

Combating Climate Change Beyond the Courts

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Climate Change is the single most pressing problem addressing our planet. Increasing global temperatures have the potential to flood our cities, cause fires to burn our homes and forests, and lay waste to environments that need to thrive to support human, animal, and plant life. As a mother, I want a safe and habitable planet for my children, their children, and future generations.

I recently participated in a [panel put on by the Progressive Policy Institute](#), a Washington, DC based think tank focused on promoting “radially pragmatic” ideas. The panel explored whether litigation was an effective tool to combat climate change.

My take is that litigation is an inefficient and inelegant way to combat climate change. Instead, we should urge our law and policy makers to promote innovation at the state, local, and federal level to reduce greenhouse gas emissions to address climate change. We should use the power of government and the press to share ideas that work – based on shared responsibility – rather than target a few manufacturers to pay for a problem that we have all helped cause.

Most climate change lawsuits rely on a public nuisance theory of law, rather than traditional tort liability. Public nuisance law can best be understood as the opposite of a public good – it is a public bad. Unlike traditional tort lawsuits, which are based on individual harms – you hit me with your car so I will sue you to pay my medical bills – public nuisance theory relies on a bad harm to all of us. Historically, it was used to punish someone who polluted the town well, or who blocked access to the bridge. There is no countervailing good to the public nuisance activity.

One of the biggest and most notable cases to successfully use the public nuisance theory was a case brought by Santa Clara county against manufacturers of lead-based paint, which resulted in a \$1B plus verdict (that was later reduced on appeal.) That verdict got the attention of plaintiff’s lawyers, who could see the power of a public nuisance lawsuit and have been trying to get in on the action.

In many cases, including the climate change lawsuits, the plaintiff’s lawyers shop around for local governments to serve as plaintiffs. They tell the cities that they will front the legal fees and bring the case on contingency basis. The lawyers are only paid at the end, if they recover. It is easy to see why a city might like this – there’s no skin in the game and there’s the prospect of free money. That’s more politically appealing than increasing taxes to pay for adaptations necessary as a result of climate change

or imposing mandates that will reduce greenhouse gas emissions and make those adaptations less necessary.

In California, eight cities and counties have responded to these overtures and agreed to let the lawyers file lawsuits in their names against a handful of oil and gas companies for the costs of climate change. In two cases that have since been joined together, Oakland and San Francisco sued five oil companies for an unnamed amount to pay for the costs of adaptation to climate change caused in part by use of fossil fuels. A Federal Judge dismissed the case, explaining what is wrong with these lawsuits:

“The scope of plaintiff’s theory is breathtaking. It would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming...anyone who supplied fossil fuels with knowledge of the problem would be liable.” See Order Granting Motion to Dismiss, page 4, available here: <https://www.nytimes.com/interactive/2018/06/26/climate/document-Judge-Dismisses-Climate-Suit-Against-Oil-Companies.html?module=inline>.

The judge notes, “...it is true that carbon dioxide released from fossil fuels has caused (and will continue to cause) global warming. But against that negative, we must weigh this positive: all our industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all our monumental progress would have been impossible. All of us have benefitted. Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded? Is it really fair, in light of those benefits, to say that the sale of fossil fuels was unreasonable?” (Same Order, page 6.)

The idea that a global, planet-wide problem could be blamed on a handful of companies is insufficient for providing any meaningful solutions to climate change. As the Judge Alsup noted, “The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.” (Same order, page 15.) Governments – local, state, and federal – can and should address the problem of global warming.

As was clear at the Progressive Policy Institute’s forum, California is a leader in addressing climate change issues. Not only do we have aggressive greenhouse gas emissions targets, the California Energy Commission explained that it is overseeing the Local Government Challenge, supplying grants to local governments to achieve greenhouse gas reductions. These successful projects are then highlighted so they can be replicated by other local governments. For example, San Diego is analyzing energy use in city buildings to reduce emissions, and Del Mar installed solar panels on their new city hall.

Efforts like these are a more productive use of local elected officials’ time than bringing lawsuits against politically targeted manufacturers and oil companies.

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