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Climate Change Litigation Takes an Ominous Turn

Last week witnessed a critical but largely unremarked advance for plaintiffs seeking to impose liability on major public companies for the social costs of climate change.

The Ninth Circuit's ruling in [City of Oakland v. BP PLC](#) cleared the path for state-court litigation against corporate defendants on the theory that producing, distributing, using, or profiting from fossil fuels constitutes a "public nuisance." The cities of Oakland and San Francisco sued large energy companies in California state court, seeking an order requiring them "to fund a climate change adaptation program for the cities." The energy companies removed the case to federal court and moved to dismiss the complaint. [The district court agreed with the energy companies](#) that the cities' state-law nuisance claim was governed by federal law. "If ever a problem cried out for a uniform and comprehensive solution," wrote the district judge, it is the "geophysical problem" of climate change. "A patchwork of fifty different answers to the same fundamental global issue would be unworkable." Unpersuaded, the Ninth Circuit concluded that the cities' claim neither presented a "substantial question of federal law" nor was completely preempted by the federal Clean Air Act.

The Ninth Circuit's decision invites countless actions by states, municipalities, and private litigants in state courts all over the country. Absent a mechanism for uniform federal adjudication, public policy regarding climate change—as in past mass-tort litigation—will be made case-by-case in a "patchwork" of state court decisions. [As we have previously noted](#), the liability risk extends across the economy, far beyond the energy sector. And the tort system, when confronted with civil litigation claiming broad social injury, is often indiscriminate in extracting enormous damages from corporate defendants—even those seemingly far afield from the alleged liability-creating conduct.

Corporations and directors can nevertheless manage their exposure by actively evaluating climate-related risk, considering sustainability initiatives, implementing appropriate operational and board monitoring procedures, and documenting all these efforts. But the time to act is now—when the climate-related liability and fiduciary risk for most companies is visible but not yet acute.

William Savitt  
Anitha Reddy  
Bitia Assad

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