

## Climate Change Litigation: Recent Developments, Novel Theories and Emerging Trends

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Today's faculty features:

Michael S. McDonough, Partner, **Pillsbury**, Los Angeles

Jim Wedeking, Counsel, **Sidley Austin**, Washington, D.C.

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May 22, 2018

## Climate Change Litigation: Recent Developments, Novel Theories and Emerging Trends

*Michael S. McDonough*

*Pillsbury Winthrop  
Shaw Pittman*

*Jim Wedeking*

*Sidley Austin LLP*

**SIDLEY**

**pillsbury**

# Overview

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- I. Climate Change Tort Cases
  - A. Evolution of Climate Change Tort Cases
  - B. Climate Change Torts – The Next Generation
  - C. Plaintiff and Industry Litigation Strategies
- II. Public Trust Cases
  - A. Round 1
  - B. Round 2
- III. Outlook

# Climate Change Tort Cases

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- Claims that industry (e.g., oil & gas, energy) activities caused or contributed to climate change and subsequent injuries to plaintiffs
- Litigation theories
  - Public/private nuisance under federal/state common law
  - Conspiracy
  - Strict Liability (Failure to Warn & Design Defect)
  - Negligence/Trespass
- Remedies -
  - Compensation for property damage/loss of business
  - Abatement fund to pay for municipal infrastructure
  - Punitive damages
  - Disgorgement of profits
  - Other injunctive relief (e.g., yearly declining CO2 cap)

# Climate Change Tort Cases

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## Evolution of Climate Change Tort Cases

- *AEP v. Connecticut* (2004) – Public nuisance claims under federal common law
  - State plaintiffs seeking declining yearly CO<sub>2</sub> cap on power company defendants
  - USDC (2005) dismisses cases as non-justiciable
  - Supreme Court decides *Massachusetts v. EPA* (2007)
    - EPA may regulate CO<sub>2</sub> as a “pollutant” under Clean Air Act
  - 2<sup>nd</sup> Cir. reverses *AEP* decision (2009)
  - In 8-0 vote, Supreme Court (2011) held that **Clean Air Act displaces federal common law claims (e.g., nuisance) to seek GHG abatement**
    - EPA can set CO<sub>2</sub> limits by rulemaking, process for appeal
    - Caution about limited ability of courts to address climate change (e.g., 4-4 on threshold question of standing)

# Climate Change Tort Cases

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## Evolution of Climate Change Tort Cases

- *Comer v. Murphy Oil USA, Inc.* (2007) – Individual plaintiffs suing energy, fossil fuel, chemical companies for damages caused by Hurricane Katrina
  - Host of tort theories (public/private nuisance, trespass, negligence, fraudulent misrepresentation, conspiracy, etc.)
  - USDC dismisses case, holding that claims were political questions and not justiciable
  - 5<sup>th</sup> Cir. panel partially reversed USDC dismissal, holding nuisance, trespass and negligence claims met standing and justiciability hurdles
  - 5<sup>th</sup> Cir. granted rehearing en banc, then dismissed petition due to lack of quorum (leaving USDC dismissal in place!) (Supreme Court denied mandamus)
  - Second USDC suit (2012) dismissed on res judicata grounds; in dicta court concluded claims were non-justiciable, displaced by CAA
  - *AEP* (2011) had not yet been decided by Supreme Court, but revealing “trial run” of debates to come in climate tort suits

# Climate Change Tort Cases

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## Evolution of Climate Change Tort Cases

- *Native Village of Kivalina v. ExxonMobil Corp.* (2009) – Alaskan town sued energy/fossil fuel and utility companies for damages related to need to relocate due to rising sea levels
  - Narrower tort theories (public/private nuisance, conspiracy/concert of action)
  - USDC (2009) dismissed, finding claims raised non-justiciable political questions and that plaintiffs lacked standing because injuries were not “fairly traceable” to defendants
  - 9<sup>th</sup> Cir. (2012) – Relying on *AEP*, held that CAA also displaces federal common law in a suit for damages
    - *AEP* held that “type of remedy asserted is not relevant to . . . displacement.”
    - Irrelevant that EPA had not yet regulated GHGs

# Climate Change Tort Cases

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## Lessons of Foundational Climate Tort Cases

- Clean Air Act displaces federal common law claims for injunctive relief or damages due to climate change
  - But sets the stage for alternative theories (e.g., state common law) not finally adjudicated in these initial cases
- Appeals decided during active EPA consideration and adoption of climate change regulations
- Much uncertainty remains about preemption, standing and justiciability/political question hurdles

# Climate Change Tort Cases

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## Climate Torts - The Next Generation

- New wave of tort suits filed in 2017-2018 using public and private nuisance theories
- State and local governments leading the charge
- New federal Administration unlikely to regulate GHGs
- New allegations of conspiracy/failure to warn draw comparisons to tobacco litigation in 1990s
- Much greater coordination among plaintiffs and leveraging of social media
  - Many cases led by two plaintiff tort firms (Sher Edling, Hagens Berman Sobol Shapiro) working on contingency

# Climate Change Tort Cases

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## California Local Governments v. Chevron Corp., et al.

- Counties of San Mateo, Marin, City of Imperial Beach (17-cv-04929, -04934, -04935-VC) (Chhabria)
- Filed July 17, 2017 in state court; removed to USDC Aug. 2017
- Added novel theories to trespass and nuisance claims
  - Failure to warn (strict liability/negligence) & design defect
  - Allege companies “knew” of climate threats & “concealed” information
- Suits seek damages, disgorgement of profits
- Battle over venue
  - Remand granted Mar. 16, 2018; stayed Apr. 9, 2018 pending appeal
  - Judge Chhabria held that displacement of federal common law (per *AEP/Kivalina*) does not affect state common law claims

# Climate Change Tort Cases

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## People (Cities of San Francisco/Oakland) v. BP, et al.

- Nos. 17-CV-06011 WHA, 17-CV-06012 WHA (Alsup)
- Filed Sept. 19, 2017 in state court; removed to USDC Oct. 2017
  - Sole theory of public nuisance - only requires conduct be a “substantial factor” in causing harm
  - Seeks creation of abatement fund to pay for infrastructure
- Battles over venue and personal jurisdiction
  - Remand denied Feb. 27, 2018 - nuisance claims not displaced by CAA
  - *AEP/Kivalina* found displacement only where *domestic* GHG emissions involved, not *global* emissions from worldwide sale of fossil fuels
  - Out-of-state parent cos. argue no substantial connection with forum
- Mar. 21, 2018 - Judge Alsup holds unique climate change “tutorial” hearing

# Climate Change Tort Cases

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## **County of Santa Cruz v. Chevron, et al.**

- Filed Dec. 20, 2017 in CA state court; removed Jan. 19, 2018 (18-cv-0458-VC) (Chhabria)
- Named Chevron, Shell, ExxonMobil, BP, ConocoPhillips, most other oil and gas companies named in CA local government cases
- Same theories/remedies from CA local gov't complaints
- No ruling yet on motion for remand

# Climate Change Tort Cases

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## City of New York v. BP, et al.

- Filed Jan. 9, 2018 in USDC (S.D.N.Y.) (No. 18-CV-182)
- Named BP, ExxonMobil, ConocoPhillips, Shell
- Public/private nuisance and trespass claims
- Seeking damages for past/future costs to address impacts of climate change
- Defendants filed motion to dismiss; set for June 2018 hearing

# Climate Change Tort Cases

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## **City of Richmond v. Chevron, et al.**

- Filed Jan. 22, 2018 in CA state court; removed Feb. 2, 2018 (18-cv-0732-VC) (Chhabria)
- Named Chevron, Shell, ExxonMobil, BP, ConocoPhillips, most other oil and gas companies named in CA local government cases
- Same theories/remedies from CA local gov't complaints
- No ruling yet on motion for remand

# Climate Change Tort Cases

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## **Boulder County, et al. v. Suncor Energy, et al.**

- City of Boulder, CO; Boulder County; San Miguel County (2018-CV-030349)
- Filed Apr. 17, 2018 in Colorado state court
- Public/private nuisance, trespass, unjust enrichment, deceptive trade practices (CO Consumer Protection Act)
  - Allegations that industry “knew” use of fossil fuels would cause climate change damage, and intentionally deceived consumers
- Seeks past/future damages, remediation/abatement
- Likely to be a motion to remove to federal court

# Climate Change Tort Cases

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## King County v. BP, et al.

- Filed May 9, 2018 in Washington state court (No. 18-2-11859)
- Names BP, Chevron, ConocoPhillips, ExxonMobil and Shell
- Public/private nuisance, trespass
- Seeks abatement fund to cover a wide variety of past/future damages allegedly related to sea level rise, flooding, drought, habitat destruction, etc.
- Also likely to be headed for a removal

# Climate Change Tort Cases

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## Plaintiff Litigation Strategies

- “Kitchen sink” approach vs. targeted public nuisance claims
  - Favorable CA law on public nuisance (e.g., *ConAgra* lead paint case) and precedent for abatement fund
    - Need only show company’s actions were “substantial factor” in causing harm
    - Does harm outweigh the social utility/public benefit of conduct?
  - Failure to warn/products liability theories mimic tobacco cases by claiming industry “knew” of climate change risks but failed to act
    - May be intended as much to move public/political opinion
    - Challenges of showing product a “substantial factor” in claimed harm, whether risks of climate change were known or knowable by defendants, and/or already adequately known by public
    - May not prevail in cost-benefit analysis
  - Remedies – targeted abatement fund vs. “all of the above”

# Climate Change Tort Cases

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## Plaintiff Litigation Strategies

- Wide vs. narrow list of defendants
  - More defendants may allow access to more deep pockets, but makes more potential defenses available, could make case expensive and time-consuming to litigate, and makes federal jurisdiction more likely (e.g., Statoil, Arch, Peabody)
  - Where to draw the line?
- Filing cases in state court to avoid dismissal under *AEP*
  - Selection of claims and defendants makes a difference
  - Not yet decided whether state nuisance claims may be preempted
  - Plaintiffs may end up getting two “bites at the apple” – i.e., to test climate claims simultaneously in federal and state court

# Climate Change Tort Cases

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## Industry Litigation Strategies

- Leveraging these claims' fatal flaws from case precedent
  - Standing, justiciability/political question, federal preemption
  - Intractable causation issues
- Exploiting failure to warn/products liability claims
  - Cost/benefit analysis of fossil fuel products over a century
  - Defendants will depose city/county officials on what they knew about climate change and when they knew it
- Challenging government abuses of process
  - Plaintiffs may be seeking unconstitutional restriction on companies' First Amendment right to free speech to promote products and petition government against regulation
  - Government plaintiffs may be exposed to liability for their own knowledge of alleged climate risks and failure to act/disclose

# Climate Change Tort Cases

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## Industry Litigation Strategies

- Using many avenues into federal court
  - E.g., joining necessary parties entitled to be in federal court
  - Question of whether state nuisance/trespass claims are preempted/displaced by CAA likely will be decided in federal court
- Exposing abuse of process and political machinations of plaintiff governments
  - Discovery/records requests for documents relating to plaintiff firms' shopping of lawsuits, sources of litigation funding and government influence
  - Discovery of plaintiffs' own failure to disclose alleged climate risks in bond offerings, past contradictory statements about climate change
  - April 2018 - Texas state court exercised jurisdiction to allow ExxonMobil to seek discovery from CA government plaintiffs

# Climate Change Tort Cases

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## Outlook for Climate Change Tort Litigation

- California cases likely will be first to test threshold preemption and standing/justiciability issues in context of state law torts
- Causation and redressability issues are still major problems for plaintiffs
- Will force discussion of costs vs. benefits of fossil fuels over 100+ years of use; responsibility shared among millions of users, suppliers, producers of fossil fuels worldwide
- Unclear how government plaintiffs will handle their own exposure for past failures to disclose in bond offerings
- Cases likely to be leveraged politically regardless of outcome

# Public Trust Litigation

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- States hold waters and some lands in trust for public benefit
- Plaintiffs argued for expansion of theory to:
  - Atmosphere, and
  - The federal government
- Remedy - A judge must:
  - Phase out fossil fuels completely *or*
  - Phase down GHG emissions annually until atmospheric concentrations reach 350 ppm *or*
  - Phase down GHG emissions 6% per year until 2050

# Public Trust Litigation

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## Round 1

- NGO Our Children's Trust uses minor plaintiffs to allege current and future harm from climate change
- In 2011, begins filing judicial, administrative actions
  - All 50 States
  - Federal government
- State litigation/ petitions for rulemaking
  - 48 losses
  - 2 partial victories in New Mexico, Oregon
    - N.M.: Atmosphere included, but governed by statute
    - Oregon: Case was justiciable and lower court must rule

# Public Trust Litigation

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## Round 1

- Our Children's Trust sued six federal agencies
- Alleged federal public trust duty over atmosphere
- Defendants "wasted and failed to preserve" trust asset
- Demanded an injunction requiring the agencies "to take all necessary actions" to reduce CO<sub>2</sub> emissions 6% per year
  - Annual accounting of U.S. GHG emissions
  - Annual carbon budgets
  - Climate recovery plan to reach 350 ppm
  - All to be reviewed and approved by the court

# Public Trust Litigation

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## Round 1

- *Alec L. v. Jackson*, 863 F.2d 11 (D.D.C. 2012)
- No federal public trust doctrine
- No constitutional basis for a public trust doctrine
- Any common law basis displaced by the Clean Air Act
- A federal judge has no business serving as a Climate Czar
- Effectively dismissed on political question grounds
  - Court must find CO<sub>2</sub> levels are “too high” to determine breach
  - Court must determine appropriate CO<sub>2</sub> levels
  - Court must supervise multi-agency regulatory effort
  - All without a constitutional or statutory duty as a guide

# Public Trust Litigation

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## Round 2

- Our Children's Trust filed new actions in select States
    - Alaska
    - Colorado
    - Florida
    - Maine
    - Massachusetts
    - New Mexico
    - Oregon
    - Washington
- Claims include
- Substantive due process
    - Life, Liberty, and Pursuit of Happiness
    - State-created danger
  - Equal Protection
  - Public Trust
  - State Constitutional Claims

# Public Trust Litigation

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## Round 2

- Filed similar action in D. Or. against the President, eight agencies, and the department heads
  - Similar constitutional claims
  - Public trust – Ninth and Tenth Amendment
- Based on authorization or promotion of fossil fuel production and consumption through:
  - Permitting/ authorization
  - Subsidies and tax breaks
  - Energy development on public lands
- Demands an enforceable plan to “phase out fossil fuel emissions” and “stabilize the climate system”

# Public Trust Litigation

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## Round 2

- New constitutional rights theory re: climate change
- Substantive Due Process/Ninth Amendment
  - Right to a “stable climate”
  - Government ignored duty to limit GHG emissions
  - Violation of a fundamental right requiring strict scrutiny
- Equal Protection Clause
  - Adults make decisions to the detriment of minors
  - Question of whether minors/ young adults are protected class

# Public Trust Litigation

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## Round 2

### Status of federal case

- Complaint filed in August 2015
  - Trade associations intervened November 2015
  - Government, intervenors moved to dismiss, Nov. 2015
    - Lack of standing
    - No constitutional right to live without climate change
    - Youth are not a discrete minority
    - No federal public trust doctrine
    - No fundamental rights at issue and actions had a rational basis
    - Political question doctrine
    - Claims are displaced by the Clean Air Act
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# Public Trust Litigation

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## Round 2

Status of federal case

- Court denied motion to dismiss

*Political Question Doctrine Rejected*

- Political question: case involves expert testimony and squarely within a court's competence
- *Alec L.* case not persuasive
- Separation of powers concerns addressed in the remedy

# Public Trust Litigation

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## Round 2

Status of federal case

*Court Found Standing*

- Plaintiffs allege that global warming is already happening and that they are already being harmed
- Adequately alleged that U.S. actions, omissions caused global warming to a significant degree
- Accepted allegations that U.S. alone can reduce global CO<sub>2</sub> concentrations below 350 ppm

# Public Trust Litigation

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## Round 2

Status of federal case

### *Constitutional Claims*

- “I have no doubt that the right to a climate system capable of sustaining human life is [a] fundamental” right
- “Stable climate system is a necessary condition to exercising other rights to life, liberty, and property.”
- Failure to stop others from emitting GHG creates a danger

### *Public Trust*

- Created a federal public trust duty in the oceans
- The CAA cannot legislate away a public trust duty

# Public Trust Litigation

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## Round 2

- Plaintiffs faced two chasms to leap:
  - Few states claim to hold the atmosphere in public trust
  - Lack of federal public trust duty for non-federal lands
- *Juliana* decision made both leaps
- Rejected *PPL Montana* language that “the public trust doctrine remains a matter of state law” as *dicta*
- Rejected language from *Kleppe v. New Mexico* as *dicta*
  - Property Clause reserves power to regulate to Congress
  - Relied on *dicta* in two district court condemnation cases

# Public Trust Litigation

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## Round 2

- Courts approach: public trust is an “inherent aspect[ ] of sovereignty”
  - Therefore, all sovereigns have public trust duties, *Q.E.D.*
- No need to find that the atmosphere is a public trust resource
  - U.S. rights over territorial seas
  - Assumes this is the same as a public trust duty
  - Claimed injury from ocean acidification, rising ocean temps

# Public Trust Litigation

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## Round 2

### Discovery Approaches

- Plaintiffs also using Tobacco litigation “playbook”
  - Focusing on obtaining “smoking guns” from historic records
- Inspired by Inside Climate News expose’
  - Prove early knowledge of global warming
    - Both government and industry
  - Prove collusion between government and industry
  - Prove orchestrated disinformation campaigns

# Public Trust Litigation

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## Round 2

### Discovery Approaches

- Discovery and P.R. campaign are virtually indistinguishable
- Demanding records going back to 1965 and beyond
- Demanding high level executive depositions
- Depositions geared for maximum embarrassment
- Seeking discovery from sympathetic career staff
- Close cooperation between Plaintiffs and press

# Public Trust Litigation

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## Round 2

Status of federal case

### *Aftermath*

- Plaintiffs pursued unusually burdensome discovery demands against both the U.S. and intervenors
  - Focused on Exxon, collusion with the government
  - Intervenors withdrew
- United State petitioned for writ of *mandamus*
  - Ninth Circuit denied in a written opinion
  - May contain some warnings to plaintiffs and judge
- Plaintiffs and judge demanding Fall 2018 trial

# Public Trust Litigation

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## Public Trust Litigation: Similar Suits

### *Clean Air Council v. United States*

- Plaintiffs' firm filed suit on behalf of two minors against President, Dep't of Energy, EPA, Interior
- Defendants' "War on Science," denial of global warming, regulatory rollbacks violate due process rights, public trust
- United States moved to dismiss
  - Lack of standing
  - Failure to state a claim for a protected constitutional right
  - No federal public trust duty
  - Regulatory challenges must be under the APA, statute-specific judicial review provisions

# Outlook

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- Climate change tort cases
  - Federal or State jurisdiction?
  - Production and sale of fossil fuels as a nuisance?
  - Will we get federal decisions on threshold preemption and standing/justiciability questions?
- Public Trust cases
  - What will the 9<sup>th</sup> Circuit make of a federal public trust doctrine?
  - Is there a Constitutional right to a “stable climate”?
- Remedy under both types of cases?
  - Individual judges establishing U.S. energy policy
- Will any of this move public opinion?

# Thank You

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Michael S. McDonough

[michael.mcdonough@pillsburylaw.com](mailto:michael.mcdonough@pillsburylaw.com)

Jim Wedeking

[jwedeking@sidley.com](mailto:jwedeking@sidley.com)