

The Evolving Climates in the US and UK for Environmental Damage Claims

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Key Points

- The U.S. Supreme Court may hear cases asking whether the federal Clean Air Act preempts state common law claims for injuries allegedly caused by climate change, an issue on which circuit courts have split.
- English courts have been willing to entertain claims involving alleged climate change-related harms caused by foreign subsidiaries of U.K. companies.
- Directors of U.K. companies could come under pressure from derivative actions challenging their roles in responding to climate change issues, though such cases must be approved by a court.

The November 2022 United Nations Framework Convention on Climate Change (COP27) spotlighted the political and diplomatic challenges of compensating damages caused by climate change. At the same time, fundamental questions about who should be held responsible, and how, remain. Parties are increasingly turning to the courts to settle claims of climate change-related injuries.

Recent developments in U.S. and U.K. courts illustrate the varying approaches. This term, the U.S. Supreme Court may consider whether a federal statute preempts climate change-related claims under state common law. Meanwhile, claims arising from environmental incidents across the world are finding a platform in the U.K. courts — and companies and directors are under increasing scrutiny for their approaches to climate change.

Federal Versus State Common Law in the US

After the U.S. Supreme Court limited the federal government's ability to regulate greenhouse gas emissions in its last term, it may once again wade into climate change litigation. Two cases with pending petitions for *certiorari* — *BP P.L.C. v. Mayor & City Council of Baltimore* and *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder*

County — have the potential to determine whether state law tort claims can provide redress to climate change's victims.

Background. Both petitions present a sequel to the Court's 2011 decision in *American Electric Power Co. v. Connecticut*. There, the Court held that the plaintiffs could not bring federal common law public nuisance claims to seek abatement of greenhouse gas emissions from fossil fuel-fired power plants. The Court found these claims had been displaced by the Clean Air Act, which authorizes the Environmental Protection Agency to regulate carbon emissions. Yet the Court left unresolved whether the Clean Air Act also preempted state common law claims involving climate change.

Seeking removal to federal court. In the pending petitions, municipalities asserted state common law tort claims against energy companies for their alleged role in exacerbating climate change. The defendants sought removal to federal court, arguing that federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse gas emissions on the global climate.

Circuit split. The U.S. Courts of Appeals for the Fourth and Tenth Circuits both rejected this argument, affirming the

district courts' orders remanding the cases to state court based on lack of jurisdiction. However, in a similar case in 2021, the U.S. Courts of Appeals for the Second Circuit refused to remand similar claims and held that the plaintiffs could not use state tort law to hold multinational oil companies liable for damages caused by greenhouse gas emissions, because these claims fell within the domain of federal common law.

Far-reaching implications. Should the Supreme Court decide to take up the pending petitions, it could close a significant potential route of climate change litigation. If it concludes that plaintiffs' claims arise exclusively under federal common law, then all of their claims will likely be dismissed under *American Electric Power* as displaced by the Clean Air Act. Conversely, if plaintiffs are permitted to litigate their claims under state common law, courthouse doors could be open for damages claims seeking redress for the effects of rising sea levels and extreme precipitation events, among others.

The outcome could be far-reaching. As of the filing of the cert petitions, more than 20 pending cases in federal courts were contesting related questions.

The Supreme Court recently invited the U.S. solicitor general to file a brief expressing the federal government's views on the *Suncor Energy* petition, signaling a degree of interest in hearing the case.

(For a broader discussion on what the Supreme Court's 2022 term may bring, see "[Supreme Court Term May Upend Precedent, Push Back Regulation.](#)")

Potential for Corporate Liability in the UK

English courts appear to be increasingly willing to hear claims for damages against U.K. parent companies for actions of their foreign subsidiaries. The focus has been predominantly on energy companies being pursued for alleged environmental damage around the world.

In July 2022, the Court of Appeal overruled a finding of *forum non conveniens* as to a class action sought to be brought against mining company BHP for the collapse of the Fundao Dam in Brazil in 2015. The Court of Appeal was not concerned by the potentially "unmanageable" nature of the proceedings, nor by the risk of inconsistent findings in parallel Brazilian proceedings. It also found that there was a legitimate advantage to pursuing the English proceedings because it might improve the chance of a settlement.



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Other examples of environmental claims in the English courts include those pursued by Zambian villagers against U.K.-based Vedanta and its Zambian subsidiary (*Vedanta Resources PLC v Lungowe*), and by Nigerian individuals regarding Shell's alleged pollution of the Niger Delta (*Okpabi v Royal Dutch Shell Plc*).

The coming year will be illuminating as the stages of liability unfold and damages, if any, are quantified. Both areas will

encompass complex and novel issues of environmental law, tort and company law.

Recourse to the Competition Appeal Tribunal. We are also likely to see increased recourse to the Competition Appeal Tribunal (CAT)'s collective proceedings procedure for ESG-based claims. A recently announced class action application against U.K. water companies for allegedly illegal discharges into waterways is the latest example of a trend of imaginatively framing claims in competition law terms to benefit from this regime. This will be the first "environmental" class action the CAT has considered and will be formulated in terms of excessive pricing and financial loss connected to the water companies' alleged abuse of dominance.

Derivative claims. Another related and significant development in 2022 was the emergence of derivative claims as a mechanism for holding directors to account for climate change issues. (Derivative claims are brought in the name of a company against its directors.) The environmental law group ClientEarth, for instance, has signaled an intention to bring a derivative claim against Shell's board for allegedly failing to prepare properly for the net-zero transition and setting inadequate targets for reductions in greenhouse gas emissions. Although a derivative claim requires the court's permission and ultimately may be unlikely to result in a finding of liability, it is potentially an effective tool for those aiming to challenge corporate policies and create reputational difficulties. Applicants for permission to bring a derivative claim need only hold one share, so ClientEarth's approach would be relatively easy to replicate.