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ALERT

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Spate of Suits Brought by California Communities for Sea Level Rise May Change Landscape of Climate Change Litigation

A recent trio of cases filed in California state court seek to hold major fossil fuel companies liable for the effects of sea level rise they allege to be caused by climate change.

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On July 17, 2017, three California communities—all represented by the same law firm—filed separate lawsuits in the Superior Court of California against the same set of 37 defendants. The three California communities bringing the suits—Imperial Beach, Marin County, and San Mateo County—are municipalities located along the Pacific coast. Marin and San Mateo are located near the mouth of San Francisco Bay, and Imperial Beach sits between San Diego and the Mexican border. According to the allegations in the complaints, rising sea levels, brought on by climate change, threaten to flood portions of all three communities. Each lawsuit lists the same eight counts, seeking to hold the defendants liable for alleged damages based on theories of public and private nuisance, strict liability, negligence, and trespass. Although the plaintiffs' chances of success in advancing traditional theories on these facts are far from certain, the cases may prove to be a turning point in corporate social responsibility litigation, particularly as it relates to society's adaptations in the face of climate change.

The 37 defendants named in each case consist of oil, natural gas, and coal companies who by some reports have produced approximately 20% of industrial greenhouse gas emissions in the last half-century. The crux of the plaintiffs' case is that the defendants deliberately "concealed the dangers" of their fossil fuel products "and sought to undermine public support for greenhouse gas regulation," even as they "took steps to protect their own assets from these threats." Based on this conduct, the plaintiffs allege that the defendants (1) created a public and private nuisance by facilitating the increase in sea level; (2) failed to warn plaintiffs that their products created a substantial risk of injury through climate change; (3) placed defective products in the stream of commerce because of the risks posed to consumers by climate change; (4) knew or should have known of the harmful effects caused by their products; and (5) caused ocean waters to trespass on plaintiffs' property. The plaintiffs' strict liability claims based on failure-to-warn and design-defect theories are novel in the context of attempting to hold private actors legally accountable for the alleged global consequences of their participation in the fossil fuel industry.

A spokesperson for one of the defendants has been quoted as saying in response to the lawsuits that "climate change is a complex societal challenge" that "should be addressed through sound government policy and cultural change…not by the courts."[1] A spokesperson for Norwegian oil & gas company Statoil, also a named defendant, agreed, stating: "previous cases have been dismissed" because climate change "is a political, not judicial, issue."[2]

Indeed, plaintiffs challenging fossil-fuel producers in U.S. courts have fared poorly in the past, particularly when asserting claims similar to some of those in the California cases. One of the best-known cases, *Native Village of Kivalina v. ExxonMobil Corp.*, involved nuisance and conspiracy claims based on the erosion of Arctic sea ice and its impact on an Alaskan village located on a low-lying barrier island. In that case, the federal district court dismissed

[1] https://www.theguardian.com/sustainable-business/2017/jul/26/california-communities-lawsuit-exxon-shell-climate-change-carbon-majors-sea-level-rises.
[2] *Id.*

the complaint on political question and standing grounds. The Ninth Circuit affirmed, concluding that federal legislation independently "preempted the plaintiffs' federal common law claims." Similarly, lawsuits filed in the wake of Hurricane Katrina, which sought damages from fossil fuel companies based on the influence of climate change on storm severity, also failed on standing, political question, preemption, and causation grounds. Some cases abroad have faced similar hurdles; for example, a Peruvian farmer's lawsuit in Peru against an energy company for its alleged contribution to climate change was dismissed on causation grounds in 2016.

But, internationally, some lawsuits against government entities have fared better and had significant effects. For instance, in 2013, almost 900 plaintiffs filed suit against the Dutch government, alleging that the country's climate change policies "posed serious environmental and health risks." As a result, in 2015, a court in The Hague ordered the Dutch government to reduce its country's emissions substantially. A South African court also recently rejected an environmental authorization for a coal power plant because climate change had not been taken into account during the authorization process. And in February of this year, an Austrian court similarly blocked an expansion of Vienna's airport because it would have increased carbon emissions.

One study reported that in the last three years "the number of lawsuits [globally] involving climate change has tripled,"[3] and these suits are expected to continue to increase. It is too early to say how trends and decisions abroad may impact climate change litigation brought here in the U.S. against private companies. But the recent trio of California lawsuits may prove to be bellwethers of whether courts in the U.S. have become more receptive to climate change litigation. Even if the claims are not ultimately successful, the theories of liability that these California communities have asserted—some of which are novel in this context—may reshape the landscape of corporate social responsibility litigation in the years to come as society settles on the appropriate role of the courts in responding to climate change.

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[3] https://phys.org/news/2017-05-climate-litigation-rapidly-global.html