ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 9 NUMBER 4

BALANCING ON THE KNIFE'S EDGE: SUBJECT MATTER JURISDICTION IN CLIMATE TORT LITIGATION

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I. Introduction

Climate tort claims against energy companies have become a frequent subject in both state courts and federal courts alike. States and municipalities have been bringing suit against energy companies much more frequently as the effects of global warming are starting to be heavily felt in some cities due to unprecedented weather conditions and rising sea levels causing destruction and costly repairs. Local governments feel that the use of fossil fuels is a direct cause of these extreme conditions. They argue some companies have perpetuated climate change through improper means by silencing and quarantining off information to the public about the negative effects of their operations. The question to be determined is in which court does this litigation best lie. Energy companies and local

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governments have been litigating this issue in several states. While local governments want the cases in state court, presumably to have something akin to a home field advantage. The energy companies are uniformly attempting to remove these cases to federal court to have more control and uniformity over the outcome of their litigation.

In *City of Hoboken v. Exxon Mobile Corp.*[1], the United States District Court for the District of New Jersey opined on subject matter jurisdiction necessary to remove a climate tort action from state court to federal court. This opinion will heavily alter strategy on both sides of climate tort litigation if adopted by all circuits. The Court analyzed the arguments for federal jurisdiction promoted by Defendants, particularly: (1) the action is covered by the federal Outer Continental Shelf Act, (2) Federal Officer removal, and (3) Federal Enclave Removal and (4) the Class Action Fairness Act and found none of the arguments were sufficient for the federal court to retain jurisdiction.

II. Procedural Status

Several other state court cases were removed to federal court by the Defendants. The suits involved city and state plaintiffs against oil and gas companies. All the cases were consolidated into the instant case for decision. The District Court remanded all cases to state court. The decision of the United States District Court, District of New Jersey was appealed to the Third Circuit. In August 2022, the Third Circuit affirmed the decision of the District Court.[2]

III. Statement of the Case

Plaintiff Hoboken alleges Defendants, by their tortious conduct, created a public and private nuisance, were negligent in their operations, and tortiously trespassed.[3] Hoboken alleged Defendants' actions were the proximate cause of carbon dioxide emissions which are the driving force in climate change. Climate change, Hoboken alleges, has caused extreme weather events in New Jersey causing disruption and damage to the city.[4] Hoboken claims Defendants knew or should have known its actions were causing climate change, but instead of changing its business practices, it crafted a disinformation campaign designed to convince the public its

1. City of Hoboken v. Exxon Mobile Corp, 558 F. Supp. 3d 191 (D. NJ 2021).
2. *Id.*
3. *Id.*
4. *Id.*

operations were not the cause, and actively concealed evidence of global warming[5], otherwise known as "greenwashing". This "greenwashing," Hoboken claims, has caused lasting harm to the city. Because Hoboken has been affected by extreme weather events, including Hurricane Irene and Superstorm Sandy, it needs substantial remediation to its infrastructure. Hoboken claims that Defendants caused this need and should therefore pay to remediate the infrastructure. Hoboken asks that Defendants pay the costs related to damage from Superstorm Sandy, and similar events, as well as pay for abatement and remediation efforts.[6]

IV. Facts

The City of Hoboken in New Jersey ("Hoboken") has sued Exxon Mobile Corp ("Defendant") for an alleged campaign of deception about the impact of fossil fuels on climate change which has, in turn, caused substantial harm to the city, including extreme weather events, rising sea levels and other problems associated with global warning.[7] Hoboken contends that Defendant is at fault through its misinformation campaign for the rise in concentration of carbon dioxide emissions that have caused negative climate change effects on the city.[8] Hoboken is a coastal town that sits on the Hudson River right by the Atlantic Ocean. Because of this the town has suffered extensive damage from climate change events, including Hurricane Irene and Superstorm Sandy.[9] The damage to Hoboken is particularly troublesome because the city is densely populated, affecting significantly more lives, and there is the constant threat of additional climate change damage including rising sea levels and extreme rainfall events.[10] This includes increased flooding in the city, decreased property values, and increased insurance and property costs for both the city and the residents.[11] Hoboken has already spent hundreds of millions of dollars to fix the damage to the city, but the city designers have already admitted that a "fully comprehensive solution" is beyond what the city can afford.[12]

Hoboken contends that Defendant actively suppressed climate change evidence, going as far as to employ "think tanks" to publish research and

5. *Id.*
6. *Id.*
7. *Id.* at 197.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

run campaigns denying climate change, as well as create "front groups with neutral names to promote climate science denial and misinformation campaigns."[13] Hoboken alleges Defendant was aware of the harm after studying fossil fuels and proceeded to prioritize profits over safety and actively worked to hide the effects of global warming.[14] Further, Hoboken alleges that once denial of climate change was no longer feasible, Defendant developed a plan to "greenwash" their consumers.[15]

Hoboken alleges the actions of Defendant are the proximate cause of its need to invest in remediation plans for the city.[16] Hoboken sued in state court alleging (1) public nuisance, (2) private nuisance, (3) trespass, (4) negligence, and (5) violation of the New Jersey consumer fraud act. Defendants removed the case to federal court and Hoboken filed a motion to remand to state court.[17]

V. Issue and Holding

The court grappled with whether the federal court has subject matter jurisdiction over the actions brought by Hoboken and whether the case should be remanded to state court after federal removal by Defendants. The federal court held that it does not have subject matter jurisdiction or original jurisdiction over the action. The case was remanded to state court because all claims brought by Hoboken arise out of state causes of action.[18]

VI. Analysis

Defendants claimed removal to federal court was proper on the following jurisdictional grounds: (1) federal question; (2) the Outer Continental Shelf Act; (3) federal officer removal; and (4) the Class Action Fairness Act. The court, after a thorough analysis into all of Defendants' defenses determined that procedurally, the court had no subject matter jurisdiction. The court analyzed this case in favor of remand by strictly construing removal statutes due to third circuit precedent.[19] The plaintiff is ordinarily entitled to remain in state court so long as its complaint does not, on its face, affirmatively allege a federal claim. Here, the Plaintiff's claims, the court found, were

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 198.
18. *Id.* at 209.
19. *Id.* at 198.

exclusively of a state nature and the fact that federal law may touch on the claims is not sufficient for removal. Specifically, the court found the state claims must be preempted entirely by federal law or be in the nature of federal claims to be removed. The claims set forth by the state court are tort claims, which are, by definition, state claims. The court acknowledged that certain federal statutes may touch on the state claims, but they are not so necessary to the claims as to require removal.

A. Application of Civil Procedure Removal Rules

Further application of well-known procedural rules such as the well pleaded complaint rule led to an outcome against removal in this case. The well pleaded complaint rule requires that a cause of action must be plead in such a way that it is a question of federal law in order for a case to be properly litigated in federal court.[20] The Supreme Court case that grapples with this rule is *Louisville & Nashville Railroad Co v Mottley*. In *Mottley,* the Mottleys were injured on a railroad and settled for a lifetime of free rides.[21] After congress passed a law that prevented this type of settlement from occurring, the railroads revoked the Mottley's passes.[22] The Mottley's then sued the railroad for breach of contract.[23] The court had to determine whether the federal courts had jurisdiction over this case, or if it belonged in state court. The Supreme Court looked at the Mottley's complaint to determine where jurisdiction lay.[24] The complaint referenced constitutional law; however, the court was not persuaded. The complaint suggested that the statute passed by Congress was in violation of the 5th amendment of the constitution. The court decided that none of these questions needed to be addressed because the federal court had no jurisdiction to hear the case, and the fact that the plaintiffs, anticipating the defendants using a constitutional defense, did not necessarily give subject matter jurisdiction to the federal courts. Instead, the Supreme Court asked: "What would the complaint itself, standing alone, do?" The fundamental cause of action in the complaint was a breach of contract, which is not a federal law question. It was held that raising a federal law defense but no federal claim is not enough to bring a claim to federal court.[25] Anticipating a federal defense

20. Louisville & Nashville R. Co. v. Mottley*,* 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908).

21. *Id.*

22. *Id.* at 150.

23. *Id.*

24. *Id.*

25. *Id.* at 153.

will not be sufficient, even if both parties agree the case turns on the federal law.[26] The cause of action must be one of federal law in order to properly belong in federal court.[27] An example of a well plead complaint in tort law is one that is rooted in a federal tort act, as opposed to a state law tort claim such as negligence. This rule applies to pleading specifically for state court or federal court, depending on where the plaintiff in a case wishes to litigate. Here, the plaintiff wanted to remain in state court, and carefully plead their complaint to only bring state law causes of action.

Alternatively, the "artful pleading" rule prevents plaintiffs from avoiding removal by failing to plead "necessary federal questions."[28] Courts will look deeper at the complaint, beyond the surface, to determine if a federal law cause of action is necessary in the following situations: (1) Congress has preempted or substituted a state law cause of action with federal law such that the plaintiff cannot avoid removal by trying to plead the state law version of the federal cause of action; or (2) Congress has explicitly made available the removal of state law causes of action to federal court.[29] The complaint in this case was well pled to remain in state court, and did not violate the artful pleading rule because it relied entirely on state tort law. Further, Congress has in no way created federal law or allowed removal of state law tort claims around climate tort law.

Additionally, Defendants and future companies that attempt to argue that these municipalities climate tort actions belong in federal court, such that the artful pleading rule applies should cite to *Grable & Sons Metal Products v. Darue Engineering & Manufacturing* to remove the actions to federal court. In *Grable*, the court found that even those claims that are based on state law may be removed for federal question jurisdiction if the claim raises a federal issue.[30] The *Grable* court found that these federal issues were necessarily raised in state law causes of action in such situations where the federal issue is "actually disputed and substantial which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[31] Potential defendants in state court looking to remove must look for an embedded federal question in the state law claim. Many of the defendants in these

26. *Id.*

27. *Id.*

28. Rivet v. Regions Bank, 522 U.S. 470, 475 (1998).

29. Beneficial Nat'l Bank v Anderson, 539 U.S. 1, 6 (2003).

30. Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005).

31. *Id.* at 2368.

state law climate tort claims will need to argue the sufficiency of the federal question such that it falls under *Grable.* In *Grable,* the Internal Revenue Service seized property for back taxes against Grable and Darue purchased it.[32] Grable filed a quiet title action for the property through a state law claim.[33] The court grappled with the issue of whether the IRS properly notified the delinquent tax payer about the sale of his land to pay for taxes.[34] The court determined that there was enough of a federal question in this question that it could be considered as arising under federal law.[35] The cause of action was clearly state law, but to resolve the question the court needed to decide an embedded federal issue. This is the type of scenario that would allow for a removal to federal court for a state cause of action – a state claim that turns on federal law.

The Supreme Court found there is a "slim category" of cases that satisfy the requirements to allow removal of a state law claim to federal court.[36] Specifically, the complaint must present a federal issue that is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.[37]

Here, the court found that "critically, Defendants do not identify any provision of federal law that would provide them a remedy that [Hoboken] may obtain or upon which [Hoboken's] nuisance claims are predicated."[38] The Court also found "the fact that federal law may be informative . . . or shape or even limit the remedy that Plaintiff may obtain does not mean that federal law is a necessary component of the cause of action.[39]

B. Federal Question

Federal question jurisdiction arises when a cause of action alleges a violation of the U.S. Constitution or federal law or when the United States is a party to a treaty.[40] Here, the Defendants alleged the claims brought by the Plaintiff were "inherently federal." They claimed the subject matter of

32. *Id.* at 2366.
33. *Id.*
34. *Id.*
35. *Id.*
36. Gunn v. Minton, 568 U.S. 251, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013).
37. Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 701, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006).
38. *Hoboken,* 558 F. Supp. 3d 191, 204 (D. NJ 2021).
39. City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191 (D.N.J. 2021), *quoting* MHA LLC v. HealthFirst, Inc., 629 F. App'x 409, 413 (3d Cir. 2015).
40. 28 U.S.C. sec. 1331.

the claim is an attempt to regulate the oil and gas industry. The Defendants claim because there are several federal statutes which regulate the oil and gas industry, the Plaintiffs must sue in federal court.

A federal issue is necessarily raised if "vindication of a right under state law must necessarily turn on some construction of federal law."[41]

The court found there was no federal question presented and a defense based on federal law is insufficient for removal.[42] The Third Circuit, in affirming, found the Plaintiffs are the "masters of their claims," and may avoid federal jurisdiction by exclusive reliance on state law. The Plaintiffs pled the Defendants committed the tortious acts of private nuisance, public nuisance, trespass and negligence. The court found none of these claims required federal jurisdiction.

Further, the federalism system presumes most state law claims belong in state, not federal court. The court found it must read a statute consistent with the principle of federalism inherent in the constitutional structure.[43]

State law claims may only be removed to federal court when some federal statute completely preempts state law. The defense of "ordinary preemption" applies only when incompatible federal and state laws regulate the same actions.[44] The defense of "complete preemption," the 3rd circuit found, is a "potent jurisdictional fiction" that lets courts recast a state law claim as a federal one. Further, just because there is a federal defense does not mean the case should be removed to federal court.[45]

Here, Defendants contended Hoboken's claims are completely pre-empted by the Clean Air Act, however, there is no evidence that suggests Congress intended to replace state law remedies that fall within the Clean Air Act.[46] The Clean Air Act 42 U.S.C. §1401 et seq. defines the Environmental Protection Agency's (E.P.A.) responsibilities for protecting and improving the nation's air quality and stratospheric ozone layer. Many of the Clean Air Act standards encompass motor vehicle emission requirements, however, it does limit methane omissions and volatile organic compounds (VOCs), which contribute to smog and are linked to health effects in humans. The Act also limits air toxins produced by oil and

41. Franchise Tax Bd. Of State OF Cal. V. Constr. Laborers v. Vacation Trust for S. Cal., 463 U.S. 1, 9, 103 S. Ct. 2841, 77 L. Ed 2c 420 (1983).

42. *City of Hoboken,* 558 F. Supp. 3d 191, 200 (D. NJ 2021).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 201.

gas activity.[47] If the federal court finds Congress intended to "completely pre-empt" a particular area of the law, any claim that falls within the area is federal in character.[48]

Defendants make the Federal Common Law argument that in areas like interstate pollution there should be a uniform application of law in the form of a federal rule. They claim this extinguishes Hoboken's claim that state court is the appropriate venue.[49] The Court found the Defendants are raising an affirmative defense that Federal Law pre-empts Hoboken's claims, which is in essence an ordinary pre-emption claim. No court has found ordinary pre-emption converts state law claims to a federal case.[50] Defendant argues Hoboken's claims arise under federal law because they want to regulate oil and gas production and sale globally. The Court rejects this argument because Hoboken seeks compensation to pay for damages that have already occurred and remediation to prevent further damage.[51] Defendants also contend the nuisance claims are "inherently federal in character." The Court found while Federal law may be implicated or guide the analysis, this is far different than being dependent on the interpretation of federal law.[52] The Court found the Clean Air Act did not completely pre-empt the law on the subject, saying ""[i]f Congress intends a preemption instruction completely to displace ordinarily applicable state law, and confer federal jurisdiction thereby, it may be expected to make that atypical intention clear," quoting *Empire HealthChoice Assurance, Inc. v. McVeigh,* 547 U.S. 677, 698, 126 S.Ct. 2121, 165 L. Ed. 131 (2006).

C. Outer Continental Shelf Lands Act

The Outer continental Shelf Lands Act ("OCSLA")[53] controls the Outer Continental Shelf; all land under water along the state coastal waters under U.S. jurisdiction. The Act places the responsibility for the administration of mineral exploration and development on the Outer Continental Shelf under the Department of Interior. The Interior Department leases the minerals to

47. United States Environmental Protection Agency, *Basic Information about Oil and Natural Gas Air Pollution Standards*, https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/basic-information-about-oil-and-natural-gas (last viewed Jan. 19, 2023).

48. N.J. Carpenters & the Trustees Thereof v. Tishman Const. Corp. of N.J., 760 F. 3d 297, 302 (3d Cir. 2014) (quoting *In re U.S. Healthcare, Inc*., 193 F. 3d 151, 160 (3d Cir. 1999).

49. City of Hoboken, 558 F. Supp. 3d 191, 201 (D. NJ 2021).

50. *Id.*

51. *Id.* at 202.

52. *Id.* at 204.

53. 43 USCA § 1349(b).

private companies and formulates regulations necessary to carry out the provisions of the Act. The Act also provides that any cases arising out of or in connection with operations conducted on the outer Continental Shelf are under the jurisdiction of federal courts. The operations referred to in the act consist of many of the activities involved in oil and gas company operation: exploration, development and production of minerals, and mineral rights. To determine if a court has jurisdiction under the Act the courts look at "(1) whether the conduct "that caused the injury constituted an operation conducted on the outer Continental Shelf that involved the exploration and production of minerals and (2) if the case "arises out of, or in connection with the operation."[54] Although it could be argued that the claim fits this criteria, the court found that an additional requirement found in the statute itself undermines this. The Court found there is no jurisdiction under this act because it requires a "but for" causation between Hoboken's claims and Defendants' Outer Continental Shelf operations.[55] The Court did not find such a causal link saying "even if some of the activities that caused the alleged injuries stemmed from operations on the Outer Continental Shelf, the Defendants have not shown that the Plaintiffs' causes of action would not have accrued but for the Defendants' activities on the shelf. The Court rejected the Defendant's assertion that the "but for" test was too restrictive, pointing to the statutory text of the OCSLA (section 1349(b)) which only requires a "connection."

In addition, the third circuit found that a suit under OCSLA must be linked closely to production or development on the Outer Continental Shelf. The Act as a whole defines a body of law applicable to the seabed, the subsoil, and the fixed structures on the Outer Continental Shelf, which does not apply in this case.

The court found traditional state law claims against oil and gas companies and related entities for nuisance, trespass, and negligence, including negligent failure to warn, relating to burning fossil fuels and omitting carbon dioxide, and misrepresenting matter of public concern about climate change, were too far removed from oil production on the Outer Continental Shelf to support federal jurisdiction of state law claims. The state petition never mentioned the OCSLA.

54. In re Deepwater Horizon, 75 F.3d 157, 163 (5th Cir. 2014).
55. 43 USC § 1349.

D. Federal Officer Removal

Federal Officer Removal is implicated under the Federal Officer Removal statute, 28 U.S.C. §1442 et seq which was created to protect officers of the federal government from interference by litigation in state court while performing official duties. One of the requirements for this type of removal is the Plaintiff's claims are based on Defendant's conduct arising under the United States, its agencies, or its officers.

Defendants argue they are required to act under a federal officer because the government is involved in its fossil fuel production.[56] Defendants rely on their involvement in the Outer Continental Shelf leasing program to support their claim. The court did not address whether Defendants could be covered under the Act, but pointed out Hoboken claims arise out of a misinformation campaign, not Defendants' oil production so this argument necessarily fails, saying "Hoboken's complaint is focused on Defendants' decades long misinformation campaign that was utilized to boost Defendant's sales to consumers. Defendants do not claim that any federal officer directed them to engage in the alleged misinformation campaign."[57]

E. Federal Enclave Removal and Class Action Fairness Act

Defendant argues the complaint relies upon conduct that occurred in the District of Columbia and should be removed based on Federal Enclave Removal, U.S. Constitution, Article I, Section 8, Clause 17. Federal Enclave removal is implicated when the location of the injury is in a federal enclave. The express language of the enclave clause references "state land purchased by Congress with the consent of the State Legislature."[58] A federal enclave is an area over which the federal government has assumed exclusive legislative jurisdiction.[59] The Court again reasons the focus of Hoboken's claim is harm that occurred in Hoboken, not in a federal enclave, which would preclude the actions taken by Defendants in the District of Columbia.[60]

Defendants also argue that the case should be removed to federal court under the Class Action Fairness Act. The Class Action Fairness Act (CAFA), 28 U.S.C. §1332(d), 1453 and 1711-1715 gives federal courts

56. *Id.* at 206.

57. *Id.* at 207-08.

58. Gavrilovic v. Worldwide Language Resources, Inc., 441 F. Supp. 2d 163, 177 (2006).

59. *Id.* at 176.

60. City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191 (D.N.J. 2021).

diversity jurisdiction over class actions when the amount in controversy exceeds five million dollars, there are minimally diverse parties, and the class consists of a hundred or more members. A class action is a legal proceeding in which one or more plaintiffs bring a lawsuit on behalf of a larger group similarly situated, known as a "class."

The court found this case is not a class action, so this argument necessarily failed.[61]

VII. Implications

This reasoning if accepted and followed by the other circuits, could impair oil and gas companies 'ability to remove to federal court and plaintiffs are likely to carefully craft its complaints to exclude federal issues in an attempt to remain in state court.

The trend of suits against private companies by government agencies has resulted in mixed results when those companies attempt to remove state court claims to federal court. Cases filed by governmental entities against tobacco and opioid manufacturers are cases in point. Some of these cases were removed and others were remanded, based on some of the same arguments brought by Defendants here. The distinction between the removed and remanded cases seems to turn on the governments ability to properly plead their state court claims without implicating federal law.

A. Opioid Litigation

The opioid crisis in the early 2000s brought with it a wave of litigation against the manufacturers of the opioid manufacturers after many people died of overdoses from various types of opioids. Many people became addicted to illegal opioids, often heroin, after first becoming addicted due to prescription opioids.[62] While this litigation initially involved individuals and class actions, many state and city governments began to bring litigation as well. These cases usually involved claims that the opioid manufacturers engaged in "false, misleading, or fraudulent advertising,"[63] much like the climate tort litigation currently plaguing oil and gas companies.

Defendant manufacturers in these cases, when their cases were remanded back to state court and removal was not successful, often used the primary

61. *Id.*

62. Anna Stapleton, *In Defense of the Hare: Primary Jurisdiction Doctrine and Scientific Uncertainty in State-Court Opioid Litigation*, 86 U. Chi. L. Rev. 1697, 1698 (2019).

63. *Id.*

jurisdiction doctrine to attempt to stay litigation. Their arguments were that until the Food and Drug Administration could answer scientific questions at the heart of the plaintiff's claims, litigation was premature. This argument was an attempt to bring the litigation back to a federal decision.[64] The primary jurisdiction doctrine allows parties to move for a stay of litigation or dismissal in two situations, (1) an administrative agency has exclusive jurisdiction over at least one issue raised, or (2) the court wishes to seek the expert advice of an agency for at least one of the issues. While the first situation does not apply to the climate tort cases currently being litigated, the second situation could apply here, because courts have at times interpreted this to include an agency's input even when no regulatory scheme is implicated.[65]

In the current climate tort litigation, oil and gas companies could attempt to utilize primary jurisdiction to exercise more control over the litigation left in state court due to well pleaded complaints. However, judges are inconsistent with their acceptance of such requests for stays, though the majority seems to deny the stays. Courts will often balance the usefulness of the agency's expertise against undue delay concerns. The reality is that scientific evidence is brought frequently in state court litigation, and the court does not stay the litigation for agency feedback in all of these situations.[66] To routinely grant stays would severely delay litigation of all types and undermine the state court system. Courts have found that "scientific complexity" on its own is not enough reason to employ the primary jurisdiction doctrine. Further, climate change data has "solidified" over the last decade, greatly impairing the argument that a central government agency would need time to develop data for expert scientific testimony purposes, such that a stay of litigation would be necessary.

B. Tobacco Litigation

Many suits were filed against large tobacco companies for misinformation campaigns working to purposely suppress research and information regarding the ill effects and addictive nature of tobacco and smoking.[67] Much of this tobacco litigation was resolved using a master settlement agreement entered in to by forty-six states, the District of Columbia, and five United States territories at the national level in the

64. *Id.* at 1699.

65. *Id*. at 1716.

66. *Id.* at 1721.

67. *See* Coyne v. American Tobacco Co., 183 F.3d 488 (6th Cir. 1999); Phillip Morris, Inc. v. Blumenthal, 123 F.3d 103 (2d Cir. 1997).

1990s.[68] While this was an efficient end to the litigation, it failed to properly compensate and allocate the money in smaller localities, such as city and county governments.[69] This is because state governments were often the parties in the litigation, leading to funding going to state government health initiatives and tobacco control, with a majority going to unrelated funding. When the states settled on behalf of everyone the small municipalities took the hardest hit because there was no practical application on a local level of the funds. This caused small governments that wished to sue for state tort claims to become more wary of such settlements. This gives these local governments more incentive to keep their cases in state courts and avoid a uniform application of the law in federal court, which might compensate them less than they feel they are owed due to their individual and unique damages.[70] Oil and gas companies will likely struggle to be able to enter into any kind of national settlement for the climate torts being brought against them.

However, there were some cases that were still litigating these types of claims. Some of these cases survived removal, because no actual state law was implicated, and the complaints were not well pled to include only state law.[71] Further, many of these states already had statutes prohibiting unfair trade practices, which is the basis of many of the tobacco tort claims. Courts found that there was no need for a state cause of action, because the citizens affected by tobacco use could bring these claims themselves.[72]

Here, in climate tort litigation, the local governments are carefully pleading to ensure only state law is implicated, and the relief they seek is for the city, not individual citizens who were impacted. These complaints foreclose the arguments for the defendants in this litigation that private citizens can bring these claims if they wish.

C. The Well Pleaded Complaint Rule

The proverbial thorn in the oil and gas companies' side in climate tort litigation is the well pleaded complaint rule. The Supreme Court has found that even if state law is the basis for a cause of action, if the right to relief requires resolution of a substantial question of federal law, federal courts

68. *Id.*

69. Stapleton, *supra* note 62.

70. *Id.*

71. *See* Coyne v. American Tobacco Co., 183 F.3d 488 (6th Cir. 1999); Phillip Morris, Inc. v. Blumenthal, 123 F.3d 103 (2d Cir. 1997).

72. *Id.*

have subject matter jurisdiction over the action.[73] Further, this federal question must be presented *on the face* of the complaint, making it even more difficult for oil and gas companies to argue for federal question jurisdiction.[74]

Plaintiffs are embracing the rule in complaints to implicate only state law when suing large out-of-state oil and gas companies because they believe the state will be more sympathetic to their claims and they will receive more favorable outcomes.[75] The perceived benefit is that these corporations are out-of-state, large, and have allegedly participated in behavior that has harmed the local plaintiffs that states wish to protect.[76] The better and more strategically drafted the complaints are for non-removal, the better the chance the plaintiff in these cases can prevent removal and succeed in remand to state court.[77] Further, the more local governments that are successful in preventing removal, the more examples and strategy the plaintiffs in climate tort litigation are going to educate states to properly plead their cases to ensure state court litigation.

One strategy defendants in climate tort litigation can use, if there are multiple defendants joined together, is attacking the joinder of the claims for fraud. If the court finds that the plaintiff has joined specific defendants to prevent diversity jurisdiction, this could save oil and gas companies being sued in state court for climate tort actions. However, the burden rests with the defendant to prove fraudulent joinder and is "one of the heaviest burdens known to civil law."[78] Where in-state defendants are pled to thwart diversity jurisdiction, if the defendant can show that there is no evidence to support the claims against the in-state defendants, courts have found fraudulent joinder.[79] Additionally, courts have also found where the defendant can prove with "clear and convincing evidence" that the plaintiff has no intention of pursing the in-state defendant there is improper joinder.[80]

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73. Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983).

74. Caterpillar Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987).

75. Paul Rosenthal, *Improper Joinder; Confronting Plaintiff's Attempts to Destroy Federal Subject Matter Jurisdiction,* 59 Am. U.L. Rev. 49 (2009).

76. *Id.* at 58.

77. *Id.*

78. *Id.* at 64.

79. *Id.*

80. *Id.*

VIII. Jurisprudence Impact

If accepted by other circuits, this ruling will impact oil and gas companies' ability to remove climate tort claims to federal court, requiring the companies to mount defenses in multiple state courts with different laws, attitudes, and procedures, thus making defense more difficult and precarious. Other circuits deciding the same issues have come to the same conclusion. The 3rd circuit became the fifth circuit to refuse removal to federal court in these climate tort cases, following the 1st, 4th, 9th, and 10th circuits.[81] If the trend continues as more climate tort litigation is brought, this could cause oil and gas companies to shift strategies when facing these sorts of claims, including catering arguments to state court laws and values which may likely be less sympathetic to their claims as opposed to federal judges.

IX. Conclusion

The Court's finding in the case may change the ability of oil and gas companies to respond to climate change tort lawsuits when carefully crafted to exclude federal law claims. This will leave oil and gas companies litigating in multiple states, with various attitudes, rules, regulations, and laws. If Defendants and other energy companies similarly situated can not avail themselves of federal jurisdiction, they will be forced to contend with a myriad of state laws and regulations that inform the impact of fossil fuel extraction and refining on climate change. This "multiple front" litigation will not only be substantially more expensive for oil and gas companies, but it will also increase the likelihood of inconsistent rulings by state courts on the issues presented, thus requiring oil and gas companies to adapt its business practices depending on the specific state in which it does business. There are a few options to these defendants to try to prevent removal, including fraudulent joinder claims when diversity jurisdiction is destroyed by joinder of an in-state defendant, as well as carefully reviewing the complaints filed by plaintiffs for federal law implications and individual and class action party relief as opposed to government relief.

The trend is undoubtedly toward multi-state litigation which will likely lead to increased costs for consumers. In addition, no uniform defense can be presented by energy companies leaving state firms representing energy

81. *See* Rhode Island v. Shell Oil Prod. Co., L.L.C., 979 F.3d 50 (1st Cir. 2020); Mayor and City Council of Baltimore v. B.P. P.L.C., 952 F.3d 452 (4th Cir. 2021); County of San Mateo v. Chevron Corp., 960 F.3d 585 (9th Cir. 2020); Bd. Of County Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020).

companies wrestling with trying to find a cohesive legal principle from state court judgments, either for the Plaintiffs or the companies, which could inform the energy companies of their legal obligations in their oil and gas operations. Should a case like this make its way to the Supreme Court to decide the issue, the outcome will certainly have a significant impact on the exploration and refining of oil and gas and, whatever the outcome of the certiorari petition, will almost certainly increase regulatory oversight.