

NEW YORK CITY SUES MAJOR ENERGY COMPANIES FOR CLIMATE CHANGE

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Legal Briefings

On January 9, the City of New York opened a new legal front against energy companies, suing Exxon, BP, Chevron, Royal Dutch Shell, and ConocoPhillips for the cost of defending the city from the effects of climate change – such as rising sea levels and increased flooding – that is allegedly caused by the carbon emissions attributable to these defendants. Much like the suits filed last year in California state court by the counties of San Mateo, Marin and Santa Cruz and the cities of San Francisco, Oakland, Imperial Beach and Santa Cruz, New York's complaint alleges that the defendants are responsible for the costs of constructing preventative infrastructure because the defendants promoted, marketed and sold fossil fuel products, while knowing and failing to disclose that fossil fuel emissions cause climate change.

In conjunction with its complaint, New York announced that its pension funds would divest all holdings in fossil fuel businesses over the next several years.

Like the complaints filed in California, New York's complaint alleges that the defendants are liable under nuisance and trespass theories of liability because they are responsible for a significant portion of global emissions over the course of many years. New York alleges that the five defendants are responsible for 11% of all carbon and methane emissions since the beginning of the Industrial Revolution. Also like the complaints in California, the New York complaint alleges that the defendants have continued to market, promote and sell fossil fuels despite their own internal scientific studies – dating back as far as the 1970s – concluding that fossil fuel emissions cause climate change.

New York's complaint seeks unspecified damages, but alleges that the cost of flood and storm surge resiliency projects may run to "many billions of dollars" over the coming years.

As noted in our previous alert about the California lawsuits, the defendants have strong arguments to dismiss the complaint as a matter of law, before either side must disclose documents or give testimony. These defenses, which are described in more detail in our previous alert, include:

- **Federal Preemption:** The defendants can argue that federal law, including the Federal Clean Air Act, preempts any state common law claims, including claims sounding in nuisance, that seek to reduce fossil fuel emissions, and that federal laws and regulations are better suited to address a global phenomenon such as climate change with implications for interstate and international commerce and international relations. While the Supreme Court has not directly ruled that state common law nuisance and trespass claims are preempted, it did hold in *American Electric Power v. Connecticut* that the Clean Air Act does displace federal common law nuisance claims for similar reasons.
- **Lack of Standing:** The defendants can argue that New York lacks standing to assert any claims, because there is no clear causal nexus between the alleged misconduct and the alleged costs to the City of remediating and preventing rising sea levels and other effects of climate change, most of which have yet to occur and may be due to a multitude of potential causes rather than the alleged misconduct of the defendants.
- **Political Question Doctrine:** While this defense is rarely invoked, the defendants may argue that New York's claims should be dismissed because any relief granted by the court would impinge on the prerogatives of other branches of government.
- **Lack of proximate causation:** The defendants can argue that it is not possible for New York to meet its burden of proof as to proximate causation. Indeed, proving tort liability and entitlement to remedial relief will require New York to prove that its purported injuries (most of which have yet to occur) were caused by the defendants' allegedly tortious conduct, rather than a myriad of other potential natural and human causes of rising sea levels and greater storm surges, which have nothing to do with alleged tortious conduct of the five energy companies named in this lawsuit.

Notably, New York filed its complaint in federal court, rather than in state court as the California municipalities did. While defendants in the California cases have moved to remove the cases to federal court, which will delay their adjudication of the merits, the New York complaint may move directly to the motion to dismiss phase. New York thus may be the first jurisdiction where these claims are tested on the merits, and we predict, will be dismissed on the merits.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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