CHAPTER TWO

The Impact of Regulatory Legislation on Common Law Actions (pp. 104-116)

PREEMPTION AND STATE COMMON LAW ACTIONS AGAINST OIL COMPANIES

A slew of state common law actions have been brought against oil companies in state courts seeking compensation for the costs of adapting to climate change. The defendants have tried to remove these cases to federal court and then to claim that they should be preempted by *American Electric Power*. As indicated in Notes 2 & 3 on pages 114-115, those who believe that state common law actions should be preempted by the Clean Air Act cite *Oullette's* holding that the law of the source state has to be applied. They argue that this would be ridiculous in the context of GHG emissions because it makes no difference where sources are located; all such emissions contribute to the climate crisis. Note that *American Electric Power* involved a case filed initially in federal court seeking to use federal common law to require reductions in GHG emissions from the defendant utilities. The cases brought by cities, counties and states against fossil fuel companies are brought under state common law and seek damages for consumer fraud and the costs of adapting to climate change, not court-ordered emissions reductions. This makes it quite a leap to say that these cases belong in federal court.

As mentioned in Note 3 on pages 114-115, when *BP p.l.c v. Mayor and City Council of Baltimore* was before the U.S. Supreme Court the oil companies argued in their briefs that because climate change is a global problem state climate litigation necessarily should arise under federal common law and *American Electric Power* therefore should bar them. At oral argument Justice Barrett stated that it would be "fairly aggressive" for the Court to decide this issue, which was not actually before the Court in a case involving the reviewability of remand orders in removal actions. The Court did not address this issue when it decided by a 7-1 vote that federal appellate courts could review all grounds for removal when hearing appeals of remand orders. Justice Gorsuch wrote the majority opinion. Justice Sotomayor dissented, arguing that the Court's decision "will reward defendants for raising strained theories of removal under §1442 or §1443 by allowing them to circumvent the bar on appellate review entirely." In the *Baltimore* case the oil companies had argued that they should be able to use the "federal officer removal" exception because they had contracts to sell oil to the federal government (a rather far-fetched "the feds made me do it" defense).

In City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021), New York City sued four multinational oil companies for damages in federal court alleging that their production and sale of fossil fuels had contributed to a public nuisance, a private nuisance, and a trespass under New York law. In July 2018 federal district judge John Keenan dismissed the lawsuit. Judge Keenan held that because climate change is a global problem it should be governed by federal common law that had been displaced by the Clean Air Act. While conceding that the Clean Air Act did not displace claims targeting foreign emissions caused by the defendants' products, the court concluded that judicial caution counseled against allowing a federal common law claim to target them. In April 2021, a panel of the Second Circuit affirmed this decision. The court distinguished this case from the many state common law actions that had been filed against the oil companies in state courts by noting that the primary issues addressed by federal courts in

those cases involved the propriety of the oil companies' attempts to remove them to federal court. Relying largely on the Ninth Circuit's *Kivalina* decision, which is discussed in Note 5 on pages 115-116, the Second Circuit panel concluded that by seeking damages the plaintiffs essentially were trying to regulate GHG emissions as were the plaintiffs in *American Electric Power*.

The Congressional Review Act (pages 171-172)

DEMOCRATS USE CONGRESSIONAL REVIEW ACT TO VETO TRUMP METHANE RULE ROLLBACK

Because the President may veto resolutions of disapproval, use of the Congressional Review Act is largely confined to instances where regulations are issued shortly before there is a change in presidential administrations. Congressional Democrats used the CRA to veto the Trump administration's August 2020 rollback of the Obama administration's regulations to control methane leaks from oil and gas operations. Coral Davenport, Senate Reinstates Obama-Era Controls on Climate-Warming Methane, N.Y. Times, April 28, 2021, https://www.nytimes.com/2021/04/28/climate/climate-change-methane.html Three Republican Senators joined in the 52-42 vote to veto the Trump rollback.