Climate Change Litigation:
The Emergence of Public Nuisance under (the Golden) State Law

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SYNOPSIS

§ 1.01 Summary

Climate change litigation resurfaced in 2017 after a brief hiatus in plaintiffs' attempts to hold fossil-fuel companies responsible for global climate change. This paper addresses how plaintiffs today seek to plead around the U.S. Supreme Court's 2012 foreclosure of federal public nuisance tort litigation alleging harm resulting from climate change. First, we review the key federal climate change cases culminating in the Supreme Court's 2012 decision in *American Electric Power Co. v. Connecticut* ("*AEP*"). Second, we discuss how plaintiffs today attempt to use the full gamut of California tort law to revive climate change litigation. Third, we highlight other legal issues impacting this current round of climate change litigation.

Climate change litigation in the United States more than doubled in the past five years, from approximately 380 cases filed by 2012 to over 800 today.[1] As heat waves, wildfires, winter "bomb" storms, and torrential-rain floods rage across the country, climate change has again been thrust into the media spotlight. Climate change-related cases range from federal statutory claims

[1] *Climate Change Litigation in the United States*, CLIMATECASECHART.COM (Jan. 22, 2018), http://www.climatecasechart.com.

under the Endangered Species Act brought by conservation groups to securities-fraud class actions brought by shareholders. This paper discusses only a specific subset of cases: governmental plaintiffs using tort theories to sue fossil-fuel companies for localized and regional adverse effects allegedly from climate change.

Until recently, climate change litigation was "an overwhelmingly federal affair"; in 2012, tort claims seeking recovery or injunctive relief for climate change damages in state courts remained comparatively rare.[2] Now, the fossil-fuel industry faces a slew of state-law tort claims seeking recovery for climate change-related harms in California. A recent lawsuit filed by New York City and reports from Colorado and Los Angeles indicate similar suits may follow. What fuels this latest wave of litigation seeking to blame fossil-fuel companies for global climate change?

§ 1.02 Federal Origins: Who Sued, Why, and What Happened?

[1] *Comer v. Murphy Oil Company* (2007)

In 2007, coastal residents in Mississippi brought a federal class action for public nuisance ("*Comer I*") against companies producing and refining oil, gas, coal, and chemicals, alleging that defendant-companies' direct, operational greenhouse gas ("GHG") emissions around the world contributed to global climate change, which then aggravated the damage caused by Hurricane Katrina in 2005. The district court held that private plaintiffs lacked standing and that the cases presented a political question on a "debate which simply has no place in the court" because plaintiffs were asking the court "to balance economic, environmental, foreign policy, and national security interests and make an initial policy determination of a kind which is simply nonjudicial . . . [and] best left to the executive and legislative branches."[3] The district court did not comment on the political-question doctrine under Mississippi state law.

On appeal, the Fifth Circuit panel initially reversed, finding that plaintiffs had both state and federal standing to pursue their claims that were not political questions. But the Fifth Circuit next reheard the case *en banc* and ultimately vacated its own panel opinion, when later recusals resulted in a loss of quorum.

After the U.S. Supreme Court refused to intervene in the Fifth Circuit decision to deny an appeal, the same plaintiffs in 2012 refiled, again alleging state law-based public nuisance for GHG emissions ("*Comer II*"). But the intervening *AEP* decision that year (discussed below) prompted the district court to again dismiss the case on the bases of *res judicata*, lack of standing, nonjusticiable political questions, and remoteness. Notably, the court also found that the Clean Air Act, in addition to displacing federal common law on public nuisance, also preempted plaintiffs' state-law claims for public nuisance because they also "hinge on a [judicial] determination that the defendants' emissions are unreasonable."[4] On appeal, the Fifth

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[2] Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STANFORD ENVIRO. L. JOURNAL 49 (2012).

[3] *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855, 860 fn. 2 (5th Cir. 2009).

[4] *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012) ("*Comer II*"), *aff'd in part*, 718 F.3d 460 (5th Cir. 2013) (affirming dismissal on basis of res judicata).

Circuit affirmed the dismissal, but solely on the basis of *res judicata*, mooting the district court's other dismissal grounds.

[2] *Kivalina v. ExxonMobil* (2008)

In 2008, an Alaskan tribal village sued twenty-four oil, energy, and utility companies for their GHG emissions contributing to climate change, which threatened the coastal village by reducing protective sea ice and increasing storms and flooding. The *Kivalina* plaintiffs sought to recover the estimated $400 million to relocate inland from the eroding coast.[5] The district court dismissed the case, finding that—under one of six *Baker v. Carr* factors of political-question doctrine[6]—courts lack the tools necessary to resolve this type of case.

The Ninth Circuit affirmed the dismissal, but for a different reason. It held, based on the intervening 2011 *AEP* decision, that the Clean Air Act displaced the *Kivalina* plaintiffs' federal public-nuisance claims. The appellate court emphasized that solving any alleged effects of global warming "must rest in the hands of the legislative and executive branches of our government."[7] The U.S. Supreme Court refused to the hear the case, leaving the Ninth Circuit opinion binding precedent in that circuit. That opinion did not analyze plaintiffs' public-nuisance claims under state law.[8]

[3] *American Electric Power v. Connecticut* (2011)

In 2011, the U.S. Supreme Court first addressed climate change under a public-nuisance theory for claims against six major power generators and the federal Tennessee Valley Authority for contributions to global warming through interstate GHG emissions.[9] The Court held that the Clean Air Act, and EPA action authorized by the Clean Air Act, displaced plaintiffs' claims for public nuisance under federal common law. In doing so, the 2011 *AEP* decision extended the prior decision in *Massachusetts v. EPA*,[10] where the Court held that the Clean Air Act authorizes federal regulation of GHGs.

Although unanimous in its displacement analysis in *AEP*, the Court split four-to-four on other issues reached by the lower courts, because Justice Sotomayor recused herself. As a result, whether private citizens and States can use federal common law nuisance to abate out-of-state

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[5] *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 872 (N.D. Cal. 2009) (holding that a lack of judicially discoverable and manageable standards precludes federal nuisance claim), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012) (holding that the Clean Air Act displaced federal common law claim for public nuisance), *cert. denied*, 133 S. Ct. 2390 (2013).

[6] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[7] *Kivalina*, 696 F.3d at 858.

[8] Judge Philip M. Pro of the District of Nevada, sitting by designation, authored a concurring opinion in part to voice his view of "tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim." *Id.* (Pro, P., concurring).

[9] *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*"AEP"*).

[10] 549 U.S. 497 (2007).

pollution is "an academic question," because federal legislation authorizes only the EPA—not the States—to regulate carbon-dioxide emissions.[11]

§ 1.03 State Courts Now: Who's Suing, Why, and What's Happening?

[1] Dismissed from Federal Court, Plaintiffs Sidestep to California

"We have learned a great deal from the early [federal] cases."
-Matt Pawa, Counsel for Climate-Change Plaintiffs[12]

In 2012, there were no reported tort cases seeking recovery or injunctive relief for climate change damages in state courts.[13] Now, eight cities and counties in California are suing collectively almost every major fossil-fuel producer. And media reports from Los Angeles and Colorado indicate similar lawsuits may follow.[14] [15]

The federal cases centered on fossil-fuel companies emitting GHGs, increasing the concentration in the atmosphere, allegedly causing climate change, which somehow caused harm in plaintiffs' jurisdictions. Those complaints focused on emissions directly from companies' operations, like methane flaring when drilling for oil or emitting carbon dioxide when combusting fossil fuels to produce electricity.

But, among other issues, federal courts struggled to conceive of how to trace defendants' emissions to the precise portion of GHGs in the atmosphere that may or may not have been causing the subpart of climate change (local weather events or coastal erosion) that actually harmed plaintiffs' communities. If, for example, defendant companies had never directly emitted GHGs, would climate change—at least, those subparts (local weather events or coastal erosion) potentially caused by other countries' emissions, or the U.S. government's emissions, or consumers' own emissions—still have damaged plaintiffs' communities? Courts refused to decide this complicated causation question and instead dismissed these cases at the pleading stage.

Faced with this track record in federal courts, plaintiffs today set their sights on state courts, and on one state's court in particular, where plaintiffs assert that changes in public nuisance law appear to create a new climate for climate change litigation. Plaintiffs today bring the same federal claims, this time masquerading as state claims.

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[11] *Id.* at 423.

[12] Matt Pawa, *Memorandum on "Potential Global Warming Lawsuit for California to Recover Global Warming Damages,"* (Mar. 9, 2015), *available at* http://www.dailymail.co.uk/~/article-5078897/index.html#i-c10796b85672970c

[13] Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STANFORD ENVIRO. L. JOURNAL 49 (2012).

[14] David Zahniser, *L.A. lawmakers look to sue big oil companies over climate change — and the costs that stem from it* (Jan. 13, 2018), *available at* http://www.latimes.com/local/lanow/la-me-ln-climate-change-lawsuit-20180113-story.html

[15] Alex Burness, *Boulder considers suing fossil-fuel companies that emit greenhouse gases* (Jan. 8, 2018), *available at* https://www.denverpost.com/2018/01/08/boulder-lawsuit-fossil-fuel-companies/

[2] In California, Plaintiffs Try to Reinvent Tort Law on Climate Change

"A global warming case would be grounded in the doctrine of public nuisance. [. . .] California nuisance law is strong on the key issues for a global warming case."
-Matt Pawa, Counsel for Climate-Change Plaintiffs[16]

AEP shut down federal public nuisance lawsuits against fossil-fuel producers for GHG emissions, yet eight cities and counties in California are now suing nearly the same companies for allegedly causing a public nuisance – *i.e.*, climate change. What is different this time?

In plaintiffs' counsel's own words: "[T]he Clean Air Act does not regulate oil or coal companies' production of fossil fuels—[federal regulation] is aimed at emissions rather than production. [. . .] [T]his principle would not seem to preclude a state law claim . . . strictly focused on [companies'] role as producers."[17] Indeed, plaintiffs are now suing defendants with a focus on their role as fossil-fuel promoters and producers—not as GHG emitters.

The current governmental plaintiffs in California are the County of San Mateo, City of Imperial Beach, County of Marin, City of Santa Cruz, County of Santa Cruz, City of Richmond (all represented by Sher Edling LLP), City of Oakland, and City of San Francisco (represented by Hagens Berman Sobol Shapiro LLP).

Considering all eight California complaints, plaintiffs in two cases (Cities of San Francisco and Oakland) allege solely public nuisance. Plaintiffs in the remaining six cases allege causes of action for public nuisance, private nuisance, strict products liability, negligence, and trespass. Plaintiffs' basic allegations are:

- **Public Nuisance**: Defendants are creating or assisted in creating nuisances of rising local seas, more flooding, and more storms, which interfere with the public's right to health, safety, and enjoyment of property, among other things. Plaintiffs' cities and counties are especially vulnerable to sea-level rise due to their coastal locations.

- **Private Nuisance**: Defendants' fossil-fuel induced sea-level rise interferes with Plaintiff-governments-as-landowners' rights to use and enjoyment of their property.

- **Strict products liability**: Defendants produced fossil fuels, a defective product, and/or Defendants failed to warn that combusting those fuels would cause climate change.

- **Negligence**: Defendants breached their duty to design, test, inspect, and distribute fossil fuels to prevent defective products from entering the stream of commerce. When those fuels were used and combusted, those defective products caused climate change, which caused the seas to rise, which caused damage to Plaintiffs' coastal communities.

[16] Matt Pawa, *Memorandum on "Potential Global Warming Lawsuit for California to Recover Global Warming Damages,"* (Mar. 9, 2015).
[17] *Ibid.*

- **Trespass**: Defendants' fossil-fuel activities caused the oceans to physically trespass onto Plaintiffs' coastal properties.

The Oakland and San Francisco plaintiffs claim to "seek only an abatement fund . . . for the purpose of addressing the public nuisance presented by global warming."[18] They rely on recent developments in public nuisance liability under California tort law.

[3] *The People v. ConAgra* (2017): Evolving Public Nuisance in Tort

[a] What Does Lead Paint Have to Do with Climate Change?

In November 2017, California became the first state in the nation to find lead paint manufacturers liable under public nuisance for promoting lead paint for a hazardous use.[19] Plaintiffs hope to use *ConAgra* to pursue previously unsuccessful claims against fossil fuel companies—this time, by alleging public nuisance and seeking abatement. ("The People's claim here—public nuisance against a producer that has engaged in improper promotion—is a recognized claim under California law, as a state appellate court affirmed just last week. [*ConAgra* citation.]" Plaintiffs' SF Remand Motion 2:-17-18.) What should we know about this case?

[b] Case Background

Seventeen years ago in California state court, ten cities and counties sued the largest manufacturers and merchants of lead pigment. Plaintiffs argued that lead paint in residential buildings within their jurisdictions is a public nuisance requiring abatement. The trial court dismissed the case on summary judgment. But, in 2006, the Court of Appeal reversed as to the public-nuisance cause of action.

In 2011, plaintiffs amended their complaint. This time, plaintiffs eliminated all but their public-nuisance cause of action and alleged that defendants' production and sale of lead-based paint created a public nuisance that defendants must abate by removing all lead from public and private homes, buildings, and properties. In 2014, the court ordered the remaining defendants to pay $1.15 billion into an abatement fund to be managed by a neutral third party that would distribute the money through grants. Defendants appealed the trial court's order, but on November 17, 2017, the Court of Appeal affirmed that defendants were responsible for creating a public nuisance of lead paint in residential buildings.[20]

The Court of Appeal found that liability for public nuisance does not hinge on whether the defendant "owns, possess, or controls the property" or else has the "ability to abate," but

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[18] Climate Liability News, *California Climate Lawsuits: Different Strategies, Same Goal* (Dec. 18, 2017), *available at* https://www.climateliabilitynews.org/2017/12/18/climate-lawsuits-liability-california/

[19] *People v. Conagra Grocery Prod. Co.*, 17 Cal. App. 5th 51 (2017), *reh'g denied* (Dec. 6, 2017), *review filed* (Dec. 22, 2017) ("*ConAgra*").

[20] The court also reversed and remanded to decrease the $1.15 billion abatement fund because there was not enough evidence to show that the manufacturers should be responsible for all homes built through 1981.

rather on whether the defendant "created or assisted in the creation of" a nuisance through "affirmative promotion for a use defendants knew to be hazardous."[21]

[c] Knowing While Promoting a Hazardous Use of a Product

Under *ConAgra*, Defendants have actual knowledge sufficient for public nuisance liability when they produce, market, sell, and promote a product for a hazardous use.[22] The *ConAgra* court only looked to "what a defendant must have known" for proof of actual knowledge, as opposed to "what a defendant should have known" as proof of constructive knowledge based upon a duty to discover information.[23] To attribute actual knowledge to defendants, the Court pointed to trial evidence showing that defendants learned about harmful lead exposure throughout the early twentieth century via (i) association-sponsored conferences, (ii) Congressional hearings on bills aimed to prevent lead poisoning, (iii) speeches given by industry figureheads at conferences for paint manufacturers, and (iv) materials sent to [defendant-]members of the industry's professional association, all of which "plainly discussed the dangers posed by interior residential use of lead paint."[24]

The Court inferred that defendants "must have known" about the hazards of lead-based paint without specific evidence that any one defendant heard or attended any one speech or conference, "[b]ecause defendants were leaders in the paint industry at that time."[25] Furthermore, the Court held that the actual-knowledge evidence need not show that a defendant "understood *precisely how* children could be harmed by interior residential lead paint, so long as there is substantial evidence that [defendant] knew that interior residential lead paint posed a significant risk of harm to children."[26]

[d] Assisting in Creating a Nuisance by Promoting a Hazardous Use

The appellate court reversed the trial court's order creating an abatement fund for all homes built before 1981 because it rejected the inference that defendants' promoting lead-paint usage before 1951 continued to cause lead-paint usage between 1951 and 1981.[27] The appellate court characterized the trial court's order as a "very limited order requiring abatement of only deteriorated interior lead paint, lead paint on friction surfaces, and lead-contaminated soil at residences in the ten jurisdictions."[28]

Promotion. A defendant "creates or assists in the creation of" a nuisance by promoting, through affirmative conduct, a use of a product while actually knowing the use is hazardous.[29]

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[21] *ConAgra*, 17 Cal. App. 5th at *12.
[22] *Id.* at *13.
[23] *Ibid.*
[24] *Id.* at *13-15.
[25] *Id.* at *15.
[26] *Id.* at *17.
[27] *Id.* at *28.
[28] *Id.* at *34.
[29] *Id.* at *18.

Basing public-nuisance liability on promotional advertising activities—both direct in-house and indirect through professional associations—did not violate defendants' First Amendment rights to free speech and association, since the remedy for public nuisance "will not involve enjoining current or future speech."[30] Otherwise, so long as defendants' advertising campaigns knowingly promoted the hazardous use (here, interior residential use of lead paint) as opposed to some other use (for example, exterior use of lead paint), liability attaches.

Causation. The causation element is satisfied when any individual defendant's conduct is a substantial factor—more than an "infinitesimal" or "theoretical" part—in bringing about the injury, damage, or loss.[31] The Court of Appeal found "plenty of evidence that defendants' [past] affirmative promotions of lead paint for interior residential use played at least a 'minor' role in creating the nuisance [of lead paint in homes] that now exists."[32] Thus, the identity of any one manufacturer of the lead paint found in any one home "is irrelevant," so long as that manufacturer's promotions were a substantial factor in leading to the use of lead paint on residential interiors generally.[33]

Lastly, according to the *ConAgra* court, defendants are jointly and severally liable for the public nuisance, with the burden on them to apportion liability amongst themselves.[34] In his memorandum, Plaintiffs' counsel noted, "California public nuisance law is particularly robust on the key issue of whether it is possible to hold liable a small subset of numerous contributors to a public nuisance."[35]

[e] Abatement is the Only Remedy

Pesticide manufacturers have successfully defeated public-nuisance causes of action in California state court, in which governmental plaintiffs brought multiple causes of action, and the centerpiece of the complaint sought money damages rather than abatement. See *In re TCP Cases*, Judicial Council Proceeding No. 4435. Mirroring the plaintiffs' strategy in *ConAgra*, two of the California climate change plaintiffs bring only one cause of action, for public nuisance, and explicitly limit their demand to abatement.

In *ConAgra*, the court found that paying into a $1.15 billion abatement fund was not a "thinly-disguised" damages award, since the fund "would be utilized, not to recompense anyone for accrued harm, but solely to pay for the prospective removal of hazards defendants had created."[36]

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[30] *Id.* at *19.
[31] *Id.* at *25.
[32] *Ibid.*
[33] *Id.* at *29.
[34] *Id.* at *36.
[35] Matt Pawa, *Memorandum on "Potential Global Warming Lawsuit for California to Recover Global Warming Damages,"* (Mar. 9, 2015).
[36] *Id.* at *46.

"The distinction between an abatement order and a damages award is stark. An abatement order is an equitable remedy, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiffs . . . Damages, on the other hand, are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct . . . Generally, continuing nuisances are subject to abatement, and permanent nuisances are subject to actions for damages."[37]

Plaintiffs bringing recent climate change cases pivoted from their unsuccessful run in federal court to what they believe is an opportunity in California state court following the *ConAgra* history and recent appellate opinion – seeking abatement rather than money damages pursuant to a public-nuisance cause of action.

§ 1.04 What Else Is Driving Climate Change Litigation?

[1] *Juliana v. United States*: Constitutional Climate Change

In 2015, young people from around the country sued the federal government alleging it knew "for decades" that GHG emissions caused climate change, but nevertheless "continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation."[38] Plaintiffs argued the government's conduct violated the due-process and equal-protection clauses of the Fifth Amendment, unenumerated rights in the Ninth Amendment, and the public trust doctrine. Plaintiffs asked the court to compel defendants to cease "permitting, authorizing, or otherwise subsidizing" fossil fuels and to develop and implement a "national plan" to limit the atmospheric concentration of carbon dioxide to 350 parts-per-million by the year 2100.[39] In all, the *Juliana* plaintiffs focus on defendants' acts of permitting and supporting fossil fuel production and consumption to argue that they "have unconstitutionally caused, and continue to cause, substantial impairment to the essential public trust resources."[40] In June 2017, after the District of Oregon denied the government's motions to dismiss, the United States filed a writ of mandamus in the Ninth Circuit Court of Appeals. The Ninth Circuit stayed the district court proceedings and heard oral argument on December 11, 2017. To date, there is no known decision in this case.

[2] *Wash. Enviro. Council v. Bellon*: Causation in Climate Change Science

In 2013, an environmental group sued various Washington state officials demanding they regulate five refineries accounting for approximately 5.9% of GHG emissions in the state. The specific issue on appeal was Article III standing, specifically the redressability and traceability requirements. But the Ninth Circuit also discussed causation, finding the allegations to be nothing more than:

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[37] *Ibid.*

[38] *Juliana v. United States*, No. 15-cv-1517, D.E. 7 (D. Or. 2015), ¶ 7.

[39] *Id.* at ¶¶ 12, 212.

[40] *Id.* at ¶ 309.

> …a series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or other evidentiary basis that the refineries' emissions are the source of their injuries. While Plaintiffs need not connect each molecule to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an 'attenuated chain of conjecture' insufficient to support standing.

The Ninth Circuit also found that causation in a case relating to GHG emissions "may be a particularly challenging task" because "there is limited scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts in a given region," especially given the "numerous independent sources of GHG emissions, both within and outside the United States, which together contribute to the greenhouse effect."[41]

§ 1.05 Conclusion

Following unsuccessful attempts in federal court to hold fossil-fuel companies responsible for global climate change, plaintiffs now turn to California law and hope for a different result. A recent lawsuit filed by New York City and reports from Colorado and Los Angeles indicate additional communities may be considering similar suits. These California cases may be only the beginning of a new breed of climate change litigation. Understanding how plaintiffs proceeded historically compared to the current wave of litigation, including their use of new legal theories to escape existing precedent, will be the key to the outcome of this litigation.

[41] *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013).