

Oil and Gas, Natural Resources, and Energy Journal

Volume 7 | Number 2

The 2021 Survey on Oil & Gas

December 2021

New York

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Recommended Citation

Nathaniel I. Holland & Benedict J. Kirchner, *New York*, 7 OIL & GAS, NAT. RESOURCES & ENERGY J. 379 (2021), <https://digitalcommons.law.ou.edu/onej/vol7/iss2/16>

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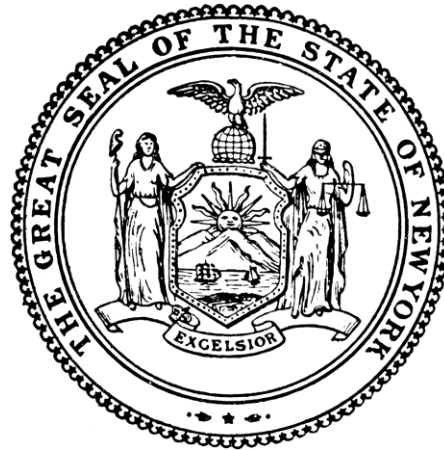
ONE J

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New York's ban on the hydrofracturing operations required for unconventional oil and gas operations has stifled oil and gas operations in New York, resulting in an accompanying paucity of oil and gas cases. The most noteworthy case that is related to the oil and gas industry is *City of New York v. Chevron Corporation*, in which the United States Court of Appeals for the Second Circuit affirmed the Southern District Court of New York's dismissal of the City of New York's state law claims against oil and gas companies based on worldwide emissions related to climate change.

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City of New York v. Chevron Corporation, 993 F.3d 81 (April 1, 2021)

In 2018, the City of New York (“City”) brought a case in federal district court asserting state law tort claims against Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, Royal Dutch Shell plc, and BP plc (“Producers”) seeking damages caused by the production and sale of oil and gas by the Producers worldwide. On July 19, 2018, the district court dismissed the City’s complaint on the following grounds:

First, the district court determined that the City’s state-law claims were displaced by federal common law. It reasoned that transboundary greenhouse gas emissions are, by nature, a national (indeed, international) problem, and therefore must be governed by a unified federal standard. Second, the district court determined that the Clean Air Act displaced the City’s common law claims with respect to domestic emissions. Lastly, the district court concluded that while the Clean Air Act does not displace claims targeting foreign emissions, judicial caution counseled against permitting the City to bring federal common law claims against the Producers (especially the Foreign Producers) for foreign greenhouse gas emissions.¹

The City then appealed the district court’s decision. The Court of Appeals framed the issue as, “whether municipalities may utilize state tort law to hold multinational Producers liable for the damages caused by global greenhouse gas emissions.”² The City’s claim was that it is “exceptionally vulnerable”³ to global warming and climate change and sought to hold Producers responsible for damages to mitigate the effects of global warming in the City of New York. The Court pointed out every person in the City contributes to global warming.⁴

The Court discussed the United States’ environmental laws and regulations, particularly the Clean Air Act of 1963 and the creation of the Environmental Protection Agency (“EPA”) in 1970, whose purview was to regulate pollution pursuant to the Clean Air Act and other relevant laws. The Court noted that the Clean Air Act envisions extensive cooperation

1. *City of New York v. Chevron Corp.*, 993 F.3d 81, 88 (2021) (quoting *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471-476 (S.D.N.Y. 2018)).

2. *Id.* at 85.

3. *Id.* at 86.

4. *Id.*

between federal and state authorities.⁵ The Clean Air Act gives states an extremely limited role in regulating pollution from beyond a given state's borders and clearly, "global warming – as its name suggests – is a global problem that the United States cannot confront alone."⁶

The Court then discussed federal common law. Following *Erie Railroad Co. v. Tompkins*,⁷ federal common law only exists where a federal court is compelled to resolve federal law questions that cannot be answered from federal statutes.⁸ "In that sense, federal common law functions much like legal duct tape."⁹ Where federal common law exists, it preempts state law.¹⁰ The Court proceeded to analyze whether federal common law applied in this case. It framed the argument as "whether the application of New York law to the City's nuisance and trespass claims would conflict with federal interests."¹¹ The Court determined that a suit for claims arising from harms caused by global warming may not proceed under New York state law, citing cases applying federal law to cases involving interstate pollution, "because such quarrels often implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding ... need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'"¹² The Court stated that "[t]he City intends to hold the Producers liable, under New York law, for the effects of emissions made around the globe over the past several hundred years. In other words, the City requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet."¹³ Because the City's claims implicate the conflicting rights of states and relations with foreign nations, the Court concluded that this case is an "example of when federal common law is most needed."¹⁴

The Court distinguished the case from a litany of climate change cases in other jurisdictions. The other cases were brought in state court; whereas this

5. *Id.* at 87.

6. *Id.* at 88.

7. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

8. *City of New York*, 993 F.3d 81, 89 (citing *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304,314 (1981)).

9. *Id.* at 90.

10. *Id.* (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988)).

11. *Id.*

12. *Id.* at 91 (quoting *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 102–03, 102 n.3 (1972)).

13. *Id.* at 92.

14. *Id.*

case was brought in federal court. The key issue in those cases was whether the defendants' anticipated defenses could create federal-question jurisdiction under the removal statute, 28 U.S.C. § 1331.¹⁵ Because the City filed in federal court, "the Court was free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry."¹⁶

The Court then concluded that the Clean Air Act preempted federal common law claims as it pertains to the City's claims regarding domestic emissions: "For many of the same reasons that federal common law preempts state law, the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions."¹⁷ The Supreme Court had previously held that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of greenhouse gas emissions.¹⁸ With respect to claims for damages, the Ninth Circuit held that the Clean Air Act displaces the City's common law damages claims.¹⁹ Ultimately, the Court affirmed the district court's conclusion that the City's federal common law claims concerning domestic greenhouse gas emissions were displaced by statute.²⁰

Next, the Court reviewed whether or not the displacement of federal common law by the Clean Air Act revived the City's state law claims. The Court held that the Clean Air Act did not permit the state law claims of the City, applying a Supreme Court rule that resorting to state law on a topic previously governed by federal common law is permissible only to the extent it was authorized by the federal statute.²¹ While the Clean Air Act did allow states to regulate emissions and pollution that occur within their own borders, the City did restrict its claims to New York state.²²

Last, the Court addressed the extraterritorial reach of federal common law. The Court first held that the Clean Air Act only governed domestic emissions for two primary reasons. First, the Clean Air Act did not expressly apply outside of the United States and "[w]hen a statute gives no

15. *Id.* at 94.

16. *Id.*

17. *Id.* at 95.

18. *Id.* (quoting *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 424-25 (2011)).

19. *Id.* at 96 (citing *Native Vill. of Kivalina v. ExxonMobil Corp. (Kivalina)*, 696 F.3d 849, 857 (9th Cir. 2012)).

20. *Id.* at 98.

21. *Id.* at 99 (quoting *Illinois v. City of Milwaukee (Milwaukee III)*, 731 F.2d 403, 411 (7th Cir. 1984)).

22. *Id.* at 100.

clear indication of an extraterritorial application, it has none.”²³ Second, the Court concluded that Congress tasked the State Department, rather than the EPA, with articulating the United States’ foreign policy with reference to environmental matters relating to climate.²⁴ Therefore, the Clean Air Act could not displace the City’s federal common law claims relating to foreign emissions.²⁵ Finally, the Court utilized a separation of powers argument to bar the City’s federal common law claims based on foreign emissions.²⁶ The Court affirmed the judgment of the district court dismissing the City’s action.

23. *Id.* (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

24. *Id.* at 101 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007)).

25. *Id.*

26. *Id.* at 103 (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018)).