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Climate Change Tort Litigation: Enough Is Enough

By **Victor Schwartz** (February 28, 2019, 3:30 PM EST)

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For more than 15 years, local officials have tried suing American energy producers over issues related to global climate change. The lawsuits have alleged various legal theories, but the courts have rejected all of them.

As the U.S. Supreme Court held in 2011, there is "no room for a parallel track" of tort litigation in setting emission limits or determining national energy policy. Nevertheless, local governments continue to file these cases, which raises the question: At what point is enough enough? When do these lawsuits become frivolous or vexatious?

This question is an important one, because in the past two years, 14 municipalities, counties and states have filed lawsuits against America's energy companies over climate change. These lawsuits allege that oil and gas producers should be liable for impacts of climate change merely for selling the fuels that we all need for basic sustenance.

There is no merit to these lawsuits. Climate change has been widely studied since the 1960s, and as Supreme Court Justice Ruth Bader Ginsburg explained when she wrote the opinion of a unanimous Court in AEP v. Connecticut, deciding if and how to address climate change is an issue "within national legislative power" and not appropriate for the judiciary.

In the years after the Supreme Court's edict, the U.S. Court of Appeals for the Ninth Circuit made it abundantly clear that there is no legal foundation for climate change litigation at all. Given the Supreme Court's broad rejection of this litigation, the Ninth Circuit explained, "it would be incongruous to allow [such litigation] to be revived in another form." Thus, regardless of the tort, court or type of remedies sought, climate change tort litigation should be dead on arrival.

In 2012, a group of environmentalists, lawyers and public officials developed a new strategy for pursuing this litigation. They tried to distinguish their claims from those the Supreme Court and others rejected. The old lawsuits, they said, tried to regulate greenhouse gas emissions by having a court specify how much CO2 utilities could emit.

Their repackaged lawsuits, on the other hand, are about money. They want money from energy producers to pay for alleged local impacts of climate change. Two law firms started crisscrossing the country to recruit localities and agree to take them on contingency fee bases.

The courts have appreciated that these are differences without distinctions. Last year, federal judges dismissed the recent cases that Oakland, San Francisco and New York City filed. The judge dismissing the San Francisco and Oakland lawsuits recognized that the benefits and risks associated with fossil fuels are "worldwide" issues. Addressing climate change, he continued, "deserves a solution on a more vast scale than can be supplied by a district judge or jury" in a particular case. The judge dismissing New York City's lawsuit said the same thing, noting that the "immense and complicated problem of global warming requires a comprehensive solution."

These events suggest that this litigation has reached its tipping point. Attorneys have an obligation under the law not to pursue litigation that has no basis in law or fact, or a reasonable extension of law. Attorneys also have an obligation not to engage in vexatious litigation designed to annoy, harass or embarrass a defendant.

Yet these cases are continuing in the courts. Already this year, courts hearing cases filed by San Mateo and Rhode Island have spent time and resources on preliminary procedural matters. And the U.S. Courts of Appeal for the Second and Ninth Circuits are receiving briefing on the dismissed cases by Oakland, San Francisco and New York City.

At the same time, the Ninth Circuit is hearing an appeal of another novel attempt to use the courts to regulate climate change. This other case does not target the private sector, but rather the United States government. The government's response, which was filed earlier this month, makes the same fundamental point as the private companies being sued — that climate change policy must be decided in Congress and federal agencies, pursuant to a multitude of factors.

The public officials, and the private contingency fee lawyers who are recruiting them and underwriting climate change litigation, both clearly know the litigation's track record. Filing lawsuits that have failed time and again would appear the definition of frivolous and vexatious. Courts have not yet gone down the road of potential sanctions, but it is an issue increasingly worthy of consideration.

It is understandable that public officials want to do something about climate change. It is one of the pressing issues of our time. Tort litigation, however, is not the answer to climate change. Rather than pursuing failed litigation, governments should search out solutions that actually work, such as examining the energy sources they use, upgrading their transportation systems and modernizing their buildings.

Bringing lawsuits to blame the companies that manufacture energy may generate headlines, but will do nothing to address the issues. These lawsuits waste scarce judicial resources and threaten jobs and our economy, and it is time for the courts to put an end to them.

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