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Environment & Energy

State Courts Should Hear Cities' Climate Deception Lawsuits

By Karen C. Sokol

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The Fourth Circuit held oral arguments last month in *Baltimore v. BP*, in which the city is seeking to hold BP and other fossil fuel companies liable in state court for their allegedly deceptive marketing campaign to hide the climate hazards of their products. Karen Sokol, a professor at Loyola University New Orleans College of Law, contends that state courts are appropriate venues for litigating these matters, contrary to industry arguments.

On Jan. 25, the U.S. Court of Appeals for the Fourth Circuit held oral argument in *Baltimore v. BP PLC*, a case in which the city is seeking to hold BP and other fossil fuel companies liable in state court for their systematic deceptive marketing campaign to hide the catastrophic dangers of their products.

The goal of their decades-long, ongoing disinformation campaign: to lock in a fossil-fuel based society—and continue reaping astronomical profits—even during a fossil fuel-driven climate emergency. Other cities, counties, and states have brought similar suits in their state courts, all invoking long-standing state deceptive marketing laws.

So why is Baltimore's case before a federal appellate court? The panel's three judges wanted to know—and the answer is more misrepresentation.

The industry misrepresents the plaintiffs' claims and the governing law in courts. Thankfully, the judges didn't seem to buy it.

Arguments in Court

Industry attorney Kannon Shanmugam argued that the deceptive marketing claims asserted by Baltimore and the other localities are not state claims but federal ones. "So that puts defendants in charge of what plaintiffs' claims really are?" Judge Stephanie Thacker pressed.

It would indeed. Conveniently, the industry asserts that the plaintiffs' state deceptive marketing claims are "actually" federal common law claims based on greenhouse gas emissions. Not coincidentally, the Supreme Court held in 2011 in *American Electric Power v. Connecticut* that federal legislation—specifically the Clean Air Act—"displaced" such federal common law claims.

Thacker resisted: "Even though the Clean Air Act...displaced [federal] common law, you're still arguing that [is] the source of law?"

"Yes, that is correct," Shanmugam replied, according to a recording of oral arguments posted on the court's website.

As that exchange makes clear, the industry's defense in these cases comes down to this: The plaintiffs' claims as we frame them have a very fleeting existence. They exist just long enough to get the state suits into federal courts, at which point federal courts will of course have to dismiss them because they don't exist.

Thacker called out the industry's "circular argument" here: "That, at least for me, defies logic," she said.

Industry Mischaracterizes Plaintiff Claims

But the industry can't be bothered by logic or law. Instead, it mischaracterizes the plaintiffs' claims and the governing law to shift the focus away from its disinformation campaign and evade discovery and trial in state courts.

This argument is deeply flawed. Federal common law claims are quite narrow because, as the Supreme Court has long held, it is primarily state courts that develop and apply their own bodies of common law.

The industry line, then, is that the plaintiffs can't assert their claims based on long-standing state laws prohibiting deceptive marketing; rather, it insists that the plaintiffs can only bring a claim that the Supreme Court has ruled non-existent.

But in *American Electric Power*, the court also noted that its ruling had no bearing on the plaintiffs' state claims, and thus that, with the federal common law displaced, the proper venue for the case was state court. The industry conveniently omits that point from its arguments.

The industry has used circular legal misrepresentations to tie the state deceptive marketing cases up in jurisdictional battles for almost five years now, not only wasting judicial resources but also interfering with our nation's divided system of governance.

States Play an Essential Role in Health, Safety Protections

In the U.S. constitutional structure, states have always played an essential role in providing their residents with public health and safety protections. And for decades, state courts have applied state laws to provide remedies for harms to health and safety caused by deceptive marketing. The current state cases against industry defendants are relying on these same laws; namely, state tort law and state consumer protection statutes.

State tort law has always been an important mechanism in this country for holding private actors legally and financially responsible for misconduct. It has become particularly important since the mid-20th century, as corporations amassed both economic and political power and significant control over information thanks to sophisticated and often deceptive marketing campaigns.

In response to the significant harms caused by such disinformation, state courts drew on existing state tort law principles to provide relief to the injured, and state legislatures enacted consumer protection statutes imposing civil penalties for deceptive marketing. Underlying both types of law is states' recognition that deceptive marketing presents significant health and safety threats.

Baltimore v. BP and the other state cases may be the first to seek to hold fossil fuel industry actors to account in state court for disinformation about climate science and the immeasurable dangers of fossil fuel products. But they are certainly not the first to seek to hold corporate actors to account for health and safety harms caused by disinformation campaigns.

Indeed, state tort and statutory claims are well-suited to the plaintiffs' allegations, and state courts with experience applying these laws are the most appropriate venue to adjudicate such claims.

In short, the plaintiffs' allegations involve the sort of corporate malfeasance that state laws, and thus state courts, have been addressing for over half a century now. The principal difference is the magnitude and severity of the harms for which they seek redress.

Indeed, because of the tragic success of the industry's disinformation campaign, these cases may be the most important example ever of the value of these long-standing state laws. They thus have the potential to show the value of our system of divided governmental powers, but only if the industry's defense strategy of misrepresentation fails.

Thacker brought the stakes into sharp relief: "As I understand your argument, it almost doesn't matter how plaintiffs frame their complaints."

As her comment makes clear, a ruling in favor of the industry would upend essential procedural rules that preserve state judicial authority and, relatedly, protect plaintiffs' abilities to choose their claims and the court in which they file them.

In our disrupted climate, and amid increasing revelations by researchers and journalists about the fossil fuel industry's deception, we must understand the full nature of any wrongful conduct that got us here, and we must hold wrongdoers accountable. Invoking state laws is a key way to do that in this country, and it is a strategy that plaintiffs in these cases have the right to pursue.

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