



Beyond the Courtroom: Climate Tort Litigation in the United States

Climate litigation in the United States has been a nearly 20 year-old effort to turn climate change into a tort litigation issue, not a matter of national energy policy. The litigation campaign has garnered a great deal of media attention, and lawyers continue to pursue plaintiffs to file claims. But every court to consider the substantive merits of these cases, including the U.S. Supreme Court, has rejected them. As these courts have explained, producing and selling energy people need and use every day is neither unlawful nor a public nuisance, and therefore, not a liability concern. Climate change is a global challenge that needs to be addressed, but this litigation is neither a viable legal option nor productive to bringing about meaningful progress.

So, why are these public nuisance lawsuits still being pursued? In short, this litigation is driven by politics and profit. In *Beyond the Courtroom*, the Manufacturers' Accountability Project follows this political and money trail. After providing a look back at the first round of climate litigation in the early 2000s, the report focuses on the re-launch of these cases in 2017, who has been funding this litigation campaign and how they have recruited cities, counties, state attorneys general and a private industry group as plaintiffs.

As the report shows, a handful of nonprofit foundations are providing money to law firms and public relations consultants to generate the litigation. Their goals are to use media attention from the lawsuits to drive the debate on climate public policies and harm energy manufacturers and their supporters politically by publicly blaming them for climate change. For these parties, winning the litigation is secondary, though the lawyers have secured huge contingency fees in hopes of generating personal wealth from a successful outcome in these cases.

This report is designed to serve as a resource for reporters and others following the litigation. The information contained within is well-sourced and contains several previously unreported revelations.

Chapter One provides an overview of the climate litigation campaign, tracing its history and focusing on the key organizations and plaintiffs' attorneys active in environmental litigation. This chapter also provides an explanation for why these lawsuits have been unsuccessful. The original climate tort lawsuit, *American Electric Power Co. v. Connecticut (AEP)*, reached the United States Supreme Court where the Justices unanimously decided that such cases were beyond the judiciary's purview.

Chapter Two delves into the complex web of organizations that are driving the litigation. The law firms representing the plaintiffs' in these cases rely on this tightly knit network of academics, foundations and activists to assist with the legal research and generate media attention for the litigation. Although they present themselves as a grassroots movement, as this report shows, they are actually highly coordinated and funded by the same sources.

Chapter Three details the organizations and media outlets operating as the public relations arm of the climate litigation campaign. Their objective is to normalize for political leaders the idea that suing energy manufacturers is an appropriate way to help combat climate change and then to leverage the lawsuits to associate blame with the energy companies.

Chapter Four describes how plaintiffs' attorneys have traveled the United States to try to convince municipalities and other entities to hire them to file these lawsuits. Trying to get manufacturers to pay for local infrastructure projects aimed at mitigating the impacts of climate change may seem appealing to municipalities, but history shows that they are unlikely to succeed and that the litigation could result in wasted time, resources and taxpayer money.

Chapter Five explains the use of contingency-fee arrangements and other financing mechanisms as the plaintiffs' lawyers seek life-changing wealth from the litigation—all while getting paid by the foundations to bring the litigation in the first place.

Finally, **Chapter Six** discusses the flawed public nuisance legal arguments, the true motives of the proponents behind the climate litigation and how such lawsuits are often contradictory to their advocates' asserted goals.

This litigation and the efforts to expand public nuisance law are of concern to all manufacturers—not just energy manufacturers. First, energy is critical to manufacturing. Second, all manufacturers are at risk of getting caught up in this public nuisance litigation trend. If one of these lawsuits succeeds, activists and plaintiffs' lawyers will no doubt target many other manufacturers for these ill-conceived lawsuits.

Chapter One:

Climate Tort Litigation's Long Campaign Marked by Few Successes

Over the past two decades, plaintiffs' lawyers and environmental groups have sought to join forces with public officials to sue America's energy manufacturers over global climate change. Climate tort litigation has attracted an array of plaintiffs from small and big municipalities to crab fishermen to the State of Rhode Island. The lawsuits all ask courts to make energy manufacturers pay for impacts of global climate change by blaming them for selling products that contribute to climate change.

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The environmentalists have said that these lawsuits represent their frustration that policymakers in Washington, D.C. are not doing enough on climate change. They see litigation as a political tactic that could penalize energy production and use, leading to huge increases in energy costs around the country—what they call the “true cost” of fuels.¹ The towns and lawyers have said that this litigation is solely about money. The towns want funding for local projects, and their lawyers are working on a contingency fee basis, which means they aren't paid if they don't win.

The dream of a payday they believe can be in the tens or even hundreds of millions of dollars and the ability to currently tap into millions of dollars of environmental activist funding makes even the slimmest chance at that payday worth their while. As one of the lawyers explained, they are hoping to leverage their ability to file a multitude of government lawsuits to drive settlement, which they are hoping can be done irrespective of the legal merits of their claims.

Chapter One of this report looks at the origins of these lawsuits, as well as the involvement of the key lawyers, non-profits and activists behind this twenty-year long campaign.

Climate Litigation's Origins

The first group to articulate the legal strategy for suing companies in the energy industry for contributing to climate change was the now-disbanded Global Warming Legal Action Project. Founded in 2001 by environmental attorney Matt Pawa as a special project for the Civil Society Institute, GWLAP had four goals:²

1. “Develop and apply a tort law approach to global warming that will require major greenhouse gas emitters and fossil fuel companies to internalize the costs of their contributions to global warming;
2. “Serve as a forum for sharing strategy and ideas with attorneys nationwide and worldwide who are seeking to use legal action to promote progress on reducing global warming;
3. “Educate members of the bar and the public regarding industry's potential liability for global warming injuries by participating in legal symposia, publication of articles and similar activities; and
4. “Undertake such additional legal work that will further CSI's mission of combating global warming and promoting clean energy solutions.”

Matt Pawa worked through his law firm at the time, Pawa Law Group P.C., to mount the project's cases against companies in the energy industry.³ In 2004, GWLAP joined the attorneys general of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin and the New York City to file an initial tort case against the American Electric Power Company and five other electric utility companies.⁴ It was the first climate change case resting on the theory of public nuisance—a claim that argues that the public (as opposed to any number of individuals) suffered a harm as a result of an unreasonable activity that interferes with a public right.⁵ The lawsuit asserted that this public nuisance was caused in part by the greenhouse gas emissions of the utilities named in the lawsuit and that a court should remedy the situation by imposing judicially-created limits on the utilities' emissions.

The case, generally known as *AEP v. Connecticut*, eventually went to the U.S. Supreme Court, which issued a unanimous decision in favor of the utilities. In 2011, the Court, in an opinion authored by Justice Ginsburg, explained that responsibility for addressing climate change

should rest with Congress and federal agencies, and that there was no room for a “parallel track” of public nuisance litigation under the federal common law theory at issue. Despite this repudiation from the Supreme Court, GWLAP and Pawa did not end their pursuit to make the energy industry liable for climate change.

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AEP v. Connecticut was one of four climate change public nuisance cases filed at that time. GWLAP’s website claims involvement in one of these other cases—*Native Village of Kivalina v. ExxonMobil Corp.*—a case filed in 2008 that targeted a few dozen oil, gas and other energy manufacturers.⁶ GWLAP does not appear on any of the court documents. Matt Pawa and Pawa Law Group P.C. are listed as counsel for the plaintiffs.⁷

In this case, the Native Village of Kivalina and the City of Kivalina, both located in the state of Alaska, relied on a variation of the public nuisance theory put forth in *AEP v. Connecticut*. According to the plaintiffs, energy manufacturers and their products’ GHG emissions had contributed to global warming and, therefore, should be responsible for the impacts of climate change on their communities, namely the melting of the ice barrier that had protected the city and village from storms and erosion. The plaintiffs argued that Kivalina’s inhabitants had to move their communities to a different part of the state to avoid erosion into the Arctic Ocean and that these companies should pay the hundreds of millions of dollars necessary for this relocation.⁸

Pawa’s attempt to use a public nuisance argument against energy manufacturers in Kivalina was rejected. First, Senior District Judge Sandra Brown Armstrong of the Northern District of California granted the energy manufacturers’ motion to dismiss the case. According to Judge Armstrong, responsibility for climate change involved a political, not a judicial question, making it improper to adjudicate in a court of law. She also found that the plaintiffs lacked standing to “pursue their global warming claims under a nuisance theory on the ground that their injury is not ‘fairly traceable’ to the conduct of the Defendants.”⁹

Pawa’s appeal to the Ninth Circuit similarly failed when a three-judge panel unanimously upheld Judge Armstrong’s opinion.¹⁰ The court concluded, “If a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in another form.” The U.S. Supreme Court declined to hear the case when appealed in 2013.¹¹

GWLAP eventually disbanded. Financial records indicate that it stopped receiving contributions in 2016. The following year, Hagens Berman Sobol Shapiro acquired Matt Pawa’s law firm in order to “double down” on its environmental law practice.¹²

Operating through a nonprofit provided Pawa with the financial latitude to work on these highly speculative cases on a contingency fee basis, while preserving the potential for his law firm to profit from successful litigation. All told, GWLAP received at least half a million dollars from major philanthropies such as the Rockefeller Brothers Fund, Wallace Global Fund, Tides Foundation and Energy Foundation—organizations that would later be instrumental financial backers for other groups involved in climate tort litigation.¹³

Although GWLAP no longer exists, Pawa is still a prominent figure in the litigation. A key difference, though, is that more than a decade after his first climate-related lawsuit against the energy industry failed, Pawa faces more competition from other attorneys pursuing climate tort litigation.

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Litigation from Multiple Angles: Well-Supported Non-profits

GWLAP’s dissolution created opportunities for other nonprofit organizations to pursue climate tort litigation. Groups like the Niskanen Center, EarthRights International and the Conservation Law Foundation, all of which share similar funders and objectives, began working with other nonprofits and private law firms to pursue climate change tort litigation, this time focusing solely on energy manufacturers.

NISKANEN CENTER

The Washington, D.C.-based Niskanen Center launched in 2015 as a libertarian think tank, but stopped identifying with libertarianism three years later.^{14,15} Niskanen has received funding from philanthropies engaged in environmental advocacy such as the Hewlett Foundation and the Open Society Foundation.¹⁶ Niskanen also received a \$200,000 grant “for its climate program” in February 2018 from the Rockefeller Brothers Fund.¹⁷

The grant from the Rockefeller Brothers Fund was well-timed. In April 2018, the Niskanen Center joined with EarthRights International and the Denver-based Hannon Law Firm as counsel for the City and County of Boulder and San Miguel County in Colorado in filing a public nuisance lawsuit against ExxonMobil and Suncor Energy, a Canadian oil producer. The lawsuit seeks to blame these two companies for local climate change injuries and demanded that the two energy manufacturers pay for local infrastructure projects related to climate change. In an effort to validate the rationale for their claims, the Colorado communities allege that these companies knew about the risks of burning fossil fuels and continued to produce and sell

fossil fuels anyway.¹⁸ This and the other climate change lawsuits also acknowledge that risks associated with climate change were widely studied and known, including by U.S. government agencies, such as NASA, and international bodies.

The Niskanen Center's Chief Counsel, David Bookbinder, is one of the attorneys who is representing the plaintiffs in the Colorado litigation.¹⁹ Like Pawa, Bookbinder has a long history with climate tort lawsuits. The Sierra Club had been a plaintiff in *AEP v. Connecticut* when Bookbinder was the nonprofit's Chief Climate Counsel. Also, in 2017, prior to his work on the Colorado case, Bookbinder wrote several articles discussing other climate tort lawsuits, including the lawsuits San Francisco and Oakland had brought against five oil and gas companies to pay for building sea walls and other infrastructure projects they said were needed to protect the cities from sea level rise. In September 2017, he wrote a blog post for the Niskanen Center that fleshed out details of the Oakland lawsuit, and in a December 2017 Vox editorial, he said that he had "been consulting with lawyers working on the nuisance cases."^{20,21}

EARTHRIGHTS INTERNATIONAL

EarthRights International was founded in the 1990s by two lawyers and a human rights activist with the mission of prosecuting human rights abuses. The nonprofit describes itself as specializing in "legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns."²²

ERI is connected with wealthy philanthropies. Its board members include Kavita Ramdas, a Rockefeller Brothers Fund trustee, and Carroll Muffett, an activist who is president of the Center for International Environmental Law and a board member of the Climate Accountability Institute.^{23,24}

ERI has received nearly \$1 million from the William and Flora Hewlett Foundation since March 2016 and receives support from the Oak Foundation, a Swiss philanthropy that has committed \$100 million to its climate justice initiative.^{25,26}

To date, ERI's main involvement in climate tort litigation has been through the lawsuit brought by Boulder County, San Miguel County and the City of Boulder. It also attempted to convince Fort Lauderdale, Florida, to pursue a climate tort lawsuit against energy manufacturers.²⁷ ERI's General Counsel Marco Simons met with the Fort Lauderdale City Commission to pitch the municipality on bringing a lawsuit against energy manufacturers to pay for climate change damages.²⁸ Simons also reportedly participated in closed-door meetings with city attorney Alain Boileau, scheduled by Seth Platt, a registered lobbyist for the Institute for Governance & Sustainable Development.^{29,30} ERI was ultimately unsuccessful in its attempt to influence Fort Lauderdale to pursue litigation.

CONSERVATION LAW FOUNDATION

The Conservation Law Foundation is an environmental advocacy nonprofit based in Boston. CLF has focused on trying to generate climate change litigation in New England.

CLF pursued litigation over damages for climate change starting in 2016, which is earlier than some of the other nonprofit organizations. That year, the organization brought a lawsuit against ExxonMobil

for allegedly engaging in a campaign to discredit climate change, thereby endangering people and their communities.³¹ However, at the core of the case was a complaint that the company hadn't sufficiently prepared an export terminal in Everett, Massachusetts for the effects of climate change.³² Likewise, in 2017, CLF filed a similar lawsuit against Shell Oil Company, alleging that it had not complied with the Clean Water Act when building a fuel terminal in Providence, Rhode Island.³³

In its litigation against ExxonMobil, CLF cited stories from *InsideClimate News* and the *Los Angeles Times* as evidence that ExxonMobil knew about climate change in the 1970s, yet did nothing to try and mitigate its effects. Focusing on this point, rather than the Everett facility proved to be a mistake. As indicated, climate change was a topic of wide discussion at that time, including by high-ranking U.S. government officials. U.S. District Court Judge Mark Wolf dismissed CLF's suit in part and ordered the group to file an amended complaint focusing on any "imminent" risks to the facility. Judge Wolf made clear that "plaintiff does not have standing for injuries that allegedly will result from rises in sea level, or increasing in the severity and frequency of storms and flooding, that will occur in the far future, such as in 2050 or 2100."³⁴ Once again, climate liability arguments fell short.

Private Law Firms Chase Profit in Climate Litigation

By 2016, GWLAP had all but disappeared, replaced by these three well-funded nonprofits. None of these organizations, however, had gained a foothold in their lawsuits against energy manufacturers. At the same time, Matt Pawa continued pursuing litigation against these companies as a partner for the Seattle-based law firm Hagens Berman Sobol Shapiro.

Becoming a partner at Hagens Berman and co-chair of the firm's environmental practice was a natural fit for Pawa. Steve Berman, co-founder of Hagens Berman, had also been counsel in *Kivalina*, alongside Pawa.

Steve Berman built his law practice around class action and government contingency fee litigation. He represented Washington, Arizona, Illinois, Indiana, New York, Alaska, Idaho, Ohio, Oregon, Nevada, Montana, Vermont and Rhode Island on a contingency fee basis in suing the tobacco industry in the 1990s, which collectively resulted in a \$206 billion settlement.³⁵ As Berman remarked in an interview with *Vice*, "Imagine if I could get ten or 15 cities to all sue and put the same pressure on the oil companies that we did with tobacco companies and create some kind of massive settlement."³⁶

Berman's experience bringing government contingency-fee litigation against tobacco companies may have made his practice even more appealing to Pawa, who had already started trying to create a connection between climate tort litigation and tobacco litigation. In 2012, Pawa presented at a meeting in La Jolla, California, where scholars and lawyers discussed how the federal Racketeer Influenced and Corrupt Organizations Act had been used against the tobacco industry and might be used against energy manufacturers.³⁷ Pawa's presentation outlined how the litigation tactics

that eventually brought tobacco companies to the settlement table could be used against energy manufacturers, regardless of the legal merits of the claims.

Four years after the La Jolla conference, Pawa presented about environmental litigation to attorneys general from New York, Vermont and Illinois alongside Sharon Eubanks, the leader of the U.S. Department of Justice's investigation of the tobacco industry under RICO.³⁸ This wasn't Pawa's only meeting seeking to recruit state attorney general allies. In February 2016, philanthropist Wendy Abrams contacted Illinois Attorney General Lisa Madigan's scheduler to set up a meeting for Pawa, Sharon Eubanks and Steve Berman.³⁹ Pawa and Berman made their collaboration public the next year with an evolved strategy to sue energy manufacturers, and it would soon be on display on the West Coast.

On September 20, 2017, the cities of San Francisco and Oakland filed separate climate tort lawsuits against BP, Chevron, ConocoPhillips, ExxonMobil and Shell. The lawsuits allege that these five companies' products caused the public nuisance of global climate change and seek to make them pay for seawalls and other infrastructure projects to guard against rising sea levels.⁴⁰ The two cities hired Hagens Berman, specifically Pawa and Berman, to represent them on a contingency-fee basis.⁴¹ The arrangement stipulated that if Hagens Berman successfully obtained monetary damages from the energy manufacturers, the firm would be entitled to 23.5 percent of the cities' recovery.⁴²

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This wasn't the only contingency-fee case in which Hagens Berman was engaged. In January 2018, Hagens Berman was hired by the New York City in its case against the same five energy companies on a contingency-fee basis, though the amount of the contingency fee remains undisclosed.⁴³ Likewise, the firm also secured a 17% contingency fee with King County, Washington, to represent the municipality in its public nuisance climate change lawsuit against energy producers filed in May 2018.⁴⁴ Reports have been written on their efforts to contact and recruit local public officials for this litigation.⁴⁵

The Same Arguments Attract New and Varied Plaintiffs

The Oakland and San Francisco lawsuits were filed separately in state court but have since been consolidated in federal court. Federal District Judge William Alsup determined that the cases belonged in the federal judiciary, following requests from the defendants to move the cases to federal court.⁴⁶ By order of Judge Al-

sup, on March 21, 2018, both sides presented in a first-of-its-kind “science tutorial” on the causes and impacts of climate change before the court. During another hearing, on May 24, 2018, Judge Alsup strongly pushed back against the cities' argument that fossil fuels are a public nuisance saying, “If we didn't have fossil fuels, we would have lost [World War II] and every other war. Planes wouldn't fly. Trains wouldn't run. And we'd be back in the Stone Age.”⁴⁷

Fifteen attorneys general, including those from Colorado, Texas, Kansas and Oklahoma, supported the manufacturers' motion to dismiss the case through an amicus brief, which argued that “Plaintiffs are attempting to export their preferred environmental policies and their corresponding economic effects to other states. Allowing them to do so would be detrimental to state innovation and regional approaches that have prevailed through the political branches of government to date.”⁴⁸

The U.S. Department of Justice also supported dismissal of the case, using similar arguments that had maintained that GHG regulation was within the purview of the executive and legislative branches, not the judiciary. As it wrote in its amicus brief,

“The Cities' theory of liability would grant virtually every individual, organization, company, or government who can allege injury from climate change a claim that could be leveled against a multiplicity of defendants...Each successive court would be required to make still more difficult predictive judgments in determining whether and to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change...To decide this case would also intrude impermissibly on the function of the political branches to determine what level of greenhouse gas regulation is reasonable...Such a sensitive and central determination is appropriately vested in branches of the government which are periodically subject to electoral accountability.”⁴⁹

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On June 25, 2018, Judge Alsup ruled that regulating GHGs is beyond the scope of the judicial system.⁵⁰ In the dismissal, Judge Alsup accepted the science behind global warming but determined that the issue of climate change is one that can only be solved by executive and legislative action. One month later, on July 27, Judge Alsup dismissed the lawsuits for lack of personal jurisdiction, ruling that the cities failed to prove their alleged injuries would not have occurred if it were not for the energy companies' California-based operations.⁵¹

Pawa and Berman, though, were not the only lawyers to see opportunity in California. Hagens Berman's competitor, Sher Edling LLP, had pitched San Francisco on climate litigation in July 2017, and San Francisco and Oakland cut ties with Hagens Bergman and hired Sher Edling in November 2018 to file their appeal of Judge Alsup's ruling. The appeal was filed in the U.S. Court of Appeals for the Ninth Circuit on March 13, 2019.^{52,53}

Sher Edling is led by Vic Sher, a well-known environmental lawyer. Between 1986 and 1997, Sher worked for the Sierra Club Legal Defense Fund (now known as Earthjustice), serving as president from 1994 to 1997.⁵⁴

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During this time, Sher also began strengthening his political and communications strategy to support litigation. In 1992, he was awarded a Pew Foundation Fellowship of \$150,000 to help the Sierra Club Legal Defense Fund create new departments of political strategies and communications.⁵⁵ In 2003, Sher entered private practice, co-founding his own firms, Sher Leff LLP and, later, Vic Sher Law.⁵⁶

In 2016, Sher founded a new private practice with Matt Edling, a lawyer who was previously a partner at Cotchett, Pitre & McCarthy, a San Francisco law firm with significant experience filing high-dollar class actions against accounting firms and banks.^{57,58} This newly-minted law firm, Sher Edling, quickly began pitching counties and municipalities across California to take action against energy manufacturers.

In July 2017, the firm filed separate lawsuits for Marin County, San Mateo County and the City of Imperial Beach against 37 major fossil fuel producers, seeking to blame them for climate change impacts, alleging public nuisance, negligence, trespass and seeking undisclosed damages.⁵⁹ In the cases, the municipalities charge that the companies have created a public nuisance by producing and marketing a product that emits GHGs when combusted.

In December 2017, Sher Edling filed a similar lawsuit on behalf of the County and City of Santa Cruz against 29 oil, gas and coal companies, seeking to make them pay for the impacts of climate

change and reparations for natural disasters.⁶⁰ A few weeks later, Sher Edling also filed a lawsuit on behalf of the City of Richmond, California against the same 29 oil and gas companies, with the complaint that extracting fossil fuels and promoting their use led to rising sea levels.⁶¹ In July 2018, Sher Edling filed a similar lawsuit on behalf of Baltimore, alleging that 26 energy manufacturers “had violated Maryland laws, including its consumer protection laws.”⁶² Four months later, the Pacific Coast Federation of Fishermen's Associations filed a lawsuit against some 20 energy manufacturers, seeking to make them pay for the harm global warming had caused California's fisheries. Sher Edling is representing the plaintiff in that case.⁶³

To date, Sher Edling has filed every climate lawsuit in state court.

In addition to San Francisco and Oakland, Hagens Berman's case on behalf of New York City was also dismissed last year. Judge John Keenan, presiding over the New York City case, used a familiar argument in his dismissal: climate change is an issue that should be handled by the executive and legislative branches. As he stated “The serious problems caused [by climate change] are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government.”⁶⁴

Meanwhile, Hagens Berman's case on behalf of King County, Washington received an order to stay proceedings until San Francisco and Oakland's appeal receives a decision, given the similarities between the cases.⁶⁵ This makes the outcome of Hagens Berman's case in King County dependent on Sher Edling's success in the San Francisco and Oakland appeal.

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— Judge John Keenan.

If They Aren't Winning, What Are Their Goals?

Climate tort litigation and the effort to recruit additional governments to file lawsuits are still ongoing in many states and municipalities across the United States. However, every court that has considered the legal merits of these claims has dismissed them. Indeed, federal judges from California to New York have ruled that selling and promoting energy products is not a liability-inducing event.

Also, as Judge Alsup pointed out, litigation is not an effective nor fair way to address climate change. These are products that people across the globe – including the very cities filing these lawsuits – rely on to power their homes, businesses and communities. In the end, these lawsuits will do nothing to address climate change or its root causes. Collaborating with manufacturers to innovate new energy technologies is the only way to ward off global climate change and mitigate its impacts.

This is the first in a series of chapters that will explore other components of the climate litigation campaign and how it has grown into a well-funded and well-organized group of nonprofits and law firms. Many of these groups will stand to benefit from protracted trials and campaigns that allow donations to continue flowing in, even if they ultimately lose.

Chapter Two:

The Complex Web of Philanthropies, Researchers and Nonprofits Supporting Litigation

The campaign to impose liability on energy manufacturers for climate change impacts is global, well-funded and multi-faceted. It is more than just a few law firms representing counties, cities and states. Far from a David-versus-Goliath endeavor, this effort is being waged by a coordinated network of individuals, nonprofit organizations and academics, and is backed by some of the most powerful private funders in the United States. The next two chapters of *Beyond the Courtroom* explore some of the behind-the-scenes players who are driving this sophisticated campaign.

The plaintiffs' law firms, which were discussed in Chapter One, are relying on this extensive outside network. Academics, foundations and nonprofits are assisting them with the legal research needed for their lawsuits, helping to generate media attention for the underlying issues and attempting to bring "outside" credibility to this liability campaign—all while trying to maintain the façade of an organic, grassroots movement.

Introducing the “Billionaire’s Club” Funding Climate Litigation

The financial engine generating climate litigation against energy manufacturers has been well-documented. In 2014, the minority staff for the United States Senate Committee on Environment and Public Works released a report detailing how a few powerful people—who they termed the “Billionaire’s Club”—and the foundations they fund are driving “the environmental movement” and have spread money around to create multiple sources of seemingly independent support for their climate agenda.⁶⁶

The report summarizes these efforts as follows:

“[T]heir tax-deductible contributions secretly flow to a select group of [environmental activists] who are complicit and eager to participate in the fee-for-service arrangement to promote shared political goals... Through these arrangements, the Billionaire’s Club gains access to a close-knit network of likeminded funders, environmental activists, and government bureaucrats who specialize in manufacturing phony ‘grassroots’ movements.”⁶⁷

The report identified several foundations known to fund these efforts including: the Children’s Investment Fund Foundation, Energy Foundation, MacArthur Foundation, Oak Foundation, Rockefeller Brothers Fund, Rockefeller Family Foundation, Sustainable Markets Foundation, Tides Foundation, Wallace Global Fund and William and Flora Hewlett Foundation. To be sure, these organizations also fund many

other types of activities, from arts and culture, to economic and social justice programs. They also fund important innovations that, unlike litigation, can drive the technological and public policy solutions needed to mitigate climate change. *Beyond the Courtroom* focuses on these groups’ efforts to fund the climate liability campaign.

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The campaign’s funders can generally be divided into two types of foundations—private and public. Private foundations are often established with funds from a single source or small group of identified sources, such as a family, and have significant discretion over how the funds are to be distributed and used.⁶⁸ The 2014 minority staff report found that these foundations, “employ a ‘prescriptive grantmaking’ technique wherein they seek beneficiaries whose actions and work fit the agenda of the foundation and its donors.”⁶⁹

Public foundations are not required to disclose their donors, making calls for funding transparency at the business community highly ironic. One such foundation, the Tides Foundation, has been described by the Capital Research Center as “the leading platform for laundering away ties between wealthy donors and the radical causes they fund—while generating hundreds of new organizations along the way.”⁷⁰

As discussed below, the lawyers filing these lawsuits are receiving funding and other support from these organizations to recruit plaintiff localities to wage climate litigation. These arrangements raise serious questions: Should the plaintiffs’ attorneys disclose these payments to the courts? If the lawyers are being paid to bring the lawsuits, why do they also need huge contingency fees at the expense of the solutions they are purportedly seeking? Also, what do we know about any ulterior business or other motives these funders—many of whom remain anonymous—might have in trying to undercut the specific companies named in this litigation?⁷¹ Shouldn’t the public know whose interests their leaders are advancing by signing up for these lawsuits?

The Long-Standing Effort to Fund Climate Tort Litigation

Each nonprofit is required to submit a Form 990 to the Internal Revenue Service to retain their tax-exempt status. In addition, many philanthropic organizations maintain their own online grant databases. Analysis of these sources reveals large and conveniently timed financial contributions to the organizations representing the plaintiffs in many of the climate tort lawsuits. The organizations discussed in Chapter One—namely the Global Warming Legal Action Project, Niskanen Center, EarthRights International and the Conservation Law Foundation—have received millions of dollars from these large philanthropies.

During its tenure, GWLAP received nearly \$900,000 from organizations including the Wallace Global Fund, the Rockefeller Brothers Fund, the Nathan Cummings Foundation, the Energy Foundation, and the Tides Foundation.^{72,73,74,75} Readers will recall from Chapter One that Matt Pawa, an early advocate for climate tort litigation, founded GWLAP, enabling his private law firm to pursue cases with resources backed by these private donations. These donations coincided with the filing of Pawa's major climate tort cases.

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Specifically, in 2004 when Pawa served as counsel on the first climate change tort lawsuit—*AEP v. Connecticut*—GWLAP received at least \$175,000 from RBF and the Enylst Fund, a Tides Foundation-affiliate.^{76,77} Between 2010-2011, GWLAP received over \$500,000 from the Nathan Cummings Foundation, RBF, Tides Foundation and the Energy Foundation, while Pawa was working on *Kivalina v. ExxonMobil Corp.* Most recently, GWLAP took in at least \$150,000 from RBF and the Wallace Global Fund in 2016 for “support for work holding liable the corporations most responsible for the rapidly changing climate and its impacts on people and property.”^{78,79} Just one year later, Pawa filed climate lawsuits on behalf of the cities of Oakland, San Francisco and New York City.⁸⁰

Matt Pawa isn't the only plaintiffs' attorney who has received monetary support from powerful foundations. The Niskanen Center has received at least \$3.37 million from the William and Flora Hewlett Foundation, RBF and the Energy Foundation since 2015.^{81,82,83,84} These donations included a \$300,000 contribution from the Hewlett Foundation in 2017 for Niskanen's “climate policy and litigation program,” and a \$200,000 contribution from RBF for its “climate program.” The latter donation came just two months before Boulder County, the City of Boulder and San Miguel County filed their climate lawsuit, on which the Niskanen Center's David Bookbinder is listed as counsel.^{85,86}

ERI receives similar gifts. Since March 2016, the William and Flora Hewlett Foundation has donated \$1.5 million to ERI.⁸⁷ Additionally, ERI has received more than \$1.4 million from a foreign nonprofit called the Oak Foundation, a Swiss philanthropy that has committed \$100 million to its climate justice initiative and is bound by little to no American oversight.^{88,89} Both organizations are listed among ERI's “institutional funders,” alongside RBF, the MacArthur Foundation, the Tides Foundation, the Wallace Global Fund and the Open Society Foundation.⁹⁰

CLF also receives similar support. The William and Flora Hewlett Foundation, RBF and Oak Foundation have donated more than \$1.4 million to CLF since 2011.^{91,92,93} In 2018, CLF received an additional \$2.4 million from the Barr Foundation.⁹⁴ Despite receiving millions of dollars from these large funders, CLF features only local individuals on its website's donor page.⁹⁵

“ERI has received more than \$1.4 million from a foreign nonprofit called the Oak Foundation, a Swiss philanthropy that has committed \$100 million to its climate justice initiative and is bound by little to no American oversight.”

Direct Coordination Between the Litigation and Activists Supporting the Lawsuits

Some nonprofits are more public about the support they provide to the climate litigation campaign. For example, the Wallace Global Fund dedicates an entire section of its website to promoting climate lawsuits against manufacturers, calling the legal grounds for fossil fuel industry liability “compelling.”⁹⁶ In addition to contributing at least \$420,000 to ERI and \$120,000 to GWLAP since 2013, the Wallace Global Fund highlights its grants to Climate Accountability Institute, Union of Concerned Scientists, Center for International Environmental Law, Greenpeace and InsideClimate News.^{97,98,99} Each of these organizations are involved in the broader climate litigation movement, providing research, public relations support and strategic counsel to help recruit support for the litigation.

In January 2016, the Rockefeller Family Fund and the Rockefeller Brothers Fund hosted a strategy session in their shared New York City office to discuss the “Goals of the Exxon Campaign.”¹⁰⁰ Attendees included Matt Pawa; representatives from the Conservation Law Foundation and the Energy Foundation; Sharon Eubanks, former head counsel for the U.S. Department of Justice in the tobacco litigation; and Carroll Muffett, President and CEO of CIEL.¹⁰¹

According to a memo obtained by the *Washington Free Beacon*, the strategy session focused on coordinating tactics for various groups to target “industry associations,” as well as how to coordinate their campaigns targeting state attorneys general and the U.S. Department of Justice.¹⁰² They also discussed “a rapid response and coordination structure to react to new research, revelations

and legal developments as they happen,” including a “war room, joint social media, and coordinate organizing and media pushes” from various organizations.

The 2016 strategy session was not the first such meeting of its kind. In 2012, UCS and CAI convened a group of environmental activists, lawyers—including Matt Pawa—and nonprofit organizations in La Jolla, California.

Both UCS and CAI support the climate liability campaign through promotional events and research. For this work, they have received generous donations from the major funders discussed above. UCS has received more than \$11 million from the MacArthur Foundation, Wallace Global Fund, William and Flora Hewlett Foundation, Oak Foundation and the “Rockefeller Funds” since 2002.¹⁰³ Similarly, CAI has received at least \$327,000 from RBF and the Wallace Global Fund since 2013.¹⁰⁴

The La Jolla conference provided a roadmap for the strategies and arguments this interconnected network of philanthropists, academics, activists and lawyers would put forth in their effort to target energy manufacturers in court. Their primary objective was to see if they could “use the lessons from tobacco-related education, laws, and litigation to address climate change.”¹⁰⁵ For example, they discussed strategies for obtaining internal fossil fuel company documents that “demonstrate companies’ knowledge that the use of their products damages human health and well-being by contributing to dangerous anthropogenic interference with the climate system.”¹⁰⁶ Attendees also discussed the utility of identifying a sympathetic state attorney general who could subpoena these internal company documents and “weighed the merits of legal strategies that target major carbon emitters, such as utilities, versus those that target carbon producers.”¹⁰⁷

Since this meeting, many of these efforts have come to fruition: state attorneys general have launched investigations and subpoenaed documents from energy manufacturers, congressional hearings have been scheduled and the media has regularly compared this litigation to the tobacco litigation in the 1990s.

Academic Support Supplied by Similar Private Funding Resources

“The La Jolla conference provided a roadmap for the strategies and arguments this interconnected network of philanthropists, academics, activists, and lawyers would put forth in their effort to target energy manufacturers in the courts.”

Academics are also assisting in the climate liability campaign by commissioning research, providing legal and consulting assistance, generating publicity and filing amicus briefs. Many of these academics are affiliated with some of the most prestigious universities in the nation. Although they may seek to leverage their schools’

prestige and their presumed independence, they are often tied to the litigation’s participants, as well as some of its main funders.

The School of Journalism and Sabin Center for Climate Change Law at Columbia University

Academics associated with Columbia University have contributed both research and media support to the climate liability campaign through the school’s law and journalism programs. In 2015, graduate fellows in the Columbia University School of Journalism’s Energy and Environment Reporting Project wrote a series of articles on ExxonMobil published in the *Los Angeles Times*.¹⁰⁸ The pieces examined documents relating to the company’s climate science research. It was later disclosed that this project was funded by the Rockefeller Brothers Fund (RBF), Rockefeller Family Fund (RFF), Energy Foundation, and Open Society Foundation.^{109,110,111}

“Academics are also assisting in the climate liability campaign by commissioning research, providing legal and consulting assistance, generating publicity, and filing amicus briefs.”

This project also coincided with a series of articles by *InsideClimate News*, which were also funded by RFF.¹¹² These coordinated efforts laid the foundation for a social media campaign that became known as “#ExxonKnew” and were the catalyst for then-New York Attorney General Eric Schneiderman and current Massachusetts Attorney General Maura Healey to launch investigations into ExxonMobil.^{113,114,115}

The Sabin Center for Climate Change Law, which is housed at Columbia, is funded by environmentalist Andrew Sabin and run by Michael Gerrard and Michael Burger.^{116,117,118} Gerrard is a vocal proponent of the climate lawsuits targeting manufacturers. A few weeks before the School of Journalism released its series, Gerrard proposed that “the attorney general of New York could subpoena the oil companies for what they know deep down about climate change and the perils to their business and hiring phony scientists and all kinds of things including emails.”¹¹⁹

Emails obtained through a public records request reveal that Gerrard was asked to help generate ideas for state and federal RICO lawsuits against fossil fuel companies.¹²⁰ He publicly praised Schneiderman’s decision to investigate ExxonMobil, saying it could “yield a great deal of info that would be pertinent to whether the federal government” could pursue a RICO investigation.¹²¹ Days later, records show that Gerrard coordinated with Schneiderman’s office, asking Lem Srolovic, Bureau Chief of the Environmental Protection Bureau in the New York attorney general’s office, about documents related to the inquiry.¹²²

Burger is also a vocal supporter of climate litigation. He has argued that the “legal underpinning” exists for the theories in the litigation, but has also acknowledged that the “lawsuits are, without question, pushing the envelope of nuisance law and tort law.”^{123,124} In November 2018, the Sabin Center filed an amicus brief in support of New York City’s climate lawsuit.¹²⁵

The Emmett Environmental Law and Policy Clinic at Harvard University

Harvard University’s law clinic has also provided multiple levels of support for climate tort litigation. For example, it has helped connect climate change liability activists to sympathetic state attorneys general, supplied amicus briefs in support of the litigation and produced research to give credence to the “Exxon Knew” narrative. Harvard’s Emmett Environmental Law Clinic was created by a \$5 million grant from Dan Emmett, a real estate developer and environmentalist.¹²⁶

The clinic provides a forum for state attorneys’ general staff, academics and private attorneys to “convene and learn” about various aspects of climate tort litigation.¹²⁷ It has also hosted workshops and worked closely with nonprofits on this effort.¹²⁸

In May 2016, the clinic partnered with the Union of Concerned Scientists on a climate workshop that included La Jolla alumni such as Harvard University professor Naomi Oreskes, UCS Director of Climate and Policy Peter Frumhoff and former chief counsel for the U.S. Department of Justice in the tobacco litigation Sharon Eubanks, among others.¹²⁹ This workshop offered a unique opportunity to connect “climate science colleagues,” “prospective funders” and “senior staff from attorney’s general offices” in an off-the-record meeting to discuss climate liability.¹³⁰

“The Clinic provides a forum for staff of state attorneys general, academics and private attorneys to ‘convene and learn’ about various aspects of climate liability litigation.”

In a blog post describing the event, UCS noted, “The meeting provided senior staff from state attorneys general offices in nearly a dozen states with an opportunity to hear from leading climate scientists, legal scholars, historians, and other experts on topics including climate attribution research, lessons from tobacco litigation, and the potential role of state consumer protection laws.”¹³¹ This blog was posted only after attendees received open records requests inquiring about the meeting.¹³²

Harvard University professor Naomi Oreskes and postdoctoral researcher Geoffrey Supran are two of the of the most consequential academics involved in the climate liability campaign. Oreskes has primarily focused on developing a narrative that manufacturers should be liable for climate change because they tried to mislead the public on climate issues, comparing the actions of energy producers to those of tobacco companies. In 2010, she authored the book *Merchants of Doubt: How a Handful of Scientists Obscured*

the Truth on Issues from Tobacco Smoke to Global Warming.¹³³ Oreskes later shared this research at the La Jolla conference, which she helped to organize through her involvement with the Climate Accountability Institute.¹³⁴ Angela Anderson of UCS said the research “could potentially be useful as part of a coordinated campaign” to associate culpability with the production of energy.¹³⁵ Matt Pawa “thought the information could prove quite useful in helping to establish joint and several liability in tort cases.”¹³⁶

Since then, Oreskes also worked with Richard Heede, co-founder and director of CAI, to publish academic papers that “placed the responsibility for climate change at the feet of major fossil fuel companies.”¹³⁷ In 2015, she also met with staff from the New York attorney general’s office alongside Sharon Eubanks to discuss potential RICO lawsuits against energy manufacturers.^{138,139}

In 2017, Oreskes and Supran published a study alleging that ExxonMobil misled the public on climate change.¹⁴⁰ The Oreskes-Supran study received criticism for manipulating data and cherry-picking materials to promote their predetermined narrative against the company.¹⁴¹ Their study included “a variety of fundamental errors” and was “unreliable, invalid, biased, not generalizable, and not replicable,” according to Dr. Kimberly Neuendorf, a professor at Cleveland State University, whose research method was utilized in the study.¹⁴² The researchers’ study was also funded in part by the Rockefeller Family Fund.¹⁴³

In January 2019, Oreskes and Supran, along with other climate scientists, signed an amicus brief supporting the climate tort lawsuits brought by municipalities in California against several energy manufacturers.¹⁴⁴ The brief’s other signers include Ben Franta, a Stanford Law and PhD student studying “the history of climate science and fossil fuel producers,” and the Center for Climate Integrity, which launched in 2017 to support “climate cases aimed at holding fossil fuel companies and other climate polluters liable.”^{145,146} The counsel listed on the brief is Keller Rohrbach LLP, a law firm hired by Seattle to investigate the possibility of filing a climate tort lawsuit of its own.¹⁴⁷

“Their study included ‘a variety of fundamental errors’ and was ‘unreliable, invalid, biased, not generalizable, and not replicable,’ according to Dr. Kimberly Neuendorf, a professor at Cleveland State University, whose research method was utilized in their study.”

Supran has also worked internationally to advance climate litigation. In August 2017, he served as an expert witness for a climate change inquiry conducted by the Philippines Commission on Human Rights, which is investigating whether major energy producers could be found guilty of human rights violations for their contributions to climate change.¹⁴⁸ He has also provided testimony to the European Parliament on climate change and climate science in an effort to convince policymakers to take actions against energy manufacturers.¹⁴⁹

The Emmett Institute on Climate Change and the Environment at UCLA

In addition to funding Harvard's Environmental Law Clinic, Dan Emmett also provided a \$5 million gift to UCLA's Law School to establish the Emmett Institute on Climate Change and the Environment, and continues to donate millions of dollars to fund its operations.^{150,151}

The institute is working to advance climate litigation through two of UCLA Law's environmental programs: the Environmental Law Specialization and Frank G. Wells Environmental Law Clinic, which is described as "a vital training ground for environmental lawyering."¹⁵²

Through the work of UCLA law professors Sean Hecht, Cara Horowitz and Ann Carlson, the Emmett Institute has emerged as a vocal proponent of climate change litigation. Horowitz attended the aforementioned 2016 Harvard meeting, which convened state attorneys' general staff and environmental activists on behalf of the institute.¹⁵³ Additionally, the institute hosted a talk with Sher Edling's Vic Sher titled, "Suing Over Climate Change Damages: The First Wave of Climate Lawsuits."¹⁵⁴ Ann Carlson, who moderated the discussion, also works as a consultant for Sher Edling, advising the law firm on some of its climate change cases.¹⁵⁵

In 2018, Horowitz and Carlson partnered with the Union of Concerned Scientists to organize a discussion about the viability of locality climate lawsuits, featuring Serge Dedina, mayor of one of the first plaintiff cities, Imperial Beach; UCS Director Peter Frumhoff; and environmentalist Bill McKibben, whose organization 350.org launched the "#ExxonKnew" social media campaign.^{156,157}

The Center for Environmental Law and Policy at Yale University

In 1994, the Yale University's law school and its School of Forestry & Environmental Studies pursued a joint initiative to open the Yale Center for Environmental Law and Policy. Today, professors and advisors from all three centers are active in the climate litigation campaign, and some of their initiatives are being funded by some of the same donors supporting climate litigation.¹⁵⁸ For example, in 2017, the MacArthur Foundation donated \$850,000 to Yale's environmental and climate change communication initiatives.¹⁵⁹

“ In 2017, Naomi Oreskes and Geoffrey Supran, a postdoctoral researcher at MIT and Harvard, published a study alleging that ExxonMobil misled the public on climate change via advertorials the company published in the *New York Times* ... Their study later received criticism for manipulating data and cherry-picking advertorials to promote their pre-determined narrative against the company.”

In 2006, the law school partnered with the San Francisco City Attorney's office to establish the San Francisco Affirmative Litigation Project, which provides legal research assistance to help the Deputy City Attorney "conceive, develop, and litigate some of the most innovative public-interest lawsuits in the country—lawsuits that tackle problems with local dimensions but national effects."¹⁶⁰ In 2013, SFALP helped the city pursue a \$1.1 billion public nuisance judgment against manufacturers of old household products that were lawful at the time they were made and sold, which "broke new legal ground."¹⁶¹ Advocates of climate litigation claim this case laid the foundation for the application of public nuisance theory in the climate tort lawsuits.

“ Today, professors and advisors from all three centers are active in the climate litigation campaign, and some of their initiatives are being funded by some of the same donors supporting climate litigation.”

Today, SFALP is helping the city with its climate tort lawsuit. According to SFALP's website, Yale students are putting in "hundreds of research hours" and "have proven invaluable to the attorneys" on the city's climate case:

"SFALP students have been involved since before the case was filed, and are playing a central role in researching the legal theories with which the court and litigants will have to grapple to pursue this case." ^{162,163, 164}

“ According to SFALP's website, Yale students are putting in "hundreds of research hours" and "have proven invaluable to the attorneys" on the city's climate case.”

In addition, the law school's Rule of Law Clinic has filed amicus briefs in multiple climate change lawsuits. On November 18, 2018, the clinic filed an amicus brief in support of New York City's climate lawsuit in the U.S. Court of Appeals for the Second Circuit.¹⁶⁵ On March 20, 2019, the clinic filed an amicus brief, this time on behalf of former U.S. diplomats and government officials in San Francisco's lawsuit, which was on appeal to the U.S. Court of Appeals for the Ninth Circuit and had been merged with Oakland's lawsuit.¹⁶⁶

One of the Yale faculty members who signed these briefs is Harold Hongju Koh, an international law professor and lead instructor for the Rule of Law Clinic. Before expressing support in these two cases, Koh convinced then-Rhode Island Attorney General Peter Kilmartin to file a climate tort lawsuit seeking monetary damages from oil companies for climate change injuries in the state.¹⁶⁷ Koh

was reportedly directed to Kilmartin by Governor Gina Raimondo, Koh's former law student.¹⁶⁸

Justin Farrell, an Associate Professor of Sociology at Yale's School of Forestry & Environmental Studies, has been involved in climate change cases for several years.¹⁶⁹ In 2015, following the publishing of the "Exxon Knew" stories from InsideClimate News and Columbia University's School of Journalism, Farrell released a report suggesting that "corporate funding" to "climate counter movement" institutions was largely responsible for skepticism about climate science.¹⁷⁰ In 2019, he released a report alleging a large-scale misinformation campaign surrounding climate science by energy manufacturers and joined an amicus brief with Naomi Oreskes and Geoffrey Supran supporting the plaintiffs in *County of San Mateo v. Chevron Corporation*.^{171,172} Today, his arguments are being used as grounds for targeting these same manufacturers through litigation.

Private Research Groups Aiding Climate Litigation

University professors like Justin Farrell, Naomi Oreskes and Ann Carlson are only a few of the academics creating research to support the climate litigation campaign.

In 2014, Roland C. "Kert" Davies established the Climate Investigations Center to "monitor the individuals, corporations, trade associations, political organizations and front groups who work to delay the implementation of sound energy and environmental policies that are necessary in the face of ongoing climate crisis."¹⁷³ In his capacity with the CIC, Davies requests and obtains documents from a number of organizations in an effort to paint them as climate deniers and houses these documents on a "Climate Files" web database.¹⁷⁴

According to CIC, "Climate Files" was created in 2016 to help reporters cover the topic of climate liability.¹⁷⁵ The database received its initial funding from a grant provided by the Knight Foundation, which has given a significant amount of money to InsideClimate News.^{176,177,178} This research is also being used in the litigation; "Climate Files" is cited by plaintiffs in *County of San Mateo v. Chevron Corporation*.¹⁷⁹

Davies has long targeted the energy industry. In 2002, he established the "PolluterWatch" database for Greenpeace, from which Naomi Oreskes and Geoffrey Supran pulled *The New York Times* advertorials cited in their 2017 study.^{180,181} In 2004, Davies established "ExxonSecrets," a Greenpeace project designed to "explain the complex web of organizations, pundits, lobbyists and skeptic scientists running Exxon's campaign to deny and undermine the scientific evidence on global warming."^{182,183}

Richard Wiles, who worked with Davies at the Environmental Working Group in the 1990s, is also conducting research for climate litigation. In 2008, Wiles founded Climate Central, an organization that researches and reports on the impacts of climate change.¹⁸⁴ The organization was inspired by a series of meetings sponsored

by the Yale School of Forestry and Environmental Studies and was established with a seed grant by the Flora Family Foundation.¹⁸⁵ A representative from the organization attended the La Jolla conference in 2012 and key studies—conducted under Wiles—have since been cited in climate lawsuits filed by Sher Edling.^{186,187}

CONCLUSION

The climate litigation campaign is a sophisticated, well-resourced and multi-pronged effort supported by a cadre of large funding organizations, academics and a number of nonprofits that seek to target manufacturers with litigation for the effects of climate change. The strategies discussed at the La Jolla conference in 2012 and again, four years later, at the Rockefeller Family Fund and Rockefeller Brothers Fund headquarters in New York City have materialized into the numerous lawsuits and outreach efforts seen today.

In addition, these coordinated efforts have resulted in a number of amicus briefs in support of the litigation, countless materials cited in the lawsuits, databases that store documents as resources for litigation and outreach efforts seeking to convince public officials to investigate or sue energy manufacturers. The next chapter of *Beyond the Courtroom* will detail how nonprofit organizations, media outlets and public affairs teams – funded by the same large donors detailed throughout this chapter—are helping to coordinate messaging with the shared goal of enhancing climate tort litigation.

“ The climate litigation campaign is a sophisticated, well-resourced and multi-pronged effort supported by a cadre of large funding organizations, academics and a number of nonprofits that seek to target manufacturers with litigation for the effects of climate change.”

Chapter Three:

The Public Relations Apparatus Supporting the Climate Litigation Campaign

The climate litigation campaign is supported by a well-heeled and highly coordinated network of funders, lawyers and advocates. This chapter looks at that network's public affairs operation, detailing the organizations and media outlets that comprise the public relations arm of the campaign. Some organizations have been involved since before the 2012 La Jolla conference, though this complex web of groups continues to expand. As their campaign tactics evolve, activists are attempting to normalize the idea that suing energy manufacturers is an appropriate response to climate change to political leaders and the public.

The Nonprofit Organizations Coordinating the Climate Liability Narrative

The public relations arm of the climate litigation campaign consists of organizations, public relations firms and "media" outlets that are highly coordinated and utilize the same talking points. It is not, as they want it to appear, an organic collaboration of interested parties.

The initial champions of climate liability—the Climate Accountability Institute and the Center for International Environmental Law—have been advancing litigation and an anti-fossil fuels agenda for years, coalescing the movement ahead of the 2012 conference in La Jolla and seeding other organizations with strategists and money.

“ The public relations arm of the climate litigation campaign consists of organizations, public relations firms and 'media' outlets that are highly coordinated and utilize the same talking points. It is not, as they want it to appear, an organic collaboration of interested parties.”

CAI was founded in 2011 by climate attribution scientist Richard Heede and Harvard University professor Naomi Oreskes with the stated goal of targeting energy manufacturers as being responsible for climate change.¹⁸⁸ Rather than focus on the countries, regula-

The Foundations Funding Climate Accountability Institute

| | |
|---------------------|------------------------|
| Wallace Global Fund | \$120,000 |
| | 2013–2016 ⁱ |

| | |
|---------------------------|-------------------------|
| Rockefeller Brothers Fund | \$207,000 |
| | 2014–2019 ⁱⁱ |

The Foundations Funding Center for International Environmental Law

| | |
|---------------------|--------------------------|
| Wallace Global Fund | \$215,000 |
| | 2013–2016 ⁱⁱⁱ |

| | |
|----------------|------------------------------|
| Oak Foundation | \$1,000,000 |
| | 2014–Feb. 2016 ^{iv} |

| | |
|----------------------|------------------------|
| MacArthur Foundation | \$2,125,000 |
| | 1991–2006 ^v |

| | |
|-----------------------------------|--------------------|
| Rockefeller Philanthropy Advisors | \$25,000 |
| | 2017 ^{vi} |

tions and activities that lead to climate change, they wanted to shift the dialogue to blame the companies that manufactured and sold the energy that the world was demanding.¹⁸⁹ In 2012, CAI partnered with the Union of Concerned Scientists to convene the La Jolla conference, introducing this idea to like-minded organizations and individuals across the country.¹⁹⁰

At the conference, attendees established that they would need “credible peer-reviewed research” to bolster their attacks against energy manufacturers.¹⁹¹ Heede spearheaded this effort, compiling the Carbon Majors Database, which attempts to quantify and trace historic and cumulative carbon dioxide and methane emissions from fuel and cement producers rather than by region or activity.¹⁹² He also partnered with Oreskes and Peter Frumhoff—the director of science and policy for UCS who sits on CAI’s Council of Advisors—to write a series of articles advancing this attribution theory with respect to specific energy manufacturers, with the intention of demonstrating climate change liability.^{193,194,195,196}

CIEL was co-founded in 1989 by Durwood Zaelke, president of the Institute for Governance and Sustainable Development, and James Cameron, fellow at the Yale Center for Environmental Law & Policy.^{197,198,199} Zaelke’s IGSD is actively pressuring cities to file litigation against manufacturers, and as discussed in the last chapter of this report, academics at Yale have produced significant research for climate litigation.^{200,201} CIEL is currently led by Carroll Muffett, who is one of three CAI Board Members along with Heede.²⁰² Muffett is a vocal supporter of the climate liability campaign and attended the Rockefeller Family Fund strategy session in 2016.^{203,204}

CIEL also has close relationships with some of the lawyers pursuing climate litigation. Matt Pawa, the lead plaintiffs’ attorney for the first round of climate lawsuits filed in the early 2000s, as well as the current cases brought by New York City and King County, has served on CIEL’s Board of Trustees for years.²⁰⁵ He is joined on the board by Katie Redford, the co-founder of EarthRights International, which represents the City and County of Boulder and San Miguel County in their public nuisance climate change lawsuit. Sharon Eubanks, the former lead counsel on the RICO case against tobacco companies who attended the 2012 conference in La Jolla and the 2016 Rockefeller meeting, is also a board member.^{206,207,208}

CIEL has significantly increased its efforts to bolster climate litigation since 2015, releasing five reports specifically about climate liability. For example, in 2017, the organization authored a report titled “Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis,”^{209,210} which claims to summarize what energy manufacturers knew about climate change and how they allegedly “misled investors and the public about climate science.” The organization also extensively blogs about the lawsuits, seeking to amplify the visibility of the litigation in the public domain.²¹¹

Thus, CAI and CIEL have served as central organizers of the research, lawyers and activists that publicly support the litigation campaign.

“ Thus, the Climate Accountability Institute and the Center for International Environmental Law have served as central organizers of the research, lawyers and activists that publicly support the litigation campaign.”

The Big 4 – How Four Organizations Magnify the Climate Liability Campaign

Four organizations, in particular, have taken an aggressive public role to advance the climate liability campaign: Greenpeace, the Union of Concerned Scientists, 350.org and the Institute for Governance and Sustainable Development . To this day, they continue to be the some of the most active organizations promoting litigation against energy manufacturers. These organizations provide research, create public relations and social media campaigns and offer themselves as prominent voices and third-party validators.

| The Foundations Funding Greenpeace | |
|------------------------------------|---------------------------------------|
| Wallace Global Fund | \$125,000 2013–2016 ^{vii} |
| Hewlett Foundation | \$1,150,000 2014 ^{viii} |
| Oak Foundation | \$900,000 2017 ^{ix} |
| Rockefeller Brothers Fund | \$495,000 2003–2018 ^x |

GREENPEACE

Greenpeace was an early promoter of assigning liability for climate change to energy manufacturers. As Chapter Two of this report outlines, the organization spearheaded several anti-fossil fuels projects in the early 2000s including the PolluterWatch database and ExxonSecrets.^{212,213} Greenpeace has since continued its dedication to the climate liability movement, sending representatives to both the 2012 La Jolla conference and the 2016 Rockefeller strategy session.^{214,215}

In 2017, Greenpeace provided seemingly independent support for the litigation, releasing a statement praising Oakland and San Francisco for filing lawsuits against five energy manufacturers.²¹⁶ In 2018, the organization publicly commended Rhode Island for filing its lawsuit, reinforcing their support for targeting energy *producers*, rather than users, for climate change litigation.²¹⁷ These statements were released by Greenpeace’s Naomi Ages.

Ages, a lawyer and former legal extern for the Environmental Defense Fund, serves as a senior political strategist and public spokesperson for Greenpeace’s climate liability activism.²¹⁸ In

2015, Ages participated in a panel at the COP 21 climate conference in Paris with UCS president Ken Kimmell, Matt Pawa, Carroll Muffett and Columbia University's Michael Gerrard. The panel promoted bringing racketeering charges against energy manufacturers over climate change.²¹⁹ Shortly thereafter, she attended the 2016 strategy session at Rockefeller Family Fund headquarters.²²⁰ She now regularly provides commentary and op-eds to publicly validate the litigation campaign.²²¹

Greenpeace is also promoting the climate liability campaign internationally. In 2017, it held a press conference at the United Nations in Germany called "Climate litigation—how major polluters are now facing court."²²² The organization's international counterparts in Canada and Southeast Asia have also petitioned local officials to investigate energy manufacturers and consider legal action.^{223,224}

THE UNION OF CONCERNED SCIENTISTS

“ The Union of Concerned Scientists has been a primary actor facilitating climate litigation... it helped organize the La Jolla conference, has hosted numerous events promoting the litigation and has met with public officials behind closed doors to encourage them to sue.”

UCS has been a primary actor facilitating climate litigation. In 2007, it published *Smoke, Mirrors and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science*, which alleged that ExxonMobil had worked to "sow doubt" about climate change to the general public.²²⁵ Since then, UCS helped organize the La Jolla conference, has hosted numerous events promoting the litigation and has met with public officials behind closed doors to encourage them to sue energy companies for climate change impacts.

For example, on March 29, 2016, UCS's Peter Frumhoff joined Matt Pawa to brief state attorneys general, urging them to sue energy manufacturers over climate change.²²⁶ After this meeting, former Vice President Al Gore, then-New York Attorney General Eric Schneiderman and several other state attorneys general hosted a press conference where they said they would push for aggressive action against energy companies, including investigating their climate disclosures.²²⁷ Frumhoff also joined his UCS colleague Kathy Mulvey at a Capitol Hill forum titled "Oil Is the New Tobacco," where Mulvey explained UCS's frequent meetings with state attorneys general in an effort to generate more of these lawsuits:

*"UCS has also been involved in providing information to attorneys general who are moving into the issue on whether these companies violated any state laws in providing this information to shareholders and the public... Our chief scientist Peter Frumhoff who's actually here with me as well and he has briefed a number of the AGs and he co-convened a session with the Harvard law school back in April."*²²⁸

The Foundations Funding Union of Concerned Scientists

| | |
|---------------------------|--|
| Wallace Global Fund | \$225,000 2013–2016 ^{xi} |
| Hewlett Foundation | \$7,730,000 2002–2018 ^{xii} |
| Oak Foundation | \$1,100,000 2005–2008 ^{xiii} |
| Rockefeller Brothers Fund | \$75,000 2005–2009 ^{xiv} |
| Tides | \$135,726 2014–2017 ^{xv} |
| MacArthur Foundation | \$9,981,040 1990–2018 ^{xvi} |
| Energy Foundation | \$7,500,750 2010–2016 ^{xvii} |

UCS also amplifies the litigation campaign on public platforms. The group has a webpage detailing the many actions it has taken to support various climate lawsuits over the years.²²⁹ In addition, the organization releases statements of support after each climate lawsuit is filed, which helps provide public cover for the litigation and advances the campaign's messaging in the media from a seemingly independent voice.²³⁰

Recently, UCS commissioned a study through academics at Yale University—which, as discussed in Chapter Two, has a history of providing various levels of support for climate litigation—suggesting that energy manufacturers should pay for climate change impacts and amplifying the messaging touted by the others in the climate litigation movement.²³¹

350.ORG

350.org, which supports divestment from fossil fuel companies, turned its attention to the climate liability campaign in 2015 after the Climate Accountability Institute released Rick Heede's "Carbon

Majors Database” project.²³² That year, 350.org also released a letter calling on the U.S. Department of Justice to investigate ExxonMobil, citing the *Los Angeles Times* and *InsideClimate News* “Exxon Knew” series. This letter was co-signed by a number of individuals including the president of UCS, the executive director of Greenpeace USA and billionaire environmental funder Tom Steyer.²³³ 350.org was now in the club.

“ 350.org, which previously supported divestment from fossil fuel companies, turned its attention to the climate liability campaign in 2015 after the Climate Accountability Institute released Rick Heede’s ‘Carbon Majors Database’ project.”

Shortly thereafter, 350.org’s co-founders Bill McKibben and Jamie Henn attended the 2016 Rockefeller strategy session in New York City, which focused on tactics to “delegitimize” energy manufacturers.²³⁴ This included developing a social media and messaging campaign across the network of allied organizations.²³⁵ Two months later, 350.org launched the #ExxonKnew website and Twitter handle, turning the climate liability movement Twitter hashtag into a full-blown public relations campaign.^{236,237}

| The Foundations Funding 350.org | |
|---------------------------------|---|
| Wallace Global Fund | \$380,000 2013–2016 ^{xviii} |
| Oak Foundation | \$3,998,934 2011–2017 ^{xix} |
| Rockefeller Brothers Fund | \$1,350,000 2012–2017 ^{xx} |
| Tides | \$653,874 2012–2017 ^{xxi} |
| Rockefeller Family Fund | \$125,000 2013 ^{xxii} |

The “Exxon Knew” campaign’s website provides resources for activists, a petition for the Department of Justice and state attorneys general to investigate the company and information about campaigns in different states.²³⁸ The campaign website now lists UCS, the Center for International Environmental Law, Greenpeace USA, the Conservation Law Foundation and EarthRights International among its closest partners.

Both McKibben and Henn have become vocal supporters of climate litigation. They frequently write op-eds and tweets supporting the investigations into, and lawsuits against, energy manufacturers.^{239,240,241,242} McKibben isn’t shy about his disdain for the industry, calling energy manufacturers “big trouble” and the “zombie that won’t die.”^{243,244} In January 2018, McKibben joined Greenpeace’s Naomi Ages at New York City Mayor Bill de Blasio’s press conference where he announced that he was suing major fossil fuel producers over climate change.²⁴⁵

350.org also hosts numerous events in support of these legal efforts. For example, in December 2015, the group hosted the “Public Trial of ExxonMobil” at the COP 21 conference in Paris.²⁴⁶ Since then, they’ve hosted a number of gatherings with their closest allies, including Greenpeace USA, UCS and more recently, the Institute for Governance and Sustainable Development’s Center for Climate Integrity.^{247,248,249,250} 350.org is now squarely entrenched as a leader in the climate liability campaign.

THE INSTITUTE FOR GOVERNANCE AND SUSTAINABLE DEVELOPMENT (IGSD)

Of the “Big 4” organizations, IGSD is the most recent to join the climate liability campaign. Founded by CIEL co-founder Durwood Zaelke, IGSD has created a sophisticated public relations campaign, complete with academic research, a podcast, promotional events and a prominent social media presence.

IGSD launched this public relations campaign in August 2017 through the Center for Climate Integrity.²⁵¹ CCI is run by Richard Wiles, who served as Kert Davies’ research partner at the Environmental Working Group during the 1990s. Kert Davies is the former research director for Greenpeace and the chief architect of a number of initiatives to gather internal company documents from energy manufacturers. While CCI does not disclose all of its funders, the initiative is funded in part by a \$7 million grant from the Children’s Investment Fund Foundation. CIFI has been described by *The New York Times* as an “activist fund in Europe long before activism became a popular strategy.”^{252,253,254}

CCI’s sole mission is to support climate tort lawsuits against energy manufacturers.²⁵⁵ According to its website, CCI provides “campaign infrastructure, resources, and strategic direction” for activists promoting the concept of forcing manufacturers to pay for climate change impacts.²⁵⁶

In January 2018, the organization launched “Pay Up Climate Polluters,” a public relations campaign that encourages cities across the country to file climate lawsuits against energy manufacturers.²⁵⁷ Their website has campaign pages dedicated to states such as

“CCI provides ‘campaign infrastructure, resources, and strategic direction’ for activists promoting the concept of forcing manufacturers to pay for climate change.”

New York, California and Florida, and provides information on each of the climate tort lawsuits that have been filed to date across the country. CCI purchased billboards in Miami, pressuring the city to file a lawsuit against energy manufacturers, and coordinated the lobbying effort urging Fort Lauderdale to take similar legal action.^{258,259}

CCI also signed onto an amicus brief in support of the lawsuits filed by Sher Edling on behalf of California municipalities. Co-signers of the brief include academics highlighted in Chapter Two such as Naomi Oreskes, Geoffrey Supran and Justin Farrell, as well as the organization’s beneficiary, Ben Franta.^{260,261}

The Foundations Funding The Institute for Governance and Sustainable Development (IGSD)

Hewlett Foundation \$1,650,000
2007–2017^{xxiii}

Rockefeller Brothers Fund \$1,940,000
2004–2017^{xxiv}

CCI also hosts events across the country to promote climate lawsuits. In April 2019, CCI co-hosted an event with UCS titled, “Holding Fossil Fuel Companies Liable for the Climate Change Harms in Colorado” at the University of Colorado School of Law. The panel included David Bookbinder of the Niskanen Center and Marco Simons of ERI, the attorneys representing the Colorado communities in their climate lawsuit.²⁶² Just one week later, CCI hosted a climate litigation event at the University of Hawai’i School of Law with two other lawyers profiled earlier in *Beyond the Courtroom*: Vic Sher, lead plaintiffs’ attorney at Sher Edling LLP, and Ann Carlson, a UCLA professor and consultant for Sher Edling.²⁶³ Although these events were held at law schools, they were one-sided affairs, with no panelists to represent any alternative viewpoints.

Recently, CCI released a report and corresponding website that attempts to calculate the cost of sea level rise adaptation for dozens of communities across the United States, while also demanding that energy manufacturers pay those costs.^{264,265} According to Wiles, the Rockefeller Family Fund and MacArthur Foundation funded the study, and Wiles’ former employer, Climate Central, calculated the report projections.^{266,267,268}

In 2018, IGSD provided a grant to launch another public relations endeavor, a Wiles-produced podcast called *Drilled*.^{269,270} Hosted by Amy Westervelt, a freelance journalist who covers the climate liability campaign, the podcast promotes the narrative that energy manufacturers should be made to pay for climate change.^{271,272} Despite *Drilled*’s funding coming from IGSD, Westervelt claimed to be wary of foundation funding in the podcast’s third season, saying, “I’ve been testing out grant foundation funding and advertisement the past couple of years and honestly, it all makes me a little uncomfortable. I have a lot of mixed feelings about advertising... but it has also been my experience that foundations will try to exert influence too.”²⁷³ Among the guests to appear on *Drilled* include Oreskes, Supran, Davies, Carlson and Simons.

Covering Climate Litigation

InsideClimate News (ICN) and *Climate Docket* (CD)—formerly *Climate Liability News*—provide sustained coverage of the climate liability campaign. These organizations, along with *Drilled*, are interconnected; they share many of the same editors, writers and funders. For example, *Drilled*’s Westervelt is a contributing author for CD and wrote an ICN profile promoting Pawa’s climate litigation efforts.^{274,275}

“*InsideClimate News* and *Climate Liability News* provide sustained coverage of the climate liability campaign. These organizations, along with *Drilled*, are interconnected; they share many of the same editors, writers and funders.”

ICN was created in 2007 by a seed grant from Michael Northrup—the director of the Sustainable Development grantmaking program at the Rockefeller Brothers Fund. It is also led by David Sassoon, a former consultant to RBF.^{276,277} *National Review* suggests that ICN has its roots in a public relations consultancy established by Sassoon called Science First Communications.

According to *National Review*:

“Links between the two entities abound. The nonprofit news organization *InsideClimate News* and the PR consultancy *Science First* are frequently mentioned together in public records, listed as though they are interchangeable. And by at least one credible account, *Science First* serves as the official publisher of *InsideClimate News*.”²⁷⁸

National Review’s examination of relevant tax filings shows ICN is funded by many of the same environmental foundations previously detailed in Chapter Two.

For example, RBF and Rockefeller Family Fund sponsored the ICN series that prompted the “Exxon Knew” campaign in 2015: *Exxon: The Road Not Taken*.²⁷⁹ This series was inspired by Michael MacCracken, a scientist with the Climate Accountability Institute and a

The Foundations Funding InsideClimate News

| | |
|---------------------------|---|
| Wallace Global Fund | \$60,000 2013–2016 ^{xxv} |
| Rockefeller Brothers Fund | \$1,400,000 2013–2018 ^{xxvi, xxvii} |
| Energy Foundation | \$250,000 2015 ^{xxviii} |
| Rockefeller Family Fund | Unknown ^{xxix} |

La Jolla conference attendee.²⁸⁰ 350.org, the Union of Concerned Scientists and other allies then leveraged this piece, calling on state attorneys general to investigate the company.²⁸¹

In response to the series, California Rep. Ted Lieu circulated a letter, signed by 44 congressional members, which cited UCS and “investigations by the *Los Angeles Times* and *InsideClimate News*,” and accused energy companies of suppressing climate science.²⁸² The New York attorney general’s office also cited ICN’s reporting when it subpoenaed ExxonMobil’s records.²⁸³

In 2017, the network of climate liability activists created CD, which is solely dedicated to covering climate lawsuits and investigations.²⁸⁴ CD provides a platform for allied activists like Bill McKibben and Peter Frumhoff to voice their support for the litigation.^{285,286}

CD, unlike ICN, has no pretense of impartiality. The organization is led by CCI Director Richard Wiles, Climate Investigations Center Director Kert Davies and Alyssa Johl, who simultaneously serves as legal counsel for CCI and a consultant for Greenpeace. She also formerly served as the senior attorney for climate and energy at the Center for International Environmental Law.^{287,288} Further cementing this close-knit network, CD hired Lynn Zinser as its founding editor. Zinser formerly served as a senior editor for ICN.²⁸⁹

The Public Relations Professionals Amplifying the Climate Liability Campaign

The climate liability campaign is also receiving assistance from public relations firms well-connected into this same network. These firms provide strategic counsel and message coordination across the non-profit organizations and law firms supporting the litigation campaign.

Resource Media is the main public relations firm helping Sher Edling amplify its lawsuits. The firm is listed as the media contact on press releases issued by Sher Edling that announce municipal climate lawsuits.²⁹⁰ Sher Edling also listed John Lamson, then-executive vice president for Resource Media, as a press contact for a letter sent to the U.S. Securities and Exchange Commission on behalf of several municipalities.²⁹¹ Recently, Lamson left Resource Media to become Sher Edling’s director of media relations.²⁹²

Sher Edling isn’t shy about how it uses public relations firms. During a November 2017 presentation, Vic Sher explained he uses public relations firms to generate validators for his litigation that are seemingly independent of each other when, in fact, they are coordinated through the public relations firms:

“If you look at the media rollout for the cases that we’ve filed so far, it’s been amazing, it’s been terrific. Stories in The New York Times, The Washington Post, NPR, scholarly pieces commenting on the strength of this case compared to the past cases. And I will tell you that while we didn’t write any of those stories it’s not just by happenstance, and a lot of work goes into it by very smart people.”²⁹³

The Foundations Funding Resource Media

| | |
|---------------------------|---|
| Hewlett Foundation | \$615,000 2012–2014 ^{xxx} |
| Tides | \$70,000 2014–2016 ^{xxxi} |
| Rockefeller Brothers Fund | \$1,100,000 2006–2017 ^{xxxii} |
| Tides | \$49,800 2015 ^{xxxiii} |
| Rockefeller Family Fund | \$35,000 2013 ^{xxxiv} |
| Energy Foundation | \$1,904,000 2014–2019 ^{xxxv} |

Climate Nexus is another public relations arm of the litigation campaign. The organization was founded in 2011 as a sponsored project of Rockefeller Philanthropy Advisors and “provides organizational support like strong governance, legal counsel, grants management, accounting, reporting, HR and finance” to anti-fossil fuels efforts.²⁹⁴ The organization is helping the climate liability campaign by amplifying messaging against energy manufacturers.

| The Foundations Funding Climate Nexus | |
|---------------------------------------|---|
| MacArthur Foundation | \$20,000,000 2016–2019 ^{xxxvi} |
| Tides | \$300,000 2016 ^{xxxvii} |
| Energy Foundation | \$1,725,000 2014–2016 ^{xxxviii} |
| Rockefeller Brothers Fund | \$1,585,000 2012–2017 ^{xxxix} |

Climate Nexus Director of Strategic Communications Hunter Cutting previously built the energy and climate division of Resource Media.²⁹⁵ Cutting has a history of bias against energy manufacturers; he rebuffed a *New York Times Magazine* feature for its reluctance to blame energy manufacturers for climate change and frequently tweets to criticize the manufacturing community.^{296,297}

Before releasing one of its anti-fossil fuels articles in the 2015, *InsideClimate News* publisher David Sassoon emailed an embargoed copy to Climate Nexus staff.²⁹⁸ Phillip Newell, senior manager for Climate Nexus, promptly coordinated with the Union of Concerned Scientists, offering to help the organization leverage this release to support the litigation:

*“You’re in luck because tonight/tomorrow InsideClimate News is publishing the latest in its series about Exxon’s research on climate. This one will focus on the legal liability and duty to disclose risk to shareholders, which should be a perfect news hook for you to use if any of you are interested in penning an oped (which I’d be happy to help you with).”*²⁹⁹

M+R is a third public relations firm supporting the activist organizations and legal teams involved in the climate litigation campaign. The firm was founded in 1991 by Donald K. Ross, former director of the Rockefeller Family Fund, as an offshoot of the law firm Malkin

& Ross.^{300,301} Ross served as CEO for M+R from 2001–2010, while simultaneously chairing Greenpeace’s Board of Directors, where Kert Davies was serving as Director of Research.³⁰²

According to the U.S. Senate Committee on Environment and Public Works report on the funders of climate litigation detailed in Chapter Two, Ross encouraged the funders to craft “a task force approach” to allocate its resources. As he explained, “Funders can play a role in using money to drive, to create, ad hoc efforts, in many cases that will have a litigation component coming from one group, a lobbying component coming from another group, a grass roots component organizing component from yet a third group with a structure that enables them to function well.”³⁰³ This is exactly what was done.

M+R acts as a lynchpin between the offshoots of the climate litigation campaign. It managed the public relations around Naomi Oreskes and Geoffrey Supran’s papers, and spearheaded communications for the Center for Climate Integrity’s “Pay Up Climate Polluters” campaign.^{304,305} In fact, it now works with many groups covered in this report such as EarthRights International, UCS, CCI, Greenpeace, 350.org, the Rockefeller Brothers Fund, RFF and the MacArthur Foundation.^{306,307,308}

“The public relations firm M+R acts as a lynchpin between the offshoots of the climate litigation campaign.”

M+R also uses the same staffers for this work in order to ensure coordination among these groups. Kyle Moler, senior strategist in M+R’s Washington, D.C. office, is the point of contact for CCI’s “Pay Up Climate Polluters” campaign and listed on the press release for Oreskes and Supran’s paper as the media contact.^{309,310} Moler’s other clients include 350.org, Greenpeace and UCS.³¹¹ His colleague, Kyle Groetizinger, helps to manage ERI’s communications around the Boulder lawsuit and was the press contact for the aforementioned University of Hawai’i event featuring CCI, Sher Edling and UCLA’s Ann Carlson.^{312,313}

Conclusion

Although efforts to pursue litigation against energy manufacturers span different law firms, states and legal arguments, each is being supported by a highly coordinated group of organizations. These organizations share the same major funders and rely on the same coordinated and tight-knit group of individuals. The appearance of any grassroots support and/or outside validators for climate litigation is not “just by happenstance,” to quote Vic Sher; rather, it is highly orchestrated.

Chapter Four:

Road Trip — The Active Recruitment of Climate Tort Lawsuits

The climate litigation campaign leverages the financial support of its major donors, its network of seemingly outside “validators” and its public relations campaign to sell the litigation to local and state governments to sign up for climate lawsuits.

The lawyers behind this litigation believe their chance of achieving a successful outcome is not necessarily tied to the legal underpinnings of the claims, but rather the number of cases they can file. Steve Berman—a plaintiffs’ attorney with Hagens Berman and a leader in this movement—explained this strategy to *VICE* in a 2017 interview, saying, “Imagine if I could get ten or 15 cities to all sue and put the same pressure on the oil companies that we did with tobacco companies and create some kind of massive settlement.”³¹⁴

“The lawyers behind this litigation believe their chance of achieving a successful outcome is not necessarily tied to the legal underpinnings of the claims, but rather the number of cases they can file.”

This chapter discusses the effort by attorneys, activists and others who are crisscrossing the country trying to convince mayors, attorneys general and other public officials to bring climate lawsuits against companies in the energy industry. They have been targeting jurisdictions where they hope to find a judge who, notwithstanding the legal shortcomings of the cases’ claims, will allow a lawsuit to at least get past a motion to dismiss. They then will seek to leverage such a procedural victory to try to recruit additional localities for the litigation.

Public records reveal that lawyers have been actively selling this climate litigation since 2016, with videos and presentations showing some of their sales pitches.³¹⁵ The lawyers are telling the local governments that they and their funders will pay for the litigation, and the governments will owe nothing if the litigation is not successful. They hope the elected officials will see this as an easy opportunity to potentially bring in revenue while, at the same time, saying they are “taking action” on climate change.

“They have been targeting jurisdictions where they hope to find a judge who, notwithstanding the legal shortcomings of the legal claims, will allow a lawsuit to at least get past a motion to dismiss. They then will seek to leverage such a procedural victory to try to recruit additional localities for the litigation.”

The Competition for Generating Climate Litigation

As detailed in Chapter One, there are several attorneys and organizations actively seeking to enlist local governments to sue energy manufacturers over climate change. Matt Pawa was a veteran of the first round of climate change lawsuits, and later, joined Steve Berman to start pitching the lawsuits together. Other attorneys and environmental activists like Sharon Eubanks and Wendy Abrams have also joined these pitches.³¹⁶ Pawa eventually became a partner of Berman’s firm, Hagens Berman, which initiated climate lawsuits on behalf of King County, New York City, San Francisco and Oakland between September 2017 and May 2018.^{317,318,319} He co-chairs Hagens Berman’s Environmental Practice Group.³²⁰

Sher Edling’s Vic Sher has also spent the last few years approaching local and state governments, trying to convince municipalities, attorneys general and even professional associations to bring lawsuits against energy manufacturers. He has also worked in concert with other groups such as EarthRights International and individuals like Ann Carlson, co-director of UCLA’s Emmett Center on Climate Change and the Environment, who has disclosed that she is providing consulting services on some of Sher’s cases.³²¹

Pawa and Sher have a history. Pawa was retained by the State of New Hampshire in the 2012 MTBE case *New Hampshire v. ExxonMobil* and recommended Sher Leff—Vic Sher’s law firm at the time—as co-counsel.³²² They agreed to split attorney fees based on a set percentage. One of the claims settled, resulting in a \$236 million award for the state with more than \$27 million in attorneys’

fees. Sher Leff deposited the attorney fees in an account the firm managed and sought to retain a greater portion of these fees than its agreed upon percentage would allow.³²³ Pawa sued to enforce the initial agreement, and the arbitrators and courts sided with Pawa, affirming his share of the fees and awarding him an additional \$6 million to cover his costs to enforce the contract.³²⁴

In the climate change cases, Pawa and Sher's firms appear to be more competitors than collaborators. For example, they both pitched San Francisco and Oakland to represent them in their climate change cases.³²⁵ The cities first retained Hagens Berman, but after appealing their lawsuit's dismissal to the U.S. Court of Appeals for the Ninth Circuit, replaced Hagens Berman with Sher Edling.^{326,327} As this chapter discusses, both law firms are actively working with their partisans to sign up more governments and groups for this litigation.

The Climate Tort Litigation Pitch in Florida: A Case Study

Florida provides a vivid example of how local governments are being courted for this litigation. In late 2018 and early 2019, Sher Edling and EarthRights International actively pitched elected officials in Florida to pursue climate litigation. For example, ERI's general counsel, Marco Simons, disclosed that it contacted five "major South Florida municipalities" about the prospect of bringing a lawsuit in late 2018.³²⁸ To date, these efforts have included hiring lobbyists, posting billboards and deploying social media advertising.³²⁹ So far, their tactics have been unsuccessful, with at least one city in the Sunshine State publicly rejecting the idea of pursuing climate litigation against energy manufacturers.³³⁰

“ In late 2018 and early 2019, Sher Edling and EarthRights International actively pitched elected officials in Florida to pursue climate litigation ... To date, these efforts have included hiring lobbyists, posting billboards and deploying social media advertising. So far, their tactics have been unsuccessful, with at least one city in the Sunshine State publicly rejecting the idea of pursuing climate litigation against energy manufacturers.”

FORT LAUDERDALE

In October 2018, ERI approached the City Commission of Fort Lauderdale, Florida in an attempt to convince the city to bring a climate lawsuit against manufacturers. ERI's Simons told the Commission that the goal of the litigation would be to get money from energy manufacturers to pay for municipal projects that would help address local impacts of climate change.³³¹ He also raised the possibility that ERI could join “with co-counsel from private firms,”

who “would also be interested in pursuing this on a contingency fee-basis,” telling the City Commission that there would be “no up-front cost to the city.”³³²

The City Commission expressed concern over how these lawsuits could harm the city and its taxpayers. For example, in response to a question from an official, Simons conceded that it is “always a possibility” that Fort Lauderdale could be required to pay the manufacturers' legal fees if the lawsuit is unsuccessful.³³³

To lay the groundwork for the pitch, ERI worked with a lobbyist to schedule meetings for Simons with Fort Lauderdale officials. Indeed, the local lobbyist, Seth Platt, scheduled several meetings between Simons and Fort Lauderdale's mayor and chief resilience officer.^{334,335} Records indicate, though, that Platt was retained for this effort by the Institute for Governance & Sustainable Development, not ERI.^{336,337}

While IGSD paid for Platt's lobbying services, records indicate that no one directly associated with the organization attended these meetings.

Likely behind the idea to hire a lobbyist was Richard Wiles—he appears as the principal on Platt's lobbying registration.³³⁸ Wiles is the executive director of the Center for Climate Integrity, a project of IGSD that is heavily involved in establishing and executing aggressive marketing campaigns to promote climate tort litigation in Florida.³³⁹ He is also the publisher of *Climate Docket*, a blog dedicated to advancing climate tort litigation.^{340,341}

Platt also arranged for Sher Edling's Vic Sher and Matt Edling to join Simons for a meeting with Alain Boileau, Fort Lauderdale's city attorney.³⁴² Platt was asked by a reporter about contracting for ERI and Sher Edling under his contract with IGSD, but refused to comment.^{343,344} Boileau, though, reportedly noted that similar litigation was facing significant headwind in courts around the country.³⁴⁵ In May 2019, he said that Fort Lauderdale had no intention of suing energy manufacturers over climate change.³⁴⁶

MIAMI BEACH

Beginning in February 2018, Chuck Savitt, Sher Edling's Director of Strategic Relationships, began reaching out to public officials in Miami Beach to discuss climate tort litigation.^{347,348} Specifically, he emailed Dan Gelber, Mayor of Miami Beach, and Susanne Torriente, Miami Beach's Chief Resiliency Officer about the prospect.³⁴⁹ Upon learning of this correspondence, Raul Aguila, Miami Beach's City Attorney, cautioned his colleagues not to meet with Savitt unless he was registered as a lobbyist in their jurisdiction:

“Who is Mr. Savitt?” Aguila wrote in an email.³⁵⁰ “Is he an attorney that wants me to retain him in potential sea level rise litigation? What is the purpose of the meeting? If so, he needs to register as a lobbyist and Mayor nor anyone else should meet with him until he does so.”

Lobbying laws in Miami Beach are robust. Individuals who want to “encourage the passage, defeat or modification of any ordinance, resolution, action or decision of any commissioner; any action,

decision, recommendation of the City Manager or any City board or committee; or any action, decision or recommendation of any City personnel during the time period of the entire decision-making process on such action, decision or recommendation that foreseeably will be heard or reviewed by the City Commission, or a City board or committee,” must register as a lobbyist and pay an \$850 fee.^{351,352}

In response to Aguilá’s note of caution, Torriente responded that she told Savitt to register as a lobbyist before she would schedule a meeting.³⁵³ According to city lobbying registrations, neither Savitt nor any other Sher Edling employee has ever registered as a lobbyist in Miami Beach.³⁵⁴

Further, the content of Savitt’s emails suggests he was trying to avoid any such scrutiny. For example, he wrote to one city official, saying, “Given state law, let’s talk rather than me send you anything.” In another email, he wrote, “Given public records laws it is much better for us to talk on the phone. Do you have time today or tomorrow?”^{355,356}

This episode provides a window into how these lawyers are working to persuade state and local governments into filing climate lawsuits against energy manufacturers.^{357,358}

CITY OF MIAMI

In Miami, proponents of climate tort litigation deployed a comprehensive public relations campaign to try to convince the city to bring a lawsuit against manufacturers.

In March 2018, IGSD’s Center for Climate Integrity worked with the Miami Climate Alliance to rent several billboards in an effort to urge Miami to file climate litigation against energy manufacturers.^{359,360} The latter organization counts groups such as the Sierra Club’s Miami chapter, 350.org, the Union of Concerned Scientists and the U.S. Climate Action Network as members. All of these groups are leaders of the climate liability campaign.



The press release announcing this local campaign listed the media contact as an employee of M+R, the same public relations firm hired by ERI to promote its climate liability lawsuit in Colorado.^{362,363}

Sher Edling’s Chuck Savitt also reached out to the City of Miami asking officials to meet with the law firm’s managing partners, Vic Sher and Matt Edling.³⁶⁴ Emails between IGSD lobbyist Seth Platt and Fort Lauderdale public officials referenced the potential for Miami to file a climate lawsuit. Platt noted that CCI was operating an “umbrella campaign for that broader effort” and that they would “adopt language and assets to fit each context, including an entirely grassroots, behind-the-scenes effort as needed.”³⁶⁵

Further Efforts by Lawyers, Activist Academics and Others to Use Their Connections to Advance the Climate Liability Campaign

As we have seen in additional states, the lawyers, activists, public relations professionals, university faculty and others involved in the climate liability campaign have tried to use their connections to prompt additional cases. In 2019, for example, they sought to use a U.S. Conference of Mayors gathering in Honolulu to generate interest in the litigation. A subgroup of the conference held a Climate Summit before the official start of the event and sponsored a resolution at the Conference of Mayors Annual Meeting to voice support for the litigation.

“As we have seen in additional states, the lawyers, activists, public relations professionals, university faculty and others involved in the climate liability campaign have tried to use their connections to prompt additional cases. In 2019, for example, they sought to use the U.S. Conference of Mayors gathering in Honolulu to generate interest in the litigation.”

It was learned that the Union of Concerned Scientists orchestrated this effort. Documents obtained via California’s Public Records Act show that UCS helped draft the resolution and worked with City of Richmond Mayor Tom Butt, who put forth the resolution at the Conference, to build support for it.³⁶⁶

A May 9, 2019 email from UCS Senior Strategist and Corporate Campaign Advisor Nancy Cole shows her corresponding with multiple City of Richmond staffers, sharing an agenda for a pending conference call that listed several items relating to the resolution:

- Providing “[s]ubstance, generally, for Mayor Butt to include in his panel conversation”
- Sharing information on “what we have both found out; feedback on political advisability of approach”
- Clarifying “whether moving forward If so, next steps – who’s going to do what by when”
- Deciding whether to “recruit advance ‘signers’ or co-proponents? If so, who does what?”

When asked by a reporter about his coordination with UCS, Mayor Butt responded, “Clearly, we could not do this by ourselves.”³⁶⁷

UCS also paid certain costs to facilitate support for the proposal at the Conference’s Annual Meeting. Before the event, Santa Cruz Mayor Martine Watkins published an op-ed in the *Santa Cruz Sentinel* explaining that she would attend the Climate Summit to

speak to other public officials about climate change litigation.³⁶⁸ She stated that she would be attending the conference at no expense to taxpayers. Public records requests showed that UCS paid her registration fee, a cost that amounted to somewhere between \$950 and \$2,000.³⁶⁹

HONOLULU

What's more, the target of these efforts appears to include the City of Honolulu itself. In June 2019, a *Financial Times* article named Honolulu as one of the cities most likely to file the next climate tort lawsuit.³⁷⁰

In May 2019, the University of Hawai'i's Environmental Law Program partnered with the Center for Climate Integrity to host a panel discussion, "Climate Change Science & Litigation: Communities Go to Court to Recover Costs of the Climate Crisis."³⁷¹ The event was presented as a locally-driven forum.

However, it was organized by allies of Sher Edling. The moderator and host of the event was Denise Antolini, the director of the University of Hawai'i's Environmental Law Program and former employee of Vic Sher at the Sierra Club Legal Defense Fund (now Earthjustice) in the 1990s.³⁷² Sher began his tenure at the Sierra Club Legal Defense Fund in 1986 and was the organization's president from 1994 to 1997.³⁷³ Antolini worked there for eight years and managed the Honolulu office from 1994 to 1996.³⁷⁴ Sher, who participated in the event as a panelist, touted his relationship with Antolini, calling himself her "first boss."³⁷⁵

In addition to Sher, Ann Carlson, co-director of UCLA's Emmett Center on Climate Change and the Environment, was there to tout the litigation. Carlson is a consultant for the plaintiffs in some of these cases and often appears at conferences with Sher.³⁷⁶ The panel also featured representatives from UCS, including Nancy Cole, and the Center for Climate Integrity.³⁷⁷

Two days after the event, Antolini authored a newspaper column with CCI's Alyssa Johl, advocating that Hawai'i and its cities file a climate change lawsuit against energy manufacturers. Neither of them disclosed their connections to Sher.³⁷⁸

It looks like these efforts may have convinced Honolulu Mayor Kirk Caldwell to consider the litigation. At a July 2019 forum held by the U.S. Senate Democrats' Special Committee on the Climate Crisis, he urged the lawmakers not to preempt the ability of municipalities to file these lawsuits.³⁷⁹

WASHINGTON, D.C.

Some efforts to recruit clients for climate lawsuits are not as public as other instances of advocates doing so, but rely on the same network of activists and lawyers. For example, in 2016, Washington, D.C. Attorney General Karl Racine joined the "AGs United for Clean Power" coalition, which was spearheaded by then-New York Attorney General Eric Schneiderman.³⁸⁰ On March 29, 2016, 17 attorneys general were briefed on climate litigation and investigations by Matt Pawa and the Union of Concerned Scientists' Peter Frumhoff. *Reuters* reported that this briefing revealed a "previously unknown level of coordination with outside advisers" and state attorneys general.³⁸¹

In February 2019, Racine's office solicited outside counsel to work on a contingency-fee basis to support an "investigation and potential litigation against ExxonMobil . . . in connect with Exxon's statements or omissions about the effects of its fossil fuel products on climate change."³⁸² One of the firms Racine's office sent this RFP to was Hagens Berman, Matt Pawa's current firm.³⁸³

Racine has also sought to tap into the State Energy and Environmental Impact Center at the New York University School of Law.³⁸⁴ The Center, funded by billionaire Michael Bloomberg, pays for attorneys to work in state attorneys general offices if the attorney general will agree that the "fellows," as they are referred to by the program, will work exclusively on "clean energy, climate and environmental issues," including climate change-related litigation and investigations of energy manufacturers.^{385,386} Racine initially downplayed this outreach, refusing to comply with an open records request regarding this communication. The emails were disclosed only after the Competitive Enterprise Institute sued Racine's office to release them.³⁸⁷

SEATTLE

Another example is in Seattle, where Mayor Jenny Durkan already had a direct connection with the climate litigation network. In 2016, while working for the law firm Quinn Emanuel Urquhart & Sullivan, LLP, Durkan represented 350.org, whose co-founders, Bill McKibben and Jamie Henn, have repeatedly endorsed the municipal public nuisance climate lawsuits against energy manufacturers.³⁸⁸

Therefore, it was not surprising that soon after Durkan's election, City Attorney Peter Holmes sent a letter to her and City Council President Bruce Harrell describing his investigation into potential legal avenues for suing energy manufacturers over climate change.³⁸⁹ He retained Keller Rohrbach LLP, a Seattle-based law firm, to conduct "the exploration of facts specific to Seattle, including what scientists know about the impact of climate change in our region, and the City's available legal options."³⁹⁰ It is notable that Seattle did not proactively retain Hagens Berman, which is based in the city and has tried to build a reputation as experts on climate litigation.

While not one of the two big climate litigation firms, Keller Rohrbach is not new to climate litigation at all.³⁹¹ It served as counsel on two amicus briefs for Dr. Robert Brulle, the Center for Climate Integrity, Justin Farrell, Benjamin Franta, Stephan Lewandowsky, Naomi Oreskes and Geoffrey Supran in *County of San Mateo v. Chevron Corporation and Mayor and City Council of Baltimore v. BP P.L.C., et al.*^{392,393} As detailed in Chapter Two, these individuals have long been key players in the climate liability campaign.

“ Given this state of affairs, it is encouraging that many communities have resisted climate litigation, realizing that suing energy manufacturers over climate change is legally unsound and counterproductive to fighting this shared global challenge.”

CONCLUSION

Over the past few years, it has become clear that climate litigation is the result of a highly orchestrated campaign of lawyers, activists, academics and public relations firms working hard to recruit communities to bring the litigation. Some municipalities will continue buying their pitches for “free” lawsuits. But, rest assured, nothing is entirely free. City attorneys must devote time and local resources to oversee any legal case. Also, as MAP has explained previously, suing manufacturers over lawful products has many negative impacts on constituents and local economies.^{394,395,396} Given this state of affairs, it is encouraging that many communities have resisted climate litigation, realizing that suing energy manufacturers over climate change is legally unsound and counterproductive to fighting this shared global challenge.

Editor's Note:

As this report was going through final edits, a few additional details emerged that further illuminate the strategy employed by litigation proponents to sell these lawsuits to public officials.

MINNESOTA

In June 2020 Minnesota Attorney General Keith Ellison filed a climate lawsuit against ExxonMobil, the American Petroleum Institute, and Koch Industries.³⁹⁷ During a subsequent webinar discussing the litigation, the Minnesota-based environmental organization Fresh Energy revealed that they and other environmental groups in the state that had cheered the lawsuit were being paid by the Center for Climate Integrity to promote the litigation to the attorney general. According to Fresh Energy Executive Director Michael Noble:

“I want to first just acknowledge that [Center for Climate Integrity] is a national organization that leads on this kind of climate liability, climate litigation. And they brought this concept to Fresh Energy in the fall of 2018, and Fresh Energy helped put this idea in front of Attorney General Keith Ellison shortly after he was sworn in.”³⁹⁸

New York University's State Energy & Environmental Impact Center has placed two of their fellows in Attorney General Ellison's office.^{399,400} These placements have been highly controversial because the fellows' salaries and benefits are paid by private advocacy groups to do the State's work. Here, the two lawyers were seconded under the condition that they work exclusively on climate and related litigations.

Fresh Energy's Noble revealed during the webinar that “Attorney General Keith Ellison started considering this possibility as early as the fall of 2019,” and the two seconded attorneys on the attorney general's staff “have basically been working on this full-time over the last few months.”⁴⁰¹ At the press conference announcing the lawsuit, Attorney General Ellison also singled out these two attorneys as leading the work on the lawsuit.⁴⁰²

HOBOKEN

Hoboken, New Jersey filed a climate tort lawsuit against energy manufacturers in September 2020, hiring Emery, Celli, Brinckerhoff & Abady LLP to represent them on a contingency fee basis.⁴⁰³ Hoboken's lawsuit represents an evolution in the campaign to convince municipalities to file litigation against energy manufacturers, because it acknowledges there are costs associated with pursuing this effort even when the city is represented on a contingency fee basis.

A resolution passed by Hoboken in January 2020 reveals that the Institute on Governance and Sustainable Development (IGSD), the parent organization of the Center for Climate Integrity, was paying all the attorney fees incurred from the litigation:

“WHEREAS, the ECB&A LLP has agreed to represent the City in the proposed litigation at no cost to the City, and therefore the City will not be responsible for paying any attorneys' fees, costs, or case expenses; and,

“WHEREAS, it is proposed that the fees will be paid by a third-party, the Institute for Governance and Sustainable Development ('IGSD'), but that the City will not be responsible in the event that IGSD fails to pay said fees for any reason...”^{404,405}

The revelation raises questions for the other tort lawsuits filed against energy manufacturers. Despite consistent assurances from the plaintiffs that they are being represented at “no cost,” the Hoboken resolution makes clear that there are indeed costs associated with pursuing these lawsuits. Do the municipalities involved in this litigation have similar arrangements with IGSD to cover their fees, or are they misleading their constituents on the risks of getting involved in the campaign?

As examined in Chapter Five, the firm representing Hoboken also stands to make millions if they should win or settle the case. The contingency fee arrangement signed by Hoboken reveals that Emery, Celli, Brinckerhoff & Abady, which presumably is also being paid by IGSD to wage this litigation, would also take 33.3 percent of the first \$750,000, thirty percent of the next \$750,000, 25 percent of the following \$750,000, and 20 percent of the remaining sum.

Chapter Five:

Foundations and Contingency Fees: The Private Financing Behind Government Climate Litigation

The plaintiffs' attorneys in the climate litigation campaign are trying to make litigation a financially risk-free proposition for local mayors and other officials who want to say they are "doing something" about climate change. As part of this proposition, these lawyers do not ask the governments to provide upfront funding for these lawsuits. But as it turns out, the litigation is also largely risk-free for the lawyers.

As explained in previous chapters, the lawyers have received funding from private foundations to wage much of this litigation as a political tool. Unable to achieve their agendas through the public policy process, the foundations are using the threat of a multitude of high-profile lawsuits to accomplish their political goals through the courts.

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Irrespective of the outcome of these lawsuits, the lawyers still receive payment—they're paid simply to generate this litigation. For example, as Chapter One explains, Matt Pawa was not attached to a large firm when he spent seven years representing the plaintiffs in *AEP v. Connecticut*, but received the funding he needed to wage the case from benefactors to his nonprofit, the Global Warming Legal Action Project.⁴⁰⁶ EarthRights International and the Niskanen Center, both representing Boulder in its climate case, are nonprofits funded by donations. Because their attorneys have not been admitted to practice law in Colorado, they partnered with the Denver-based Hannon Law Firm, which is working under a 20 percent contingency fee arrangement in the lawsuit.⁴⁰⁷ Sher Edling LLP, which is representing several climate public nuisance litigants, received more than \$400,000 in a single grant from the Resources Legacy Fund, even though the law firm is a for-profit enterprise.⁴⁰⁸

Despite this funding, the private lawyers pursuing climate change litigation are also seeking huge contingency fees from their clients

if the litigation is somehow successful in generating a settlement or litigation award. Contingency fees were intended to offset the risk for lawyers so that they would invest their own time and resources in cases for people who could not afford to pay them. Even though the plaintiffs' lawyers are not taking these kinds of risks here, they are still seeking a huge payday.

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This means the lawyers have no motivation to work constructively with manufacturers and communities to fight the causes and impacts of climate change if it doesn't produce money for them. This is part of why tort litigation is ill suited for achieving climate-related public policy goals. What is needed is a balancing of interests and incentivizing innovation—not paying off the trial bar.

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The Goals of Contingency Fees and Why Climate Litigation Distorts Them

Contingency fee arrangements to finance litigation have become common, mostly in U.S.-based personal injury litigation, because they allow someone with limited resources to hire a lawyer at no upfront cost. The lawyer finances the lawsuit and gets paid only if the lawsuit results in a recovery for the plaintiff. The lawyer's fees—a percentage of the monies received—are paid out of the recovery. If the lawyer loses the case, he or she receives nothing. In the personal injury context, it is common for plaintiffs' lawyers to seek a third of any judgment or settlement, plus costs.

Given lawyers' risk of losing their personal investment in a case, a common argument is that contingency fee arrangements safeguard against lawyers filing highly speculative or bad cases. Further, if a case is overly speculative or abusive, the courts may not only rule for the defendant but may also make the plaintiff and plaintiff's lawyers pay the defendant's fees that resulted from defending against the case.⁴⁰⁹ While unusual, a court can throw out a contingency fee agreement if it deems it unconscionable.⁴¹⁰ Contingency fees are not used in many other countries and are legal in only a few places, including the United States and Canada.⁴¹¹

“ The rationale for contingency fees is not operative in climate change litigation. The lawyers are not risking their own resources—or anyone else's resources—to develop and bring all this litigation. Also, the foundations providing them with the grants to recruit governments to file the cases are not necessarily banking on the success of the litigation. Rather, to them, the mere generation of the lawsuits is a victory in itself.”

The rationale for contingency fees is not operative in the climate change litigation. The lawyers are not risking their own resources—or anyone else's resources—to develop and bring all this litigation. Also, the foundations providing them with the grants to recruit governments to file the cases are not necessarily banking on the success of the litigation. Rather, to them, the mere generation of the lawsuits is a victory in itself. They are hoping to leverage the filings, reputational damage and threats of high-profile litigation to achieve a political goal. Thus, in these cases, the threat of losing is not a sufficient safeguard against highly speculative or abusive litigation.

The Huge Dollars and Opportunity for Abuse in Government Contingency Fee Litigation

The potential for cashing in on government contingency fee cases, including over climate change, can clearly mean life-changing money for the lawyers and their allies. As indicated earlier, their strategy—developed at the La Jolla conference in 2012—was to replicate tobacco litigation. In 1998, the Master Settlement Agreement reached between the attorneys general for 46 states, 5 U.S. territories, the District of Columbia and the 5 largest U.S. cigarette companies resulted in \$13 billion paid to plaintiffs' attorneys through contingency fee arrangements.^{412,413}

History has shown that these payouts had little relation to the number of hours actually spent working on these cases. For example, in Michigan, attorneys were awarded \$450 million in contingency fees, equaling an hourly rate of \$22,500.⁴¹⁴ Attorneys representing New York received \$625 million in fees, which came out to \$13,000 per hour.⁴¹⁵

There also was widespread concern over which law firms the state retained and who was in line for this life-changing payday, from friends to campaign donors.⁴¹⁶ In Pennsylvania, two private law firms handpicked by the attorney general to represent the state split \$50 million.⁴¹⁷ In Texas, the attorney general was later sentenced to four years in federal prison for attempting to funnel millions of dollars' worth of these legal fees to a friend.⁴¹⁸

What the tobacco litigation showed was that contingency fee arrangements were no longer merely a valuable tool for individuals with limited funds to access legal representation. They became part of a get-rich-quick strategy for private lawyers to recruit their friends in government as plaintiffs, make the litigation free for them, take advantage of the governments' authority and leverage the ability to generate multiple huge and speculative lawsuits against companies into forcing settlements.

Steve Berman, a leading lawyer in the climate cases, represented more than a dozen states on a contingency fee basis in the tobacco litigation.⁴¹⁹ In Illinois alone, he was awarded \$121 million by the national Tobacco Fee Arbitration Panel.⁴²⁰ Steve Berman said his goal in the climate change cases was to mimic this legal strategy: “Get ten or 15 cities to all sue and put the same pressure on the oil companies that we did with tobacco companies and create some kind of massive settlement.”⁴²¹

Government Contingency Fee Agreements to Private Lawyers in Climate Change Cases

In the climate change cases, only some governments have publicly disclosed their contingency fee agreements with the plaintiffs' firms. It's become clear that, as with tobacco litigation, the opportunity for the lawyers to translate this litigation into personal wealth

far outpaces any risk or reasonable fee that would normally be associated with traditional contingency fee litigation.

Here are some examples:

- **San Francisco, CA:** San Francisco entered into a contingency fee agreement with Hagens Berman, signed by Steve Berman himself.⁴²² Under this agreement, Hagens Berman would have been entitled to 23.5 percent of any recovery.⁴²³ When Sher Edling was hired for the case's appeal, its agreement with San Francisco promised 25 percent of the first \$100 million awarded, 15 percent of the next \$50 million and 7.5 percent of anything earned above \$150 million.⁴²⁴
- **King County, WA:** In May 2018, Hagens Berman secured a 17 percent contingency fee to represent King County in its climate tort lawsuit, which estimates that “[b]uilding infrastructure to protect King County and its residents, will, upon information and belief, cost hundreds of millions of dollars.”^{425,426}
- **Boulder, CO:** The lawyers representing Boulder County, the City of Boulder and San Miguel County in their climate lawsuit have a 20 percent contingency fee arrangement in place.⁴²⁷ A study commissioned by Boulder County and published alongside its lawsuit estimated that the “total cost of adaptation for mitigating only some of the potential effects of climate change across the geographic area of Boulder county through 2050 is conservatively placed at \$96 million to \$157 million for the median and high impact scenarios for the areas looked into with the City of Boulder incurring \$16 million to \$36 million of these adaptation costs.”⁴²⁸

Many of the other governments have refused to disclose their fee arrangements, the process used to select counsel or determine an appropriate fee. This raises serious transparency concerns because these firms are ostensibly representing the public. For example, New York City hired Hagens Berman to wage its climate litigation, but that fee arrangement remains undisclosed.⁴²⁹ The same issue exists with Seattle.⁴³⁰

Washington, D.C., chose a different path. After hearing a presentation from Matt Pawa on climate litigation, the city publicly advertised its desire to hire outside counsel on a contingency fee basis to lead its inquiry, and as detailed previously, sent that solicitation to Hagens Berman, among others.^{431,432} The solicitation also outlined that it would permit the hired firm to seek outside funding to finance its work for the District, demonstrating a clear understanding of how this litigation receives financing above and beyond contingency fees.⁴³³

Private Payment of Government-Hired Lawyers: Bloomberg and Attorneys General

Climate litigation has also given birth to a new, highly controversial funding arrangement, whereby foundations pay attorney general offices directly to hire lawyers for the purpose of bringing climate lawsuits. These attorneys wield the government's authority, but private interests hire and pay them.⁴³⁴

“Climate litigation has also given birth to a new, highly controversial funding arrangement, whereby foundations pay attorney general offices directly to hire lawyers for the purpose of bringing climate lawsuits. These attorneys wield the government's authority, but private interests hire and pay them. This arrangement is the brainchild of the State Energy and Environmental Impact Center, a project former New York City Mayor Michael Bloomberg began in 2017 at New York University School of Law.”

This arrangement is the brainchild of the State Energy and Environmental Impact Center, a project former New York City Mayor Michael Bloomberg began in 2017 at New York University School of Law.⁴³⁵ The SEEIC provides “legal assistance to interested attorneys general on specific administrative, judicial or legislative matters involving clean energy, climate change and environmental interests of regional and national significance.”⁴³⁶ One of the ways in which the SEEIC provides this legal assistance is by placing fellows within attorneys' general offices and paying their salaries.

Court filings in the New York attorney general's lawsuit against ExxonMobil over its climate disclosures show that the SEEIC funded attorneys in that office who worked on the ExxonMobil lawsuit.⁴³⁷ In 2018, the SEEIC had 14 fellows working in attorneys general offices in Illinois, Maryland, Massachusetts, New Mexico, New York, Oregon, Washington and the District of Columbia.⁴³⁸ Through the program, Oregon Attorney General Ellen Rosenblum was able to hire Steve Novick, a former Portland City Commissioner who promoted fossil fuel divestment.^{439,440} Novick was paid more than \$146,000 a year through the SEEIC, which is \$60,000 more than Attorney General Rosenblum makes.⁴⁴¹

In New Mexico, SEEIC staffers apologized to the attorney general's staff for needing to publicize the arrangement in order to recruit applications. “There will be limited distribution of the announcement and we will not reach out to any press in your state,” SEEIC Executive Director David Hayes told New Mexico Attorney General Hector Balderas' staff, an odd advertising tactic for a state-based job.⁴⁴²

“The top prosecutorial office in the state needs to be above reproach, and Balderas has to recognize this arrangement is not,” wrote the *Albuquerque Journal* in an editorial after the arrangement was brought to light.⁴⁴³ “While it added two attorneys to his staff, it did so at the expense of his office's independence and impartiality—even if it's in appearance only.”⁴⁴⁴

Several states have sought to limit the use of these arrangements. The Virginia State Assembly voted to nullify the use of an SEEIC special assistant attorney general, blocking the hiring of an

SEEC fellow and avoiding any similar hiring in the future by adding an amendment into the 2019 biennial budget, which required employees of the attorney general to be state or federal government employees and to be paid with public funds.⁴⁴⁵ The Wisconsin attorney general's office determined that such an arrangement would be illegal under Wisconsin law, as did the Oregon legislature's chief lawyer.^{446,447}

The Growing Outrage Over Government Contingency Fee Litigation

These arrangements have raised significant concerns over conflicts of interest and the appropriate role of politics and money in law enforcement. The contingency fee arrangements, in particular, have been widely criticized because the private lawyers' profit motive can conflict with the goals of their clients, whose duty is to represent the interests of the public and who may agree to sign onto the litigation in hopes of solving a problem.

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Contingency fees make it nearly impossible that a municipality will reach a non-monetary agreement with a defendant even if it is the best way to solve that dispute. Andrew Grossman, a fellow at the Cato Institute, explains the concern with allowing for-profit motives to invade the government's civil law enforcement regime. He calls the practice of hiring “outside attorneys to target a particular private party for law enforcement . . . policing for profit.”⁴⁴⁸

The concern that for-profit motives distort justice is the very reason that private lawyers cannot be hired on contingency fees in criminal cases.⁴⁴⁹ They create dangerous incentives that threaten justice. Civil law enforcement should be treated no differently. Given analogous concerns with the criminal justice system, a number of states have highly restricted the use of contingency fees for civil law enforcement actions since the 1990s.⁴⁵⁰

Concerns about local governments hiring for-profit firms under contingency fee arrangements are exacerbated in politically-oriented litigation. As discussed above, political activists developed the litigation as a tool and recruited the governments to be their plaintiffs to advance their public policy agenda. The public policies sought through these lawsuits, though, are not the province of courts, but state and federal lawmakers and regulators.⁴⁵¹

Here, legislatures and regulators have spent considerable time and resources studying climate change and considering balanced approaches to reducing GHG emissions but have chosen not to enact the policies sought by the groups bringing this litigation. Ironically, though, if the groups and their lawyers can make millions—or even billions—of dollars achieving their public policy preferences through the courts, it will encourage political activists of all kinds to circumvent Congress and regulatory agencies in enacting their policy preferences, even when those policy preferences are not in the best interests of the American people.

Prominent scholar Robert Reich, who served as Secretary of Labor under President Clinton, termed lawsuits with such an impact “regulation through litigation,” concluding that circumventing Congress to enact “faux legislation . . . sacrifices democracy.”⁴⁵²

Gale Norton, a former U.S. secretary of the interior and a former attorney general of Colorado, has observed the impact that growing financial motives have had on private contingency-fee lawyers getting involved in the litigation. She contrasted today's profit-seeking lawyers with the environmental lawyers from 15 years ago, who would “at best” recover attorney's fees:

“In the climate change litigation, you have traded environmental plaintiffs' attorneys, who were primarily focused on public policy, for an increasing number interested in financial gain.”⁴⁵³

What has become clear, as Secretary Norton concluded, is that the opportunity to make huge financial gains, not sound public policy, is now the driving force for the private lawyers in climate litigation.

Conclusion

The governments' use of contingency fees and third-party funding raises serious concerns over how government climate lawsuits begin, are litigated and ultimately resolved. The private attorneys are incentivized to generate personal wealth, and their funders want to pursue a political agenda—even at the expense of justice or fairness.

Courts and legislatures should continue examining the propriety of these arrangements, and, as many states have done, curtail or ban them when they impede justice. State and local law enforcement officers should not put special interests over the public good.

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.*⁴⁵⁴

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.”⁴⁵⁵ 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.⁴⁵⁶ 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.”⁴⁵⁷

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.”⁴⁵⁸ And, “pressure from the courts offers the best current hope for gaining the energy industry’s cooperation in converting to renewable energy.”⁴⁵⁹

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.⁴⁶⁰ 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.^{461,462}

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.”⁴⁶³

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.”⁴⁶⁴ DeBlasio made this comment in an appearance on Senator Bernie Sanders’ podcast when the Senator asked about the city’s pending case.⁴⁶⁵

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.”⁴⁶⁶

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.”⁴⁶⁷

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.

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?’”⁴⁶⁸

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. 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.”⁴⁶⁹

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.”⁴⁷⁰

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?”⁴⁷¹ The judge then appeared to conclude, “So this is an emissions case.”⁴⁷² 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.⁴⁷³

Whether this round of climate litigation overtly regulates carbon emissions, or would do so through 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 entirely 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 sea 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.’”⁴⁷⁴ 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.”⁴⁷⁵

“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.”

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."⁴⁷⁶

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.^{477,478}

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."⁴⁷⁹

In 2018, ExxonMobil filed a petition in a Texas District Court describing these contradictions.⁴⁸⁰ 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.⁴⁸¹

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."⁴⁸²

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."⁴⁸³ She admitted, "In the case of sea-level rise and certain other climate impacts, municipal entities generally [would] not be greatly affected for decades."⁴⁸⁴

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."⁴⁸⁵ 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

“ 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.”

billions of dollars for something that hasn't happened yet and may never happen to the extent you're predicting it will happen."⁴⁸⁶

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.

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

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.

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.”⁴⁸⁷

In the 1970s, when these theories first surfaced they were tried in *Diamond v. General Motors Corp.*,⁴⁸⁸ 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.”⁴⁸⁹ 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 the Sierra Club Legal Defense Fund (now Earthjustice). In a letter to the Manufacturers’ Accountability Project concurrent with the press conference, Antolini also said the lawsuits “allege traditional tort actions.”⁴⁹⁰

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.”⁴⁹¹

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.’”⁴⁹²

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.⁴⁹³ 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 a

“ The decision to vilify energy manufacturers, even though there is no indication there is any substance behind their allegations, is a clear indication that this litigation is really a political and public relations ploy.”

climate change case if Rhode Island’s 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.”⁴⁹⁴

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.”⁴⁹⁵ Others encouraged cooperation or at least “polling to see how such [efforts] might be received by different segments of the public.”⁴⁹⁶ The decision to vilify energy manufacturers, even though there is no indication that 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.”⁴⁹⁷ 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.⁴⁹⁸ This rhetoric also mirrors the talking points of the “Exxon Knew” campaign discussed in previous chapters of this report.

There is a disconnect between this rhetorical 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. 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 that they are not seeking to change the companies' promotion and sales of fossil fuels.

The Rhode Island complaint demonstrates this hypocrisy perfectly. It states that 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 says the State is not seeking to "restrain Defendants from engaging in their business operations."

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.⁴⁹⁹ The city suggests the companies should be allowed to continue promoting and selling energy so long as they pay for the damages caused.⁵⁰⁰ However, the notion that a person or a company 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.⁵⁰¹ But at oral argument, plaintiffs' counsel said any such promotion remained merely a "plus factor."⁵⁰²

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 that 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.⁵⁰³ 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.⁵⁰⁴ 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."⁵⁰⁵ 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."⁵⁰⁶ In ruling for ExxonMobil, the justice noted that 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.^{507,508,509}

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."⁵¹⁰

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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