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Baltimore and *Boulder County*: A Tale of Two Climate-Change Tort Suits

by Jim Wedeking

Over a dozen municipalities and States have launched a second generation of climate change tort suits, seeking to extract untold billions of dollars in damages from a relative handful of oil and gas companies. Where the first generation of such suits primarily alleged public nuisance claims,[1] this second generation asserts an array of state law tort claims (negligence, trespass, public and private nuisance, strict liability, design defect, consumer protection act violations, *etc.*) alleging that the oil and gas companies used deceptive advertising to sell fossil fuels, leading to climate change, and that climate change is causing current and future harms to the municipalities. These supposed damages, caused by current and predicted floods, droughts, sea level rise, extreme weather events, and disease, will allegedly require hundreds of billions of dollars to remediate. After years of fighting about jurisdiction, courts are now beginning to weigh arguments for dismissal.

To date, opinions have been a mixed bag, suggesting a long road of conflicting appellate opinions that will likely have to be resolved by the U.S. Supreme Court. Two courts, the Boulder County District Court and the Circuit Court for Baltimore City, issued decisions on the oil and gas companies' motions to dismiss municipal climate change tort cases on June 21, 2024 and July 10, 2024, respectively.[2] Despite being issued a few weeks apart, they differed on nearly every legal point at issue. The differences between the opinions hinge on questions about whether damages can have a regulatory effect on defendants, whether preemption focuses on the location of the alleged damages instead of the instrumentality that allegedly caused them, and the potential differences in analyzing preemption for removal purposes versus preemption as a defense on the merits.

Background

Baltimore filed suit against 25 national and international fossil fuel companies in July 2018, alleging that they "must be held accountable for deceiving consumers by disseminating misleading information that undermined the scientific community's consensus about climate change which led to the overuse of fossil fuels around the world."[3] This "sophisticated campaign of deception to

[1] The first-generation suits, *American Electric Power Company, Inc. v. Connecticut*, 564 U.S. 410 (2011), *Native Village of Kivalina*, 696 F.3d 849 (9th Cir. 2012), and *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013), raising state law tort claims against oil and gas, electric generation, and coal companies, were all eventually dismissed.

[2] *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, Case No. 2018CV30349 (Boulder Cty. D. Ct. June 21, 2024) ("*Boulder County*"); *Mayor and City Council of Baltimore v. BP P.L.C.*, Case No. 24-C-19-002419 (Balt. City Cir. Ct. July 10, 2024) ("*Baltimore*").

[3] *Baltimore* Slip Op. at 2. Baltimore is no stranger to tort litigation seeking damages from large companies for the environmental impacts of products they manufacture. Recent suits include one against Coca-Cola, Pepsi, Frito Lay, and various plastics manufacturers alleging they are responsible for plastic trash, the existence of bio-available microplastics, and a limited ability to recycle plastics. Press Release, City of Baltimore Announces Lawsuit Filed Against Plastic Manufacturing Companies for Role in Pollution (June 20, 2024). Another suit alleges that cigarette manufacturers should pay damages for cigarette butts that smokers have tossed into the city's streets and sewers. Press Release, City

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misrepresent and conceal their products' risks" purportedly caused "climate change related injuries such as sea level rise, increased frequency and severity of extreme precipitation events, increased frequency and severity of drought, increased frequency and severity of heat wave and extreme temperatures, and consequently social and economic injuries associated with those physical and environmental changes."[4] Boulder County raised substantially similar allegations and injuries,[5] as did many other municipal climate change tort suits.

The defendants fought tooth-and-claw to avoid state courts,[6] removing the cases to federal courts on various theories.[7] After federal district and appellate courts rejected removal theories, the Supreme Court remanded those decision for further consideration.[8] That further consideration, however, yielded the same result: remanding the state-law claims back to state courts.[9] After six years of skirmishing over jurisdiction, trial courts are finally starting to consider the defendants' motions to dismiss. The *Baltimore* and *Boulder County* courts were not the first to rule on defendants' preemption arguments. New York City filed suit in federal court against five multinational oil and gas companies, avoiding the years-long saga over whether federal or state courts had jurisdiction.[10] That court dismissed the case on various preemption grounds and the Second Circuit affirmed.[11] The Delaware Superior Court also found that similar claims related to greenhouse gas emissions originating outside of Delaware are preempted.[12] The Hawaii Supreme Court, however, reached the opposite conclusion in a suit for deceptive advertising, finding that the plaintiffs' claims did not seek to regulate extra-territorial emissions, and therefore, were not preempted.[13] The *Baltimore* and *Boulder County* cases were anticipated to provide either the "preemption" or "no preemption" approach some momentum. Instead, the cases split, highlighting the key issues that must ultimately be resolved.

Are Damages a Form of Regulation?

The first key issue is whether these tort suits are seeking to regulate the interstate and foreign activities that generate greenhouse gas emissions. The *Baltimore* court was not content to accept Baltimore's characterization of its suit as merely addressing deceptive advertising. It cited a law review article endorsing the climate change suits specifically because they could severely reduce or eliminate fossil fuel consumption—a policy goal that Congress has been unwilling to impose.[14] The *Baltimore* court further noted the *New York City* decision's point that portraying the coordinated

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of Baltimore Files a First of its Kind Lawsuit Against Tobacco Companies for Cigarette Filter Waste (Nov. 21, 2022).

[4] *Baltimore* Slip Op. at 2-3.

[5] *Boulder County* Slip Op. at 5-7.

[6] *See*, *e.g.*, *Rhode Island v. Shell Oil Prods. Co, LLC*, 979 F.3d 50 (1st Cir. 2020); *Mayor and City Council of Baltimore v. BP plc*, 952 F.3d 452 (4th Cir. 2020); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020); *Bd. of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020).

[7] *See generally*, *BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. 230 (2021).

[8] *BP P.L.C.*, 593 U.S. 230.

[9] *See* Lincoln Davis Wilson, In Decisions on Remand After *BP v. Baltimore*, Courts of Appeals Invite Return Ticket to Supreme Court, WLF Legal Pulse (May 9, 2022) (discussing first three decisions to reject removal after the 2021 Supreme Court decision). Note, however, that 19 States have filed a novel Motion for Leave to File a Bill of Complaint in the U.S. Supreme Court against five States to block their climate change tort actions, alleging the five plaintiff States are seeking to impose ruinous damages on businesses in every State while imposing their own energy and environmental policies nationwide. *Alabama v. California*, Case No. 158, Original (filed May 22, 2024).

[10] *City of New York v. BP plc*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

[11] *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) ("*New York City*").

[12] *State ex rel. Jennings v. BP Amer., Inc.*, 2024 WL 98888 (Del. Super. Ct. Jan. 9, 2024).

[13] *City and County of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023). The defendants' petition for a writ of *certiorari* is still pending after the Court invited the Solicitor General to submit a brief expressing the federal government's views. *Sunoco LP v. City and County of Hawaii*, Case No. 23-947 (filed Jan. 11, 2024).

[14] *Baltimore*, Slip Op. at 6 (citing Comment, City of Oakland v. BP PLC, *Ninth Circuit Finds That State Public Nuisance Claims Against Fossil Fuel Producers are Not Completely Preempted by Federal Law*, 134 Harv. L. Rev. 1897 (2021)).

climate change tort suits as anodyne tortious marketing actions "'is simply artful pleading" to transform the "complaint into anything other than a suit over global greenhouse gas emissions,'" and rejected Baltimore's claim that seeking damages (compensatory and punitive damages, as well as disgorgement) is not a form of regulation.[15]

The *Boulder County* court, however, reached the opposite conclusion. It held that "the Energy Companies are arguing against a case the Local Governments did not plead" as the federal court cases that remanded the claims back to state court already held that the plaintiffs are not seeking injunctive relief, not challenging any federal regulation or decision, and not seeking to require federal emission regulations.[16] The *Boulder County* court briefly cited the Hawaii Supreme Court's *Honolulu* decision, characterizing the tort suits as mere false advertising cases, before concluding that the *New York City* court's contrary determination is "at odds with U.S. Supreme Court precedent."[17] Specifically, it claimed that a three-judge plurality in *Virginia Uranium v. Warren* "rejected the parallel argument that Virginia's mining ban was really a means of regulating radiation, regardless of whether the regulation had the purpose of addressing nuclear hazards."[18]

There are significant issues raised with both the *Baltimore* and *Boulder County* holdings. The *Baltimore* court provided little elaboration on how damage awards may regulate behavior and relied on a reference to the *New York City* case for this point.[19] That case explained that "the Supreme Court has long recognized, regulation can be effectively exerted through an award of damages and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'"[20] However, the Supreme Court cases on this issue deal with field preemption and it is not clear whether damages would still be deemed to have the same regulatory effect if courts conclude that the federal government does not completely occupy the field of regulating greenhouse gas emissions.[21]

The *Boulder County* court relied on the district and circuit court cases that remanded Boulder County's suit to reject the notion that damages can function as regulation.[22] These cases, however, never actually addressed the question. Instead, they analyzed "complete preemption" for removal purposes (discussed below) and never mentioned any potential for damages to have regulatory effect. The *Boulder County* court's reliance on *Virginia Uranium* also seems inapposite as that case never mentioned damages and held only that the Atomic Energy Act does not extend to uranium mining and, therefore, did not preempt State regulation of mining on private lands.[23] As these cases move forward, appellate courts will have to address whether compensatory damages, and possibly other forms of requested damages, effectively regulate defendants and how important preemption is to that question. In the alternative, as the *Baltimore* court noted, the remedy may not matter at

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[15] *Id.* at 7, 10.

[16] *Boulder County* Slip Op. at 37-39 (citing *Bd. of County Commissioners v. Suncor Energy (U.S.A.), Inc.*, 405 F. Supp. 3d 947, 955, 969-71 (D. Colo. 2019); *Bd. of County Commissioners of Boulder County v. Suncor Energy (USA), Inc.*, 25 F.4th 1238, 1247 1275 (10th Cir. 2022)).

[17] *Boulder County* Slip Op. at 38-39.

[18] *Id.* (citing 587 U.S. 761, 772 (2019) (Gorsuch, J.)).

[19] *Id.* at 7 (citing 993 F.3d at 91).

[20] 993 F.3d at 92 (quoting *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012)). It is also worth noting that an intent to regulate behavior should be presumed when a plaintiff seeks punitive damages, as the City of Baltimore is, Slip Op. at 10, because such "exemplary or punitive damages" are awarded "to deter or punish malicious deprivations of rights." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). However, the *Baltimore* court did not rely on such a rationale.

[21] *See Kurns*, 565 U.S. at 637 (discussing the preemption of state common law claims by the Locomotive Inspection Act); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959) (because the "obligation to pay compensation … is designed to be, a potent method of governing conduct and controlling policy" a State board could not award damages when its regulatory powers were preempted by the National Labor Relations Act).

[22] *Boulder County* Slip Op. at 37-39 (citing *Suncor Energy*, 405 F. Supp. 3d at 969-71; *Suncor Energy*, 25 F.4th at 1247, 1275).

[23] 587 U.S. at 772.

all. In a prior greenhouse gas tort case seeking only damages from climate change, the Ninth Circuit held that "the type of remedy asserted is not relevant" to the question of preemption.[24]

Are These Suits About Local Injuries or Global Causation?

Once the *Baltimore* court held that damages are effectively regulatory in nature (even if unintended or disclaimed by the plaintiffs), this dramatically colored its view of the second key issue: preemption. Specifically, the question was whether the court should decline to find preemption by focusing on the localized nature of the alleged injuries, as Baltimore argued, or hold that the instrumentality of those alleged injuries, interstate and global emissions, were subject exclusively to federal law. The *Baltimore* court took the latter route. The "complaint is entirely about addressing the injuries of global climate change and seeking damages for such alleged injuries,"[25] not claims about advertising. "The explanation by Baltimore that it only seeks to address and hold Defendants accountable for a deceptive misinformation campaign is simply a way to get in the back door what they cannot get in the front door."[26]

Because Baltimore alleged that its damages were caused by interstate and foreign emissions, not advertising, "the Constitution's federal structure does not allow the application of state law to claims like those presented by Baltimore."[27] The *Baltimore* court held that any dispute about interstate or foreign air emissions is preempted, not necessarily because the question fits the familiar analyses of field or conflict preemption, but because no single State's law may regulate air emissions originating beyond its borders.[28] In reaching this conclusion, the *Baltimore* court accepted the defendants' argument that federal common law effectively preempts state-law claims regarding foreign greenhouse gas emissions while the Clean Air Act preempts state-law claims regarding out-of-state emissions.[29] Further, Baltimore's claims were not preserved by the Clean Air Act's Savings Clauses[30] because they are limited to actions against in-state emission sources; they do not allow States to impose their laws in an extra-territorial manner.[31]

The *Boulder County* court disagreed. The plaintiffs there alleged that the defendants' products, when used by others, altered Colorado's climate, leading to excessively high temperatures, downpours, wildfires, droughts, the loss of snowpack, worsened air quality, and outbreaks of insects and disease, and that the defendants "profited from unchecked fossil fuel sales."[32] Nevertheless, the *Boulder County* court held that neither the global sales or use of fossil fuels were relevant to the preemption analysis. It found that the plaintiffs were not "attempting to litigate a policy solution to global climate change, limit fossil fuel use or production, or control greenhouse gas emissions."[33] Instead, they were merely "seeking compensation for harms caused in their jurisdictions"[34] and, citing other cases rejecting the removal of similar claims, the plaintiffs were harmed by an allegedly

[24] *Baltimore* Slip Op. at 19 (quoting *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012)).

[25] *Id.* at 11. These alleged injuries include damages from sea level rise, an increased frequency and severity of extreme precipitation events, drought, and heat waves, "and consequently social and economic injuries associated with those physical and environmental changes." *Id.* at 2-3.

[26] *Id.* at 11.

[27] *Id.* at 11.

[28] *Id.* at 11-12 (citing *Illinois v. City of Milwaukee*, 409 U.S. 91 (1972), *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("One State cannot apply its own law to claims that deal with air and water in their ambient or interstate aspects.").

[29] *Id.* at 12-13.

[30] 42 U.S.C. §§ 7604(e)(1)-(2) and 7416.

[31] *Baltimore* Slip Op. at 17 (citing *Ouellette*, 479 U.S. 481, 500 (1987)) (discussing regulation of out-of-state water pollution and a similar savings clause within the Clean Water Act).

[32] *Boulder County* Slip Op. at 5.

[33] *Id.* at 37-38.

[34] *Id.* at 37.

"'sophisticated disinformation campaign,'" not emissions.[35]

Each court framed the alleged causes of harm very differently and, as the *Boulder County* court explained, "[r]esolution of this framing issue is important as it significantly impacts the federal preemption analysis, and to a lesser extent, the analysis pertaining to the viability of the state law claims."[36] Thus, to characterize the tort suits as either about (1) the global production, sale, and use of fossil fuels that result in foreign or interstate emissions or (2) solely the alleged in-state manifestations of climate change, purportedly resulting from deceptive advertising, largely decides the preemption question.

Do Preemption Analyses for Removal and Dispositive Motions Differ?

While the *Baltimore* court, relying on *City of New York*, held that Baltimore's claims were preempted by a combination of the Clean Air Act (out-of-state domestic emissions) and federal common law (foreign emissions),[37] the *Boulder County* court treated the question of preemption as already being answered in the negative. It dismissed the *City of New York*'s preemption analysis as "conflict[ing] with several other appellate courts that have considered these issues,"[38] including the Fourth Circuit's ruling that Baltimore's claims should be remanded to state court.

The *Baltimore* court, however, found no conflict with the Fourth Circuit's remand ruling. "The Fourth Circuit analyzed federal common law preemption under the lens of removal jurisdiction where the sole consideration and focus was the doctrine of complete preemption and not the federal defense of ordinary preemption as it applied to the merits of the case."[39] This analysis is based on "the well pleaded complaint rule," a heightened standard applicable only to the questions of federal question jurisdiction and removal.[40] Instead of ruling on dispositive matters, the court merely looks at the face of the complaint and determines whether it raises state-law or federal-law claims.[41] The "complete preemption" doctrine is an exception to the well-pleaded complaint rule.[42] That can "treat[ ] a state-law cause of action as based on a federal statute 'in reality,' meaning that, under such circumstances, there is 'no such thing' as that state-law claim."[43] This is a different and much higher standard than "ordinary preemption" in that there is a rebuttable presumption against complete preemption that can only be defeated by a clear congressional intent to remove state-law claims to federal court.[44] Ordinary preemption, by contrast, is "a federal defense to a plaintiff's claims" and, as the City of Baltimore conceded, would still be a valid defense even in the absence of complete preemption.[45]

The *Boulder County* court acknowledged that "complete preemption" and "ordinary preemption" were separate concepts but it found no practical difference between the two, noting

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[35] *Boulder County* Slip Op. at 39 (quoting *City & County of Honolulu*, 537 P.3d at 1187).

[36] *Id.* at 37.

[37] *Baltimore* Slip Op. at 12-13.

[38] *Boulder County* Slip Op. at 45-46 (citing *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44 (1st Cir. 2022); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Mayor and City Council of Baltimore*, 31 F.4th 178 (4th Cir. 2022) ("*Baltimore IV*"); *Minnesota v. Amer. Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2023); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); *Bd. of County Commissioners of Boulder County v. Suncor*, 25 F.4th 1238 (10th Cir. 2022)) (collectively, "the Removal Cases").

[39] *Baltimore* Slip Op. at 13.

[40] *Id.*; *see also Baltimore IV*, 31 F.4th at 197.

[41] *Id.* at 197-98.

[42] *Id.* at 198.

[43] *Id.* at 198 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 11 (2003)); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

[44] *Id.* at 199.

[45] *Baltimore* Slip Op. at 13-14.

that the *Honolulu* court also found that the Removal Cases' holding against complete preemption required rejecting any ordinary preemption defense.[46] Although the *Boulder County* court ultimately reviewed ordinary preemption separately, it was guided largely by the notion that it could not contradict the Removal Cases' holdings on complete preemption, that there could be no preemption without injunctive relief, and that it could not reach any conclusion that would deprive the plaintiffs of a remedy for their alleged harms.[47] Given that both the *Boulder County* and the *Honolulu* courts found the Removal Cases' complete preemption analyses to be virtually dispositive of the ordinary preemption question, appellate courts would likely need to clarify the differences in standards to avoid confusion.

Conclusion

Questions about whether damages can regulate behavior, the global nature of greenhouse gas emissions, and the nature of preemption by statute and federal common law will continue to swirl for the next several years as more trial courts rule on dispositive motions and those rulings are further appealed. The *Boulder County* defendants may not have to wait long as, on July 28, 2024, the Colorado Supreme Court granted the defendants' motion to issue a show cause order to the *Boulder County* court explaining why the plaintiffs' state-law claims were not preempted.[48] Similarly, the City of Baltimore promised to appeal the dismissal of its claims the Appellate Court of Maryland.[49] Other courts will soon weigh in, too.

[46] *Boulder County* Slip Op. at 46, 53.

[47] *See id.* at 43 (there cannot be preemption where "the Local Governments' claims do not seek to regulate or enjoin GHG emissions"); *id.* at 51 ("The Energy Companies' preemption argument conflicts with several recent appellate decisions"); *id.* at 52 (Clean Air Act "does not provide a remedy to the Local Governments for the [State law tort] claims brought herein" and preemption "would leave" plaintiffs' "entirely without a remedy" which "further supports the conclusion that the [Clean Air Act] does not preempt the state law claims advanced in this litigation.").

[48] *County Commissioners of Boulder County v. Suncor Energy USA, Inc.*, Case No. 2024SA206, Order and Rule to Show Cause (Col. July 28, 2024).

[49] Nate Raymond, Energy companies win dismissal of Baltimore's climate change case, *Reuters* (July 11, 2024).

