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Second Circuit Holds New York's Climate Tort Lawsuit in Federal Court is Pre-Empted by the Clean Air Act

In a unanimous opinion, the federal Second Circuit Court of Appeals ruled that state law "climate tort" claims asserted by the City of New York (the "City") against five oil companies are preempted by the federal Clean Air Act (CAA). *City of New York v. Chevron Corporation et al.*, No. 18-2188, 2021 WL 1216541 (2nd Cir. 2021). In doing so, the Second Circuit became the first federal appellate court to address the merits of climate change tort suits asserted under state law and filed in federal court.

The City filed the lawsuit in 2018 in federal district court alleging state law claims of public nuisance, private nuisance, and trespass under New York law. The City argued that the companies' production, promotion, and sale of fossil fuels has caused, and will cause, the City to expend significant resources in response to climate change impacts, and the companies should bear these costs instead of the City's taxpayers.

The district court granted the companies' motions to dismiss the complaint. In its opinion, the Second Circuit affirmed the dismissal for largely the same reasons as the district court:

- federal common law, rather than New York law, applied to City's claims;
- the CAA displaced claims under federal common law;
- the CAA regulates only domestic, not foreign, emissions; and
- foreign policy precluded recognition of a federal common law cause of action targeting greenhouse gas emissions emanating from beyond country's national borders.

Given the global nature of greenhouse gas emissions, the court determined that such claims were beyond the scope of state law, despite the City's pleadings alleging only state law claims. In so holding, the court could apply settled precedent from the Supreme Court holding that the CAA preempts federal common law claims concerning domestic emissions.

The Second Circuit made clear in its opinion that the case was procedurally unique to the much larger number of recent district and appellate court opinions remanding similar cases to state court after the companies being sued removed the cases to federal court based on their preemption defense raising a question under federal law. In this case, the City filed the case in federal district court, so the district court and Second Circuit were free to consider the merits of the companies' federal preemption defense. However, in the cases originally filed in state court, the scope of review is much narrower. Generally, a defense based on federal law is insufficient to create a "federal question" that supports removal of case to federal court. The Supreme Court heard oral arguments on one of these cases from the Fourth Circuit in January 2021, and an opinion could come as early as this spring or summer.

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Despite the procedural differences, companies defending against other climate change cases filed in state court were quick to rely on *City of New York v. Chevron* as a source of authority that the state lawsuits belong in federal court. Those companies identified the Second Circuit's opinion as supplemental authority in a lawsuit brought by the District of Columbia under its Consumer Protection Procedures Act claiming the defendants misled the public on their products' alleged contribution to climate change. The companies argue that the Second Circuit decision supports their arguments that allegations under the D.C. Consumer Protection Procedures Act necessarily arise under federal law, not state law, because of significant federalism concerns and global nature of climate change.

The larger effect of the Second Circuit's opinion on the other climate litigation remains is uncertain due to the procedural differences between this case and the other climate cases filed in state courts across the country. New York could appeal the case to the United States Supreme Court, although it would likely face an uphill battle to overturn the Second Circuit's opinion in the high court.

More recently, on April 22, 2021, the City filed a new lawsuit against six energy companies and the American Petroleum Institute alleging violations of the City's Consumer Protection Law. This time, the City filed the case in state court rather than federal court. The City's new complaint alleges that the defendants' promotion of their products as helping to address climate change are false and misleading because the products actually contribute to climate change. The City also alleges that the defendants falsely present themselves as environmentally responsible companies leading the fight against climate change. Several similar lawsuits are pending in other state courts across the country.

Babst Calland is actively tracking this case and dozens of other climate change cases throughout the country. If you have any questions about this case, or other climate change lawsuits, please contact Casey J. Snyder at csnyder@babstcalland.com or 412-394-5438, or Robert M. Stonestreet at rstonestreet@babstcalland.com or 681-265-1364.