Chapter Six:

The Inconsistencies Behind Climate Litigation

The climate litigation campaign is riddled with inconsistencies. Most prominently, advocates of the litigation often say in public that the lawsuits are intended to change the industry, reduce the use of fossil fuels and lower greenhouse gas emissions. Yet in court, the lawyers argue these cases are not meant to change the industry or regulate emissions at all. Likewise, the governments allege in court that their municipalities will suffer billions of dollars in climate damages, but deny any such damages in their municipal bond offerings. This chapter exposes these and other major contradictions upon which the climate litigation campaign is built, underscoring the fundamental weaknesses in their legal claims.

The main reason the organizers of climate litigation have been twisting themselves into rhetorical legal pretzels is because they are trying to differentiate this round of climate litigation from *American Electric Power Co. v. Connecticut*, which the U.S. Supreme Court unanimously rejected. At a meeting in La Jolla, California, soon after this ruling, they decided they should pursue litigation that *looks* different from that case, even if it isn't. So, instead of suing energy users (the utilities), they are suing energy manufacturers. Instead of bringing cases under federal public nuisance law, they are suing under state public nuisance law. And, instead of seeking to directly regulate emissions, which is what the plaintiffs sought in *AEP v. Connecticut,* the claimants now say they are only seeking damages for climate change harms.

These variations are distinctions without any legal differences. But, in trying to shoe-horn their lawsuits in this rubric, they are proving why their cases have no merit. Their talking points keep running into each other. Here are the top four contradictions underscoring the fallacies of the climate litigation campaign.

This Litigation is Part of the Fight to Stop Climate Change. Oh Wait, Never mind!

In hyping climate litigation to the public, advocates of the litigation campaign often say the purpose of these lawsuits is to achieve new climate regulations. They want to tarnish the energy manufacturers in the minds of the public, harm them politically and achieve concessions on public policies. In the courtroom, though, the lawyers and plaintiffs run from this characterization. In a tightly scripted way, they say the lawsuits are solely about making energy manufacturers pay for local climate change damages.

Why the double-talk? In short, advocates of litigation know the Supreme Court in *AEP v. Connecticut* already rejected the idea of overtly regulating fossil fuels or greenhouse gas emissions through tort suits. So, in court, they need to package the lawsuits as regular state tort claims seeking traditional damages.

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Dawn Reeves, a reporter for *Inside EPA*, adroitly detected this contradiction:

> State and local governments pursuing the litigation argue that the cases are not about controlling GHG emissions but instead about collecting damages from oil companies for the harms their products have already caused. But they also privately acknowledge that the suits are a tactic to pressure the industry to support future mitigation policies.[1]

The purposeful framing of climate litigation is a direct result of the La Jolla conference. After *AEP v. Connecticut*, the climate activists discussed "a variety of different approaches [for] spurring action and engaging the public on global warming, with suggestions ranging from lawsuits brought under public nuisance laws (the grounds for almost all current environmental statutes) to libel claims."[2] Those favoring litigation "emphasized the advantage of asking courts to do things they are already comfortable doing," rather than directly ask them to regulate emissions or put a price on the use of carbon, which had already been rejected.[3] As one participant said, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties."[4]

When summarizing the benefits of filing these lawsuits, the La Jolla report tellingly did not talk about actually getting money for local harms. It repeatedly said there was "nearly unanimous agreement on the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory

responses to global warming."[5] And, "pressure from the courts offers the best current hope for gaining the energy industry's cooperation in converting to renewable energy."[6]

Indeed, the main goal of the litigation is to get internal documents that, even if taken out of context, could sway public opinion against the industry. Matt Pawa acknowledged as much. In correspondence with Tom Steyer seeking funding for the litigation, Pawa emphasized his goal was "simply proceeding to the discovery phase" to pressure the companies.[7] When Steyer brought together members from three of his organizations—Fahr LLC, NextGen America, and the TomKat Foundation—to discuss their 2016 funding strategy, he said their objective here was to "weaken" energy manufacturers through "funding needed to develop" this litigation and state attorney general investigations.[8,9]

Along this same vein, the attendees of a 2016 strategy session at the Rockefeller Family Fund headquarters outlined their efforts to assist the climate litigation campaign. Their goal for the litigation was "to establish in the public's mind" that these companies are "corrupt," to "delegitimize them" and to "force officials to disassociate themselves" from the industry. The agenda also explored how to leverage the litigation for "creating scandal."[10]

In 2018, New York Mayor Bill De Blasio, who filed New York City's case, summed up his goal succinctly: "Let's help bring the death knell to this industry."[11] DeBlasio made this comment in an appearance on Senator Bernie Sanders' podcast when the Senator asked about the city's pending case.[12]

Perhaps the most damning admission came during a 2018 presentation by La Jolla participant Mary Christina Wood, a professor at the University of Oregon School of Law. In her lecture on "Atmospheric Recovery Litigation," she said, "Building sea walls and repairing roads won't do anything to fix our global climate system, but it will drain the profits of the fossil fuel companies."[13]

The attorneys directly involved in the litigation, though, know this messaging will not sell in court. Telling the truth to courts about the goals of the climate litigation campaign will undermine their cases. For example, UCLA Law Professor Ann Carlson, who counsels Vic Sher on some of his cases, has tried to downplay the broader goals of the litigation. At the 27th Annual Environmental Law Conference at Yosemite in 2018, she said the lawsuits "don't really get at the mitigation of emissions." And, "I think we'd be misleading to say that this is a solution to environmental justice concerns."[14]

David Bookbinder, chief counsel for the Niskanen Center and one of the attorneys representing the Colorado municipalities in their public nuisance climate lawsuit, has also been on script.

> "What these lawyers know—and are hoping others won't realize—is that state tort liability, even if they eschew any attempt to 'regulate,' actually does regulate conduct as much as regulation and legislation."

He has repeatedly said his lawsuit "is not 'how do we reduce the nation's emission[s] going forward,' instead, it's 'how do we pay for increased road maintenance.'"[15]

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The Supreme Court has long held that state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[16]

Many judges are fully aware of this fact and have called out the climate litigants over this rhetorical disconnect. Judge Keenan, the federal judge who dismissed the New York City case, asked the city's attorney: "Aren't you trying to dress a wolf up in sheep's clothing?" He then stated the city's lawsuit was "hiding an emissions case in language meant to seem it was instead targeting the companies' production and sales operations."[17]

When the U.S. Court of Appeals for the Second Circuit heard the city's appeal in 2019, one of the judges similarly asked, isn't the city "trying to have it both ways?"[18] The judge then appeared to conclude, "So this is an emissions case."[19] And, as indicated, when it comes to regulating emissions, the Supreme Court has already concluded that Congress and federal agencies are "better equipped to do the job [of addressing climate change] than individual district judges issuing ad hoc, case-by-case" decisions.[20]

Whether this round of climate litigation overtly regulates carbon emissions, or would do so though tort law damages, is irrelevant. Regulating emissions is not the role of state or federal courts.

Damages? What Damages?

As indicated, the city's lawyers repeatedly assert this case is about damages; it is how they differentiate this case from *AEP*. Therefore, a key element of their litigation rests on their ability to point to damages the cities are facing due to climate change. Accordingly, their pleadings detail with specificity how they believe climate change will affect their communities. Outside of the courtroom, though, the litigation advocates and localities acknowledge the entire speculative nature of their claims—or even flatly deny any damages exist or will exist. The most interesting disparity is comparing the pleadings to the municipal bond prospectuses the localities publish to encourage investment in their communities.

For example, Oakland's lawsuit was filed in 2017 and lists its predictions of climate-related damages: "By 2100, Oakland will have up to '66 inches of seal level rise,' which, along with flooding, will imminently threaten Oakland's sewer system and threaten property with a 'total replacement cost of between $22 and $38 billion.'"[21] Yet, in its 2017 bond offering, Oakland stated it was "unable to predict" climate change's impact on the city and "if any such events occur, whether they will have a material adverse effect on the business operations or financial condition of the city or the local economy."[22]

Similarly, San Mateo County's complaint claims there is a 93% chance that the County experiences a "devastating" flood before 2050. Meanwhile, San Mateo County's bond offerings in 2014 and 2016 claimed that it was "unable to predict whether sea-level rise or other impacts of climate change or flooding from a major storm will occur."[23]

After filing their lawsuits, both Oakland and San Mateo County updated their language in subsequent bond offerings to more definitively state the potential impacts of rising sea levels on their communities. Yet, both still admit that they are unable to predict the timing or severity of any future sea level rise with any degree of certainty.[24,25]

For example, Oakland issued a bond in 2018 that referenced its climate change lawsuit against energy manufacturers, but also stated, "The various scientific studies that forecast the amount and timing of sea level rise and its adverse impacts, including flooding risk, are based on assumptions contained in such studies, but actual events may vary materially."[26]

In 2018, ExxonMobil filed a petition in a Texas District Court describing these contradictions.[27] As the filing states, the same public officials who reviewed the municipal bonds signed the municipalities' legal complaints that initiated their climate lawsuits against the energy manufacturers. The National Association of Manufacturers echoed these concerns, submitting a letter to the U.S. Securities and Exchange Commission urging it to investigate the cities' possible securities fraud.[28]

Other legal experts have also weighed in on the discrepancies between the lawsuits and the bond offerings. Former California Attorney General Dan Lungren said, "No matter how embarrassing it is, lawyers for the California plaintiffs should tell the judges presiding over their cases that they need to withdraw or amend their claims."[29]

In an effort to respond to these criticisms, the municipalities hired Martha Mahan Haines, a former head of the SEC's Office of Municipal Securities. Her defense of the statements in the bond prospectuses underscored the weaknesses in the lawsuits. She concluded the bond offerings properly disclosed the "speculative information on projections" with "cautionary language in order to emphasize their uncertainty."[30] She admitted, "In the case of sea-level rise and certain other climate impacts, municipal entities generally [would] not be greatly affected for decades."[31]

Academics associated with the litigation campaign have also acknowledged this uncertainty—outside of the courtroom, of course. For example, at a press conference with Vic Sher in Hawai'i urging Honolulu and Maui to file climate public nuisance litigation, Professor Makena Coffman of the University of Hawai'i's Department of Urban and Regional Planning summed up the truth: "What do we know about our local damages? . . . [W]e actually don't know that much."[32] Honolulu filed suit anyway.

The entirely speculative nature of the pursuit of damages is exactly what Judge William Alsup, who heard the lawsuits filed by Oakland and San Francisco, found when he held a science tutorial to dig into the allegations. He pointedly told the cities' lawyer: "You're asking for billions of dollars for something that hasn't happened yet and may never happen to the extent you're predicting it will happen."[33]

Litigation that is supposedly premised on damages cannot proceed when no damages are actually articulated. This is one of the reasons Judge Alsup dismissed the San Francisco and Oakland cases.

> "A key message for the litigants is that the lawsuits are just traditional state tort claims—there is nothing novel about them at all. But, outside the courtroom, they often admit the truth: these lawsuits require substantial changes to the way tort law, particularly public nuisance theory, has been applied. This is why courts have largely dismissed lawsuits, like those here, seeking to subject manufacturers to liability for downstream impacts of products—particularly when the products are lawfully made and sold."

This Is Just a Traditional Tort Case... That Requires Changing Tort Law

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Under traditional tort law, public nuisance claims do not target product manufacturing. Public nuisance theory is a centuries-old law for stopping quasi-criminal activity when that activity creates an unlawful disturbance to a local community. Examples include vagrancy, illegally dumping pollutants into a public waterway, or blocking a public road. The government brings the public nuisance claim to make the person stop the unlawful conduct and clean up the mess. The manufacturer of products used to create the nuisance is not liable. So, protesters using barriers to block access to public roads are responsible, not the companies that made the barriers. Also, unlike here, public nuisances have no beneficial value.

Before becoming an advocate for climate litigation in recent years, Denise Antolini, the Associate Dean for Academic Affairs at the University of Hawai'i's William S. Richardson School of Law, recognized the key differences between what public nuisance has always been versus what environmentalists want it to become. Her 2001 article in *Ecology Law Quarterly* details the decades-long effort to turn public nuisance theory into a catch-all super tort for

industry-wide liability over environmental matters. She expresses her frustration that environmental lawyers were unable to get the changes to public nuisance law they had been seeking to break "the bounds of traditional public nuisance."[34]

In the 1970s, when these theories first surfaced they were tried in *Diamond v. General Motors Corp.*,[35] a case that presented a scenario similar to climate lawsuits. Corporations were sued for manufacturing products and engaging in other activities that collectively contributed to smog in Los Angeles. The court dismissed the claims because the suits were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants." State and federal courts have similarly dismissed scores of attempts to pursue public nuisance claims against manufacturers for a variety of other products.

Now that Dean Antolini is touting climate litigation, she wrote in the Honolulu *Star Advertiser* that the litigation represents a "tried-and-true tort law" claim with "more than a century of legal precedent."[36] This op-ed came days after she hosted a press conference supporting the litigation for Vic Sher—her "first boss," as he put it, when she worked for him in the 1990s at Earthjustice. In a letter to the Manufacturers' Accountability Project concurrent with the press conference, Antolini also said the lawsuits "allege traditional tort actions."[37]

Trying to get courts and the public to believe climate litigation is nothing more than a traditional state tort claim is clearly a key message point for the litigation, regardless of the truth.

David Bookbinder made this argument in a written piece about the litigation brought against energy manufacturers by San Francisco and Oakland, writing, "Environmental harm is a classic case of public nuisance and simply requires demonstrating that the defendant contributed to a condition that constitutes an unreasonable interference with public rights."[38]

Likewise, Robert Percival, an environmental law professor at the University of Maryland's Francis King Carey School of Law argued that when municipalities sue energy manufactures,

> "The state court actions, I think are just garden-variety tort actions. They're saying, 'You did something that caused us harm. We want damages.'"[39]

Simply repeating this falsehood does not make it any more true. Professor Carlson of UCLA Law has fully acknowledged that these lawsuits would set new legal precedent.[40] At the press conference Dean Antolini hosted, she admitted these "are hard cases. These are not slam dunk cases."

Judge Alsup stressed this point in dismissing San Francisco and Oakland's lawsuits. He wrote, "The scope of plaintiffs' theory is breathtaking," and "No plaintiff has ever succeeded in bringing a nuisance claim based on global warming." The truth is that nearly every attempt to expand public nuisance theory to include manufacturers of lawful products has failed, including in the climate change context.

Indeed, courts have repeatedly rejected attempts to expand public nuisance law. The Rhode Island Supreme Court, which may hear

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the state's climate change case if its case gets that far, explained why. In 2008, it dismissed the state's public nuisance case against manufacturers of old household products that, while not made anymore, were lawful and beneficial at the time they were made and sold: "[T]o permit these complaints to proceed ... would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[41]

The bottom line is that regardless of what advocates of climate change litigation say now, climate tort litigation has no legal precedent or merit. Courts have consistently rejected these expansive public nuisance claims under both federal and state tort law.

Climate Litigants: This Litigation Is Over the Illegal Promotion and Sales of Fossil Fuels... But Disclaims Any Attempt to Curb or Stop Any Such Promotion or Sales

The climate litigation campaign is also of multiple minds when it comes to what, if anything, the energy manufacturers did to warrant liability for the entirety of global climate change. In La Jolla, participants urged the litigation to point to some notion of wrongdoing, calling it "hugely important" to generate public "outrage."[42] Others encouraged cooperation or at least "polling to see how such [efforts] might be received by different segments of the public."[43] The decision to vilify energy manufacturers, even though there is no indication there is any substance behind activists allegations, is a clear indication that this litigation is really a political and public relations ploy.

In the litigation, the plaintiffs' central argument is that the energy manufacturers should be liable for causing climate change because they were aware of the risks of fossil fuels and sold them anyway. For example, in Baltimore's press release announcing the city would pursue this litigation, City Solicitor Andre M. Davis alleged that the companies knew about climate change long ago and failed to act on it, "and that's why we are taking them to court."[44] The City and County of Santa Cruz cited similar allegations in their press release announcing litigation, accusing energy manufacturers of concealing their knowledge of climate change.[45] This rhetoric also mirrors the talking points of the "Exxon Knew" campaign discussed in previous chapters of this report.[46]

There is a disconnect between this rhetoric and the legal claims. For starters, their own pleadings undermine this argument. The pleadings detail broader societal knowledge dating back to the Johnson administration in the 1960s about climate change, its causes and its impacts.[47] Thus, they acknowledge the U.S. Government, United Nation's Intergovernmental Panel on Climate Change and world scientific community had the same or greater knowledge as the manufacturers. In addition, the lawyers are telling the judges they are not seeking to change the companies' promotion and sales of fossil fuels.[48]

The Rhode Island complaint demonstrates this hypocrisy perfectly. It states the companies should be liable over "the extraction of raw fossil fuel products...; the refining and marketing of those fossil fuel products; and the placement of those fossil fuel products into the stream of commerce." But, then it says the state is not seeking to "restrain Defendants from engaging in their business operations."[49]

So which is it? Is promoting and selling these fuels unlawful, thereby giving rise to liability? Or, are these actions lawful and can continue? The litigants are trying to have it both ways.

In an effort to message this inconsistency, New York City's lawsuit downplays the allegations of wrongdoing, stating in its briefs that the energy manufacturers should be liable for global climate change merely because their products cause climate change.[50] They suggest the companies should be allowed to continue promoting and selling energy so long as they pay for the damages caused.[51] However, the notion that someone can be liable for lawful, reasonable conduct is a non-starter. What this lawsuit is trying to do is impose—not enforce—a penalty on carbon, which is a decision that must be made in Congress or federal agencies, not the courts. Only the other branches can determine whether to impose such a penalty, how much it should be and what should be done with the funds collected.

Judge Alsup, who dismissed the San Francisco and Oakland cases, pointed out this tension. He noted that in the pleadings, plaintiffs' counsel seemed to limit liability to those who had promoted allegedly phony science to deny climate change.[52] But at oral argument, plaintiffs' counsel said any such promotion remained merely a "plus factor."[53]

Vic Sher has clearly made the strategic decision to double down on the demonization message, both publicly and in court. In arguing before the Ninth Circuit in the Oakland and San Francisco cases, Sher suggested the energy manufacturers can be blamed for climate change because only they—and not the government—knew of the potential impact fossil fuels have on the climate. That simply is not true—even according to his clients' own pleadings, which detail the government's knowledge about climate change back to the 1960s. Also, in the *Juliana* case, the Ninth Circuit found that the federal government has been aware of the relevant climate science theories since at least President Johnson's administration in 1965.

Even beyond the lawsuits, the allegations have demonstrated no legal merit. In 2015, the climate activists, following up on another La Jolla strategy, sought to get their friends in government to "delegitimize" the companies, their workers and supporters as political actors.[54] They met with the U.S. Securities and Exchange Commission, then-New York Attorney General Eric Schneiderman and Massachusetts Attorney General Maura Healey to pursue enforcement actions over the alleged misrepresentations.

First, the SEC dropped all of its charges.[55] Next, the New York attorney general's case fell apart entirely. The justice hearing it called the allegations of deceit, fraud and other misrepresentations "hyperbolic."[56] Before trial, the justice weeded out the most incendiary claims, and after trial, the New York attorney general's office withdrew all of its fraud claims. The justice confirmed this fact, stating, "ExxonMobil would not have been held liable on any fraud-related claims."[57] In ruling for ExxonMobil, the justice noted the company turned over millions of documents and there were no material concerns.

Again, repeating false accusations does not make them true. But, climate activists and litigants continue to try to get judges and the public to buy into their mischaracterizations, regardless of how inconsistent they are. As discussed, their goal is to leverage lawsuits for political gain, with demonizing energy manufacturers central to that effort.

Conclusion

These contradictions are the most pronounced inconsistencies in the climate litigation campaign, underscoring the weaknesses of the legal cases. As the La Jolla report shows, this litigation was never about winning in court, but leveraging the media surrounding litigation to achieve political reform. They want to "delegitimize," "weaken," and "bring down," energy manufacturers.[58,59,60]

They also, as David Bookbinder of the Niskanen Center said, want to control the public's consumption of fuels by making fuels more expensive: "Given that companies are agents of consumers, however, holding companies responsible is to hold oil consumers responsible."[61]

Rather than subjecting consumers—every person, business and government—to these reckless and baseless lawsuits, they should go back to the other option discussed in La Jolla and collaborate with manufacturers on innovations needed to source and use energy more efficiently. Collaboration and innovation, not litigation, are the only ways to mitigate climate change.

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