar complaint filed by the Municipalities of Bayamón, Puerto Rico.

State of Rhode Island v. Shell Oil Products Company, et al., No. 1:18-cv-395.

The State of Rhode Island seeks relief under theories of public and private nuisance, products liability, trespass, impairment of public trust resources, and equitable relief under Rhode Island's Environmental Rights Act. After the state court denied Defendants' Motions to Dismiss in regard to both jurisdiction and failure to state a claim, Defendants sought *certiorari* in the Supreme Court of the United States, to which the Supreme Court denied on April 24, 2023. Thereafter, Plaintiff renewed its request for discovery on Defendants' fossil-fuel business activity in Rhode Island, which the state court granted. Jurisdictional discovery is currently underway.

Upcoming Decisions

Still more climate change cases are in the preliminary stages prior to motion to dismiss briefing. Additional cases of note include:

Town of Carrboro, North Carolina v. Duke Energy Corp., No. 24CV003385-670 (N.C. Super. Ct.)

On December 4, 2024, the Town Carrboro filed suit against Duke Energy Corporation seeking compensation for the damages that it has incurred, and will incur in the future, as the proximate result of Defendant's deception campaign concerning the causes and dangers posed by the climate crisis.

The Town sought relief under theories of public and private nuisance, trespass, negligence, including gross negligence, to which it seeks damages and attorney's fees.

Due to the recent nature of this matter, there have been no further developments. This case will be interesting to track in 2025 because it is one of the few suits that allege liability against a singular and local entity, as opposed to multiple defendants. We anticipate this suit will test novel theories of alleged harm.

County of Multnomah v. Exxon Mobil Corp., No. 23CV25164 (Or. Cir. Ct., Multnomah Cnty.)

On June 22, 2023, Plaintiff, Multnomah County filed a lawsuit seeking relief under theories of public nuisance, negligence, fraud and deceit, and trespass. In addition to the fossil fuel and industry trade associations named in similar suits, Plaintiff also filed claims against McKinsey & Company and Western States Petroleum Association as well. This case may foreshadow a trend of climate change cases broadening their reach to allege claims against a wider range of defendants. Motion to Dismiss briefing as well as the anti-SLAPP motions are anticipated.

Shoalwater Bay Indian Tribe v. Exxon Mobil Corp., No. 2:24-cv-158 (W.D. Wash.) and *Makah Indian Tribe v. Exxon Mobil Corp.*, No. 2:24-cv-157 (W.D. Wash.)

On December 20, 2023, the Makha and Shoalwater Bay Indian Tribes filed nearly identical Complaints in the Washington Superior Court against Exxon Mobil Corp., BP, Chevron, Shell, ConocoPhillips, and related entities. The Complaints seek relief under public nuisance, products liability, and failure to warn, alleging that Defendants' fossil fuel activities have significantly contributed to environmental degradation affecting their lands, traditions, and way of life, which subsequently endangered their communities' future.

On February 6, 2024, Defendants moved to remove the case to the Western District of Washington, to which the Court granted. Thereafter, Plaintiffs' filed Motions to Remand the matter back to the Washington Superior Court. As of June 10, 2024, the Plaintiffs' Motions to Remand were fully briefed.

Although it is still early, we anticipate that these suits may raise novel legal questions under federal Indian law jurisprudence. The preemption, Commerce Clause, and separation of powers arguments raised in other climate change suits may be more challenging (or invalid altogether) to raise against tribal plaintiffs.

Coverage Litigation

In Climate Change Coverage Suit, Hawaii Supreme Court Rules That Reckless Conduct Can Be An "Occurrence" And That Greenhouse Gases Are Pollutants Within Scope Of Pollution Exclusion

As discussed in a prior Insurance Alert, the climate change litigation cases have resulted in two significant coverage-related decisions to date. Most recently, the Hawaii Supreme Court ruled for an insurer in a coverage dispute involving underlying alleged harms for climate change. The court ruled that the reckless conduct alleged in the underlying suits constituted an "accident" and thus an "occurrence" within the meaning of the policies. However, the court also ruled greenhouse gases are "pollutants" and therefore that the pollution exclusion bars coverage for damages arising out of greenhouse gas emissions. *Aloha Petroleum, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 2024 Haw. LEXIS 179 (Oct. 7, 2024).

BACKGROUND

Suits by Hawaiian municipalities against Aloha and other fossil fuel companies alleged that Aloha's former and current parent companies were on notice that their products would cause catastrophic climate change but concealed and/or denied that knowledge while increasing production of fossil fuels.

Aloha sought a declaration that AIG was obligated to defend the suits. AIG refused, arguing that Aloha's conduct was intentional and was not a covered occurrence and in any event, coverage was barred by the policies' pollution exclusions.

The federal district court ruled that the suits alleged reckless conduct—namely that the defendants acted with "conscious disregard for the probable dangerous consequences of their conduct and products' foreseeable impact on the rights of others." The district court did not rule on coverage, however, and instead certified the following questions to the Hawaii Supreme Court:

1. For an insurance policy defining a covered "occurrence" in part as an "accident," can an "accident" include recklessness?

2. For an "occurrence" insurance policy excluding coverage of "pollution" damages, are greenhouse gases "pollutants," *i.e.*, "gaseous" "irritant[s] or contaminant[s], including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste"?

The Hawaii Supreme Court answered both questions in the affirmative.

DECISION

The court held that "accidents" are both "unexpected and "not intended or practically certain from the insured's standpoint." In finding that an accident may involve reckless conduct, the court emphasized that recklessness requires an awareness of the risk of injury, but not a certainty. The court concluded that "[r]eckless conduct—an awareness of risk of harm—falls short of practical certainty." The court stated: "When the risk crosses the line into 'practical certainty,' it is no longer an 'accident.'"

In so holding, the court harmonized prior Hawaii precedent, which the district court had found to be in conflict. The Hawaii Supreme Court found no tension between its intended or "practical certainty" standard, previously articulated in *Tri-S Corp. v. Western World Ins. Co.,* 135 P.2d 103 (Haw. 2006) and earlier precedent holding that an occurrence-based policy does not cover the "expected or reasonably foreseeable result of the insured's own intentional acts or omissions." *See AIG Haw. Ins. Co., Inc. v. Est. of Caraang*, 851 P.2d 321 (Haw. 1993).

The court explained: "We clarify what *Caraang* meant by 'reasonably foreseeable.' In that case's context, *Caraang* referred to the reasonably foreseeable results of an insured's intentionally harmful conduct. *Caraang* used 'reasonably foreseeable" as another way of invoking the intentional conduct exception to coverage." Having cabined *Caraang's* reasonable foreseeability standard to apply to the insured's intent alone, and not to the insured's expectations, the court held that "when an insured perceives a risk of harm, its conduct is an 'accident' unless it intended to cause harm or expected harm with practical certainty." Finding no such practical certainty here given the recklessness allegations in the underlying suits, the court concluded that the allegations against Aloha could constitute a covered occurrence.

With respect to the pollution exclusion, the court first addressed whether a pollution exclusion is limited to "traditional environmental pollution" or extends to non-traditional contexts, such as small-scale harm to an individual in a limited or enclosed capacity. Noting that jurisdictions are split on this issue, the court endorsed the former position, finding that what makes a substance a "pollutant" subject to a pollution exclusion is whether it causes damage to the environment.

Having reached that conclusion, the court held that greenhouse gases are clearly traditional environmental pollution. The court emphasized that "reducing [greenhouse gas] emissions is the most consequential environmental pollution issue our species has faced." The court cited numerous government studies and state regulations identifying greenhouse gases as "pollutants" to buttress the "common sense" understanding that the term encompasses harmful gases emitted into the environment.

The court rejected Aloha's argument that its products were used legally and in the ordinary course of business and that "contamination" should be limited to accidental scenarios, such as an oil spill. The court also stated that "[t]he legality, ordinariness, and intent of a product's use is irrelevant" because "the operative question is whether a substance causes pollution to the environment." As such, the court held that the exclusion was unambiguous and that any expectation of coverage on the part of Aloha for harm arising from greenhouse gas emissions was not reasonable.

COMMENTS

The other state supreme court to address the "occurrence" issue in the context of climate change coverage litigation reached a different conclusion. In *AES Corp. v. Steadfast Ins. Co.,* 725 S.E.2d 532 (Va. 2012), the Virginia Supreme Court held that the insured's conduct could not be

deemed "accidental" because climate change was the "natural or probable consequence" of that conduct. *AES* ruled that under Virginia law, an accident requires conduct that is "unexpected from the viewpoint of the insured"—precluding coverage for reasonably foreseeable harms, as AIG urged the court to find in *Aloha Petroleum*. However, the Hawaii Supreme Court distinguished *AES* based Hawaii law differing from Virginia law. In Hawaii, "practical certainty"—not mere reasonable foreseeability—is required for unintended consequences to fall outside the meaning of "accident."

Aloha Petroleum leaves unresolved the consequences of the absence of a pollution exclusion from certain long-ago policies issued to Aloha Petroleum. The Hawaii Supreme Court noted that two policies from the 1980s lacked pollution exclusions but left it for the district court to determine whether AIG must defend the underlying suits. Resolution of this question may turn, according to the court, on the extent of the damages allegations in the underlying suit that relate to the time period in which the policies lacking pollution exclusions were issued.

Other Notable Climate Change Litigation Developments

On December 18, 2024, the Montana Supreme Court recognized that Montana's constitutional right to a "clean and healthful environment" implicitly includes a right to a "stable climate system." *Rikki Held. v. State of Montana*, No. DA 23-0575 (Mont. Dec. 18, 2024). A group of sixteen youth sued the state challenging a limitation included in the Montana Environmental Policy Act ("MEPA"). Under that limitation, "an environmental review conducted pursuant [to MEPA] may not include a review of actual or potential impacts beyond Montana's borders" and "may not include actual or potential emissions that are regional, national, or global in nature." The court ruled in favor of plaintiffs, concluding that the MEPA limitation is unconstitutional and violative of Montana citizens' right to a stable climate system.

The Court began its decision by focusing on the plain text of Montana's state Constitution, which provides, "The state and each person shall maintain and improve a clean a healthful environment for present and future generations." The decision describes this language as broad and forward-looking. The court concluded that the constitution right of Montana citizens to a "clean and healthful environment" presents an *actionable* obligation for the state, not merely an *aspirational* goal. The court also accepted fact findings made by the lower court, concluding that "climate change is harming Montana's environmental life support system now and with increasing severity for the foreseeable future."

The Court reached three central holdings. *First*, the Court found that the sixteen individual youth plaintiffs had standing to challenge the MEPA limitation. The plaintiffs had standing, the Court concluded, because plaintiff sought to enforce a fundamental right and enjoining the State from acting in accordance with the MEPA Limitation would effectively redress the plaintiffs' claimed injuries from climate change. The Court reasoned that "[i]t may be true that the MEPA Limitation is only a small contributor to climate change generally, and that declaring it unconstitutional will do little to reverse climate change" but "our focus here, as with Plaintiffs' injuries and causation, is not on redressing climate change, but on redressing their constitutional injuries[.]"

Second, the Court determined strict scrutiny should apply to its assessment of the MEPA limitation. This heightened level of scrutiny applies because the MEPA limitation amounted to a "blanket prohibition on GHG emissions review in all MEPA analyses" and thereby "clearly implicates the right to a clean and healthful environment." In applying strict scrutiny, a reviewing court will find the law proper only if (1) the government has a compelling interest; (2) the law is narrowly tailored to achieve that interest; and (3) the law uses the least restrictive means to achieve that interest.

Third, the Court found the MEPA limitation could not survive strict scrutiny. The Court rejected the State's argument that it has a "compelling interest" in protecting private property rights. Even if this asserted State interest is "compelling," the Court found the MEPA Limitation is not narrowly tailored to achieve it. The Court explained that the MEPA Limitation arbitrarily excludes *all* activities from review of cumulative or secondary emissions, which is neither narrowly tailored nor the least restrictive means to achieve that interest.

Notably, the *Rikki Held* ruling provides that GHG emission evaluations cannot be prohibited outright but it does not outline when or how GHG emissions must be considered in permitting. Future litigation over that question is expected. More broadly, the *Rikki Held* decision is likely to invite additional litigation by Montana residents seeking to enforce the state's obligation, as recognized by the Montana Supreme Court, to mitigate the effects of climate change.

Summer Craig
+1-212-455-3881
scraig@stblaw.com

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Laura Lin
+1-650-251-5160
laura.lin@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Joshua Polster
+1-212-455-2266
joshua.polster@stblaw.com

Tyler B. Robinson
+44-(0)20-7275-6118
trobinson@stblaw.com

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Matthew C. Penny
+1-212-455-2152
matthew.penny@stblaw.com

Sarah E. Phillips
+1-212-455-2891
sarah.phillips@stblaw.com

Abigail W. Williams
+1-202-636-5569
abigail.williams@stblaw.com

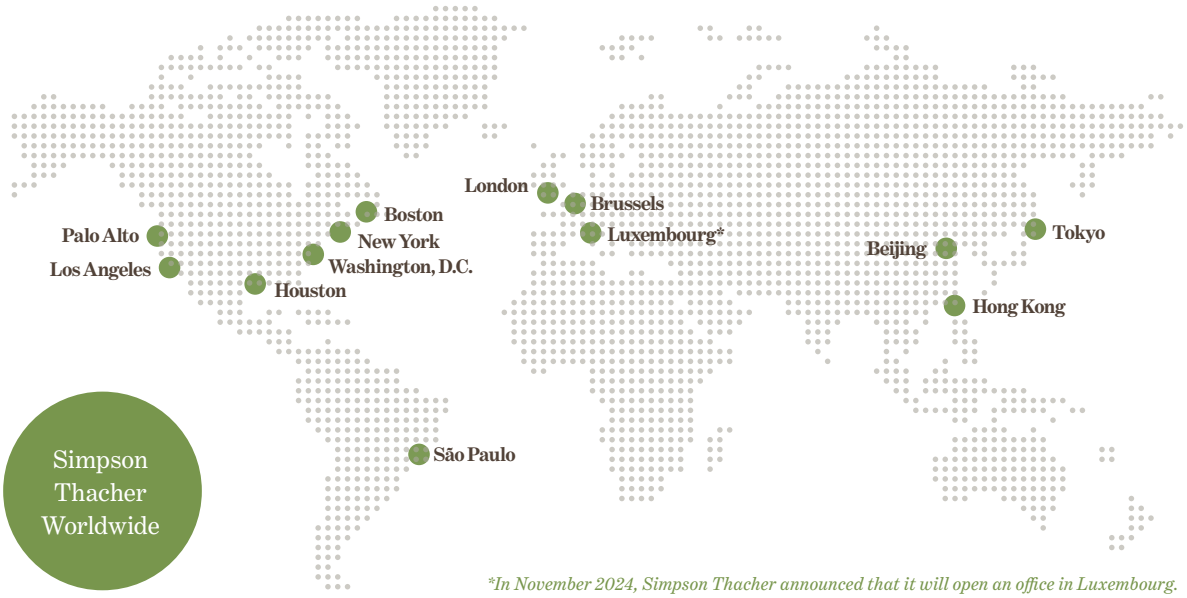
This edition of the ***Climate Change Alert*** *was prepared by*

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

and

Laura Lin
+1-650-251-5160
laura.lin@stblaw.com.

Simpson
Thacher



In November 2024, Simpson Thacher announced that it will open an office in Luxembourg.

UNITED STATES

New York
425 Lexington Avenue
New York, NY
+1-212-455-2000

Boston
855 Boylston Street
9th Floor
Boston, MA
+1-617-778-9200

Houston
600 Travis Street
Suite 5400
Houston, TX
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
29th Floor
Los Angeles, CA
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C.
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-2-504-73-00

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000

ASIA

Beijing
3901 China World Tower A
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower - 35th Floor
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama
Mori Tower, 41st Floor
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo
Japan
+81-3-5562-6200