CLIMATE FINANCIAL RISK FORUM

CLIMATE FINANCIAL RISK FORUM GUIDE 2022

SCENARIO ANALYSIS WORKING GROUP: CLIMATE LITIGATION RISK CHAPTER

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Contents

This chapter represents the output from the cross-industry Scenario Analysis Working Group of the Prudential Regulation Authority and Financial Conduct Authority's Climate Financial Risk Forum (CFRF). The document aims to promote understanding and awareness of climate-related litigation risk by providing an overview of key cases and trends as well as recommendations related to risk management and business strategy.

This CFRF guide has been written by industry, for industry. The content in this guide does not constitute financial or other professional advice and should not be relied upon as such. The PRA and FCA have convened and facilitated CFRF discussions but do not accept liability for the views expressed in this guide, which do not necessarily represent the view of the regulators and in any case do not constitute regulatory guidance.

Any references to external organisations (e.g. case studies or examples) should not be interpreted as endorsements by the CFRF and are only for case study purposes.

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While all members were involved in the development of this narrative guide, this document does not necessarily represent the views of all firms involved.

Foreword

Climate litigation began in the 1980s, but case numbers have recently taken off: over a quarter of the climate cases to date have been filed in the last three years. Drivers of this growth include the increasingly obvious physical impacts of climate change, and a perception that governments and companies are not doing enough to accelerate the transition to net-zero or are failing to live up to their climate commitments. Investors and other stakeholders are also concerned that some companies may be failing to do enough to identify, measure, report and tackle the climate risks that they face, or may be providing misleading information.

The climate litigation landscape is evolving rapidly as new types of cases are filed. While fossil fuel companies feature prominently in current cases, other industrial sectors (such as financial services, motor, aviation and food) are increasingly being targeted. Novel duties of care are beginning to emerge, such as those based on fundamental human and constitutional rights. Successful claims in one country are prompting new cases elsewhere, and some claimants are backed by wealthy philanthropists or commercial litigation funders.

Cases against companies and their directors can expose general liability, D&O and professional lines policies, and legal 'tipping points' in coming years could exponentially expand that exposure as new bases for liability become established. Litigation against governments or companies could also reshape insurers' books of business if it forces a material change of course. A recent, high-profile example is Shell being ordered to make a 45% reduction in its direct and indirect emissions by 2030.

This chapter provides a carefully selected shortlist of cases that we believe can provide valuable insights for underwriters, especially those cases yet to reach a conclusion – offering a form of 'watchlist' to help track these risks going forward. We also provide a series of recommendations to help underwriters to translate these words into actions and bring to life the concept of climate-aligned underwriting.

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1. Introduction

The Climate Financial Risk Forum ("**CFRF**") was conceived in 2019 as a joint initiative by the Prudential Regulatory Authority (**"PRA"**) and the Financial Conduct Authority ("**FCA**") to enable financial services companies, regulators and related stakeholders to identify and address climate-related risks before they crystallise. One key objective for the CFRF is to consolidate the insights and market practices that are emerging in order to strategically respond to climate change and share this knowledge to support other members of the financial services sector to develop their own tools and business strategies.

The CFRF produces thought leadership pieces, or 'chapters', annually to develop the narrative on various climate-related topics, with each iteration focusing on a different core theme. Previous chapters have addressed topics such as scenario analysis and the impact of climate-related governmental policies.

This year's chapter explores the rapidly emerging risk that climate-related litigation entails. Increasing literature is being produced in this area, including the seminal "Global trends in climate change litigation" snapshot series[1] produced by the Grantham Research Institute on Climate Change and the Environment, the Centre for Climate Change Economics and Policy ("**CCCEP**"), and the London School of Economics and Political Science ("**LSE**"), which provides an annual deep dive into recent climate litigation developments and trends. Meanwhile, cases such as Milieudefensie's action against the Royal Dutch Shell ("**RDS**") plc, including the subsequent court-mandated action ordering RDS to reduce its emissions, are vastly proliferating and gaining momentum; indeed, documented cases on climate litigation have more than doubled since 2015[2]. This movement has largely been driven by the Paris Agreement[3].

We explore cases and thematic areas for climate litigation in much more detail below, but the broad categories in this area include:

- The threats posed to enshrined and otherwise internationally recognised human rights (often referred to as 'framework litigation strategies');
- Climate-related disclosures and the presence of greenwashing;
- Corporate responsibility for climate-related damages and harms;
- Calling out failures of corporations and governments to sufficiently adapt to a low-carbon economy; and

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[1] Grantham Research Institute on Climate Change and the Environment, CCCEP, and LSE. 2022. *Global trends in climate change litigation: 2022 snapshot*. Authors: Joana Setzer and Catherine Higham.

[2] The Geneva Association. 2021. *Climate Change Litigation – Insights into the evolving global landscape*. Authors: Maryam Golnaraghi, Joana Setzer, Nigel Brooke, Wynne Lawrence and Lucia Williams.

[3] United Nations. 2015.

- Cases seeking to enforce climate standards[4].

In this document, we outline key trends and legal precedents, with a view to highlight areas of greatest risk exposure for firms in the financial services sector. We also present a number of recommendations for companies and regulators to consider as best practice in order to minimise exposure to climate-related litigation risk, particularly for the insurance sector.

A brief overview of the report and some key insights from one of its contributors, Nigel Brook from Clyde & Co, can be found in a podcast that Global Association of Risk Professionals ("**GARP**") has prepared.

This chapter cannot come too soon, given the quickly developing emergence of climate litigation and its potential consequences to the financial services sector. There is growing appetite from civil society, non-governmental organisations ("**NGOs**") as well as governments to impose a duty of care on companies, especially those that are perceived to be directly or indirectly contributing to climate change. This appetite is understandable, given the scale of environmental issues and catastrophes we have been facing – most notably some recent events:

- Increased frequency and severity of wildfires, including the 2021 forest fires across much of Siberia, which led to the destruction of around 1.5 million hectares of land and 280,000 people being affected[5]
- Extreme rainfall leading to flash floods, most significantly in Bangladesh which suffered the worst flood in a century, leading to 7.2 million[6] people being affected and 83% of Bangladesh's second major district being submerged[7]; and in Belgium and Germany, leading to more than 200 deaths and approximately 3 billion EUR of flooding-related damage[8]
- Extended and severe droughts, including "the most serious water crisis [in Italy] of the last 70 years" causing significant retreating of the river Po[9]; and the driest July in 87 years for England interspersed

[4] Harvard Law. 2022. *The Risk of Climate Litigation*. Author: Subodh Mishra.

[5] Earth.Org. 2021. *Unprecedented Wildfires in Siberia Burn Down More Than 1 Million Hectares of Land.* Author: Olivia Lai.

[6] IFRC. 2022. *Millions in Bangladesh impacted by one of the worst floodings ever seen.*

[7] Economist. 2022. *How does Bangladesh cope with extreme floods?*

[8] NHESS. 2021. *Western Europe flood in 2021: mapping agriculture flood exposure from SAR*. Authors: Kang He, Qing Yang, Xinyi Shen and Emmanouil Anagnostou.

[9] Guardian. 2022. *Quiet flows the Po: the life and slow death of Italy's longest river.* Author: Tobias Jones.

with record temperatures[10], namely the first time a 40°C temperature has been recorded in the UK[11].

Meanwhile, this appetite has been amplified by geopolitical drivers, such as the international climate conference, the 26th Conference of Parties ("**COP26**"), which took place in Glasgow in 2021; such geopolitical events have spotlighted the impacts of climate change and brought the topic more firmly into public discourse.

Firms are therefore increasingly looking for guidance on how to navigate the market landscape as climate risks crystallise and become embedded into business' strategic responses. Given the relative nascence of litigation risk as a threat posed to businesses, there is little established action by way of mitigating this risk within firms' risk taxonomies and strategic responses.

This chapter has been written to supplement the rapidly evolving literature in this crucial area by applying a sharp lens towards the potential impacts of litigation risk on the financial services sector. This is pertinent not only for the potential widespread exposure that the sector may have, but also for the responsibilities that the financial sector has to protect the wider world from the existential threat that climate change entails.

Climate-related Litigation Risk

Climate risk has traditionally been split into two distinct yet highly interrelated risks: physical risk and transition risk. Physical risks refer to the impacts felt following individual climate-related events, such as earthquakes and tsunamis, as well as impacts attributed to chronic climate change impacts, such as volatile weather patterns and the gradual increase of global temperatures[12]. Meanwhile, transition risks refer to impacts that are incurred from the transition towards a low-carbon economy, such as stranded assets due to governmental policy change.

However, recent times have seen the emergence of a new key climate-related risk that companies and organisations should be seeking to understand, manage and mitigate: climate-related litigation risk, or simply climate litigation risk.

According to the Geneva Association, climate litigation risk is defined as "cases brought before judicial and [quasi-judicial] bodies that raise issues of law or facts regarding the science of climate change and climate change mitigation and adaptation efforts"[13].

Litigation risk has risen rapidly up the agenda for numerous corporate entities and their senior leadership due to the uncertainty around this risk, the undetermined prospective losses that may be incurred, and the potential

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[10] Reuters. 2022. *UK government officially declares drought in parts of England.* Author: Lucy Marks.

[11] Met Office. 2022. *A milestone in UK climate history.*

[12] NGFS. 2021. *Climate-related litigation: Raising awareness about a growing source of risk.*

[13] The Geneva Association. 2021. *Climate Change Litigation – Insights into the evolving global landscape*. Authors: Maryam Golnaraghi, Joana Setzer, Nigel Brooke, Wynne Lawrence and Lucia Williams.

public scrutiny that may follow. This risk is described by Mark Carney, then-Governor of the Bank of England ("**Bank**") as "significant, uncertain and non-linear"[14], where impacts will almost inevitably and sharply grow as greater scientific knowledge is developed and disseminated throughout public awareness. The Bank spotlighted climate litigation risk in their climate scenario exercise in 2021, the Climate Biennial Exploratory Scenario ("**CBES**")[15]. The CBES exercise introduced this type of climate risk as a key theme in financial analysis and assessments, namely through requesting participating firms to quantify their potential losses against seven hypothetical 'adverse' case rulings.

Climate-related litigation cases are projected to grow over the coming years, as public and private stakeholders increasingly look to national and international courts to address both businesses' and governments' actions, and often inactions, in a bid to decelerate the growing impacts of climate change. Frustration is growing across the world that ambitious climate action is not being universally and sufficiently adopted, including the "dearth of climate regulation at the national level"[16].

There also appears to be a rise in so-called 'systemic lawyering', which aims to identify legal interventions with the greatest impact by focusing on key levers such as finance and supply chains, in order to increase the transformational potential of legal action[17].

The financial implications of climate litigation risk are huge. Aside from damages and transition-related costs, the company's share price, creditworthiness and financing costs could deteriorate and lead to, for example, the stranding of valuable assets. This would have major consequences for financial institutions, both on the assets side (market value of investees decreasing) and the liabilities side (additional claim payouts).

There are particular implications for the insurance industry, which is in a unique position in that insurers have both asset owner and underwriting activities. In respect of their underwriting portfolios, insurers transfer risks associated with economic activities, but do not finance those activities directly. Meanwhile, the insurer holds no capital interest in the insured's operations and no financial or direct operational control is exerted. Despite no control through ownership, the outcome of any litigation can impact both the insurer and the insurance customer, in the event of activities being reliant on the support of insurance.

Cases to date have focused on the behaviour of governments and carbon majors (companies within the highest carbon-emitting industries, namely

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[14] NGFS. 2021. *Climate-related litigation: Raising awareness about a growing source of risk.*

[15] The Bank of England. 2022. *Results of the 2021 Climate Biennial Exploratory Scenario (CBES).*

[16] The British Academy. 2020. *Climate litigation as climate activism: what works?* Authors: Joana Setzer and Kim Bouwer.

[17] Grantham Research Institute on Climate Change and the Environment, CCCEP, and LSE. 2022. *Global trends in climate change litigation: 2022 snapshot*. Authors: Joana Setzer and Catherine Higham.

large oil, coal and gas producers), but there are clear signs of a growing trend to expand into multiple sectors, including agriculture, transport, and finance[18]. As more and more precedents are set, the legal landscape promises to play a key role in the battle against climate change. Indeed, climate litigation is seen as a powerful tool to shape climate policy and advocate for climate action going forward.

In the subsequent sections, cases are presented which signify examples of the most material cases in the current climate litigation landscape. These indicate the types of climate litigation that financial institutions may expect to materialise in the coming years.

[18] Guardian. 2022. *Fossil fuel industry faces surge in climate lawsuits.* Author: Isabella Kaminski.

2. Executive Summary

Climate litigation risk is emerging as a significant challenge for the insurance industry and one which will crystallise far ahead of the impact of climate change on physical insurance perils. The number of climate change-related litigation cases has grown exponentially, doubling since 2015, and with one quarter of all cases filed since 2020[19]. Whilst governments remain the main targets, the number of cases filed against corporates has increased, and the range of sectors targeted has become more diverse, moving to include food, agriculture, transport and finance as well as the core cases against oil and gas companies.

Cases to watch – key litigation themes

The cases in this chapter, which are assembled from the Climate Change Laws of the World and Climate Change Litigation databases, are set as follows:

- Tier 1 cases have been selected by climate law experts for their plausibility and greatest likelihood of impact upon insurers, across all jurisdictions (see **Section 3: *Tier 1 Cases and Trends for Climate Litigation***).
- Tier 2 cases represent the 'next most' plausible and impactful ten cases and represent possible future directions for climate litigation (see **Section 4: *Tier 2 Cases and Trends for Climate Litigation***).
- A further selection of 2nd and 3rd order case examples from the common categories of climate litigation are presented within the Annex (see ***Key Additional Climate Litigation Cases***).

Each case has been assigned one or more index terms that can be used to search both within this chapter and within the aforementioned industry litigation databases to enable insurers to build a library of understanding around areas that are most relevant to their businesses. The cases represent a selection of 'most interesting' cases from a broad universe of climate litigation:

[19] Grantham Research Institute on Climate Change and the Environment, CCCEP, and LSE. 2022. *Global trends in climate change litigation: 2022 snapshot*. Authors: Joana Setzer and Catherine Higham.

Figure 1: Distribution of Tier 1 and Tier 2 cases by jurisdiction and sector

We note that there are a variety of ways in which climate litigation cases can be categorised. For example, the Grantham Institute's analysis[20] distinguishes between litigation strategies that are climate-aligned and those that are not climate-aligned, with the latter referring to cases that challenge climate policy measures or try to disincentivise climate activists. This report primarily focuses on climate-aligned litigation strategies and so the analysis pertains to cases that are deemed to be most relevant to insurers.

Several themes of interest to insurers emerge within the most prominent cases:

- **Not doing enough:** Cases brought against companies for failing to meet public policy objectives and rapidly developing social obligations (e.g. *Case 1: Milieudefensie et al. v Royal Dutch Shell plc (Netherlands), Case 5: Notre Affaire à Tous et al. v Total,* and *Case 11: Abrahams v Commonwealth Bank of Australia*). Climate litigation is being used as a strategic tool to change corporate behaviour and seek to force companies to align their emissions to the Paris Agreement.
- **Not doing what they said:** Cases brought against companies and named directors and officers for the misrepresentation and miscommunication of the impact of their business on the environment (e.g. *Case 3: Ramirez v Exxon Mobil Corp., Case 8: ClientEarth v Board of Directors of Shell plc, Case 9: ClientEarth v Koninklijke Luchtvaart Maatschappij N.V.,* and *Case 10: Australasian Centre for Corporate Responsibility v Santos*). So-called 'greenwashing' cases, which can also be referred to as 'climate-washing' litigation, are also emerging as a major class of climate litigation.
- **Doing harm:** Suits filed against companies for their current (via existing practices) or potential future (through new prospects)

[20] Grantham Research Institute on Climate Change and the Environment, CCCEP, and LSE. 2022. *Global trends in climate change litigation: 2022 snapshot*. Authors: Joana Setzer and Catherine Higham.

contribution to climate change (e.g. *Case 2: City & County of Honolulu v. Sunoco LP, Case 4: Saúl Luciano Lliuya v RWE AG (Germany), Case 6: Trustee of PG&E Fire Victim Trust v Lewis Chew et al. (USA),* and *Case 7: Australian Conservation Foundation v Woodside Energy (Australia)*). Cases such as these have the potential to set precedent for using climate attribution science to determine damages payable by individual companies.

The cases reviewed in this chapter highlight the range of potential consequences for insurance lines. They show that climate change is no longer the realm and responsibility of governments; companies and even specific directors are now being targeted, which has clear implications for Directors' and Officers' ("**D&O**") lines and general liability coverages. Also, the focus on more accurate calculations of Scope 3 greenhouse gas ("**GHG**") emissions in a number of prominent cases (e.g. Case 1: Milieudefensie et al. v Royal Dutch Shell plc (Netherlands)') potentially extends insurers' exposures across their insured clients' supply chains. Whilst the most prominent cases remain centred around fossil fuel companies, cases such as *Case 19: Envol Vert et al. v Casino* indicate that other carbon-intensive sectors such as agriculture, manufacturing and transport may become more vulnerable in the near future. Furthermore, insurers may find that they are directly affected by the types of litigation outlined in this chapter due to shortcomings within their own climate risk management.

While reading through these cases, insurers are encouraged to consider and reflect on the implications of the following:

- Impact on key lines of business
- Cross line aggregations
- Geographical exposure of underwriting and investment portfolios
- Extent of concentration
- Direct implications for underwriting (e.g. under-reserving and new business premiums)
- Indirect implications for underwriting and assets (e.g. stranded assets impacting credit risk)
- Jurisdiction of headquarters.

Next steps – learning the lessons of the past

The 2015 Paris Agreement may soon be regarded as the 'date of knowledge' of the effects of human activity on the Earth's climate, backed by near-universal scientific consensus in following years. Paragraph 20 of the Glasgow Climate Pact, which was signed by all United Nations Framework Convention on Climate Change ("**UNFCCC**") signatories at COP26, is considered to mark a turning point in the acceptance of governments that climate action can only be achieved if measures to tackle fossil fuels are enforced[21].

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[21] Grantham Research Institute on Climate Change and the Environment, CCCEP, and LSE. 2022. *Global trends in climate change litigation: 2022 snapshot*. Authors: Joana Setzer and Catherine Higham.

Strong parallels exist between the emergence of tobacco and asbestos-related litigation in the 20th century, with the first lawsuits centering around negligent manufacture, product liability and public harm. However, social and regulatory expectations have since developed, with greater focus on customer harm, and a higher standard of rigour required around the veracity of disclosures. Moreover, more litigation focused on personal responsibility of directors and on the prevention of climate change are anticipated. Therefore, it is vital that the financial services industry learns the crucial lessons from its past and acts in a manner that ensures its future is sustainable.

Insurers should be seeking to actively address their potential exposure to climate litigation. We have made key recommendations in this paper to help insurers identify, manage and mitigate climate litigation risk, some of which are outlined briefly below:

- **Governance and oversight**: firms should conduct a risk assessment and incorporate climate litigation risk within their risk taxonomies, even as a 'cross-cutting' risk, to understand where this risk should be placed in the risk universe, its materiality, and its interaction with other risks, followed by assigning the responsibility of managing climate litigation risk to an appropriate board member (e.g. the CRO).
- **Identification of exposure**: financial institutions should critically examine potential areas of exposure (namely underwriting liabilities, investments and business operations) to understand the materiality of exposure to climate litigation, and determine whether this materiality lies within or beyond risk appetites and limits; a key example is that insurers should closely review their policy wordings to identify which policies are obligated to cover climate litigation-related costs, and decide whether they should be repriced or run-off. Exposure will vary between asset-side and liability side, and also for example between general insurers (namely liability-side exposure through financial lines) and life & health insurers (namely asset impairment, especially in light of the long-term investment horizons).
- **Data and documentation requirements:** it is critical for firms to be requesting relevant documents from their counterparties, including transition plans, emissions data and external communications. While this may entail challenges such as lack of immediate availability of data, inconsistency of reporting methodologies or use of proxies, financial institutions need to be performing appropriate due diligence on available documentation of their counterparties to begin to determine the merits of potential climate litigation against corporates that they are significantly exposed to. Key actions involve assessing the credibility of transition plans where they are in place, as well as the ambition of corporates to align with the net-zero transition.
- **Counterparty engagement**: the withdrawal of access to finance and insurance to corporates within capital-intensive sectors, even those with credible transition plans, may have severe debilitating consequences and exacerbate the transition risk posed to the global economy. Given the significant power and influence that the financial sector wields with regards to its counterparties and investees,

financial institutions should aim to engage with counterparties that they are materially exposed to in order to support their transition into a more sustainable business, especially counterparties who have a credible transition plan to a sustainable business model. This should be balanced with the exercising of caution when becoming involved in new carbon-intensive projects, or corporates that are at risk of climate litigation but are not displaying sufficient appetite to transition to net-zero.

- **Scenario analysis and stress testing**: given the uncertainty around future case volumes and decisions, firms should use scenarios analysis and stress tests to understand the financial implications of legal precedents. Firms should aim to establish a scenario or set of scenarios where some of the cases outlined in this chapter rule in favour of the plaintiffs (thus setting precedent), and then understand their exposure to litigation in light of those precedents by, for example, calculating the impact to their average annual losses ("**AAL**"); scenarios could even be assigned likelihood probabilities depending on case ruling likelihoods, as well as an expected range for damages (for cases in which damages are being sought). Scenarios should be divided by line of business, by asset-side or liability-side impacts, and by jurisdiction.
- **Disclosures**: misleading or disingenuous climate-related disclosures by corporates are facing increased scrutiny by a variety of stakeholders including a corporate's own shareholders, and so all public claims by companies relating to green characteristics must be firmly supported by credible evidence, documentation and scientific standpoints. For examples, transitions plans deemed overly dependent on 'green' technologies that does not exist yet may no longer be acceptable. Of equal importance is the need to invest in the capability and expertise required to scrutinise the climate-related disclosures of investees and insured counterparties to minimise climate litigation risk. Firms should also consider requesting counterparties to confirm whether their climate-related disclosures have been independently audited.

In addition, this paper outlines three potential large-scale strategic routes that financial institutions may decide to explore in order to further pre-emptively mitigate their exposure to climate litigation risk. These options are:

- **Secondary markets**, in which insurers de-risk their underwriting portfolio by restructuring the portfolio to divest policies with corporates in carbon-intensive sectors to specialist acquirers.
- **Ringfencing**, where insurers create a separate entity to warehouse lines of business that may be vulnerable to significant climate litigation risk and either reprice accordingly, or sell the portfolio.
- **Pooled reinsurance**, through which insurers and reinsurers collectively facilitate insurance to policies and lines of business that would otherwise be deemed uninsurable due to a high degree of climate litigation risk, most feasibly with the support and influence of the government.

Above all, insurers and other financial institutions must act. With new precedents being set and climate litigation cases proliferating rapidly, the climate landscape clearly indicates that firms, who do not prepare, will face catastrophic risks in the near future. According to the Grantham Institute's analysis[22], more than half of all climate litigation cases outside of the US have been settled favourably for the claimants. However, the analysis also notes that in terms of the effectiveness and impacts of climate litigation, more research is required.

Summary of Tier 1 cases

Case	Description	Potential implications for insurers
Case 1: Milieudefensie et al. v Royal Dutch Shell plc (Netherlands) *May 2021*	• Hague District Court ordered Royal Dutch Shell ("**RDS**") to reduce GHG emissions caused by Group's activities by 45% by 2030 (relative to a 2019 baseline) • Court found through this class-action lawsuit that disclaimers and cautionary notes in RDS's GHG emissions reduction plans and a lack of targets for 2030 diminished RDS's individual responsibilities to reduce overall emissions	• Use of caveats and disclaimers in disclosures • Requirement for more sophisticated climate data and reporting frameworks • UN Guiding Principles on Business and Human Rights ("**UNGPs**") and the Paris Agreement as widely applicable guidelines
Case 2: City & County of Honolulu v. Sunoco LP (USA) *March 2020*	• City and County of Honolulu are seeking monetary compensation from the oil and gas sector, alleging that the deceptive actions of fossil fuel companies directly and proximately caused "a substantial portion of the climate crisis-related impacts" in their jurisdictions • Case focuses on the alleged deceptive campaigns of fossil fuel companies, arguing that climate change impacts in Honolulu would have been substantially mitigated or eliminated altogether had the campaigns not taken place	• Inspiration to other sub-federal plaintiffs, resulting in 'copycat' cases • Focus on misrepresentations and greenwashing of fossil fuels
Case 3: Ramirez v Exxon Mobil Corp. (USA) *November 2016*	• Securities class action filed by investors against Exxon and its officers seeking monetary and injunctive relief • Exxon alleged to have made a series of materially false and misleading public statements regarding climate	• Focus on misrepresentations and greenwashing of climate-related risks

[22] Grantham Research Institute on Climate Change and the Environment, CCCEP, and LSE. 2022. *Global trends in climate change litigation: 2022 snapshot*. Authors: Joana Setzer and Catherine Higham.

Case	Description	Potential implications for insurers
	change risks that artificially inflated the price of its stock, leading to financial loss for investors	
Case 4: Saụ́l Luciano Lliuya v RWE AG (Germany) *November 2016*	• Claim filed by Peruvian farmer against RWE, a large electricity producer, seeking compensation for RWE's contribution to global GHG emissions, which caused local glaciers to melt and flood the area • Reimbursement sought for the cost of setting up flood protection, proportionate to RWE's estimated contribution to global GHG emissions since industrialisation (estimated at 0.47%) • If successful, this would be the first corporate that has been allocated and held responsible for a specific contributory share of damage caused by climate change	• Legal recognition that a private company could be held liable for climate change related to damage resulting from its GHG emissions • Potential allocation of responsibility for historical climate change impacts • Potential expansion of scope of corporate responsibly (and liability) for climate change, and associated data issues
Case 5: Notre Affaire à Tous et al. v Total (France) *January 2020*	• Claimants argue that Total has not provided enough information in its vigilance plans to reduce GHG emissions, that its strategy should be brought in line with international climate agreements, and that Total should be forced to issue an updated plan to reduce emissions by 40% by 2040 (compared to a 2019 baseline)	• UNGPs and the Paris Agreement as widely applicable guidelines • Continuation of precedent for wider litigation focused on curtailing future emissions • 'Test case' for the persuasiveness of Milieudefensie v Shell in civil law jurisdictions
Case 6: Trustee of PG&E Fire Victim Trust v Lewis Chew et al. (USA) *March 2021*	• The Fire Victim Trust, a fund responsible for compensating victims of the 2017-18 Northern California wildfires, filed a suit seeking compensation for the victims • Executive officers at PG&E are alleged to have breached fiduciary duties by failing to implement critical safety measures that could have potentially prevented, or limited, the damages	• Legal recognition that a private company could be held liable for natural disasters resulting from mishandling of utilities • Focus on corporate liability and climate-related risks

Case	Description	Potential implications for insurers
Case 7: Australian Conservation Foundation v Woodside Energy (Australia) *June 2021*	• Case filed seeking to halt Woodside's $16bn Scarborough gas field development project until its impact on the Great Barrier Reef has undergone an environmental assessment • Illustrates efforts to set legal standards for oil and gas projects that may pose significant risks to the environment due to GHG emissions	• Focus on scientific data to provide injunctive relief for climate change related damage
Case 8: ClientEarth v Board of Directors of Shell plc (UK) *March 2022*	• ClientEarth accuses RDS's directors of mismanaging climate-related risks by failing to implement a Paris Agreement-aligned strategy, thus breaching directors' duties under UK company law • Potential to set precedent on whether directors could be held personally liable for failure to manage climate-related risks or to implement an adequate climate strategy	• Precedent for climate litigation against company directors • Potential increase in shareholder action against companies (particularly carbon majors), meaning more pressure and/or cost to accelerate climate transition • Insurers may need to incorporate assessment of climate risk into D&O policies
Case 9: ClientEarth v Koninklijke Luchtvaart Maatschappij N.V. (Netherlands) *July 2022*	• Claim filed against KLM to stop misleading advertisement claims, arguing that KLM's 'Fly Responsibly' campaign and carbon-offset schemes give a false impression of the sustainability of KLM's flights and plans to address climate change • Marks first case where an airline company faces greenwashing allegations under European consumer law	• Precedent for consumer law-based litigation against airlines • Potential serious restrictions for industry marketing in relation to emissions reductions and net-zero goals, or material alteration in business operations • Potential for further climate litigation as airlines are increasingly recognised as carbon majors
Case 10: Australasian Centre for Corporate Responsibility v	• Australasian Centre for Corporate Responsibility ("**ACCR**") alleged that Santos, a listed Australian oil and gas company, misled in its annual report, such as that Santos' natural gas provides "clean energy" and that it has a "clear and credible plan" to achieve net-zero emissions by 2040	• Requirement for companies to carefully assess any public climate-related claims to ensure these can be factually and credibly substantiated

Case	**Description**	**Potential implications for insurers**
Santos (Australia) *August 2021*	• ACCR seeking reimbursement of legal costs, deceptive claims to be ceased, and corrective statements to be issued • Potential for significant implications as to how corporations can legally establish and communicate net-zero transition goals (especially when companies indicate any reliance on arguably speculative usage of 'green' technologies)	• Increasing investor scrutiny of transition plans • Potential for carbon majors' reliance on emergent technologies in net-zero transition plans to be challenged • Focus on misrepresentations and greenwashing of climate-related risks
Case 11: Abrahams v Commonwealth Bank of Australia (Australia) *August 2021*	• Abrahams family's trustees and shareholders of the Commonwealth Bank of Australia ("**CBA**") filed a claim requesting access to CBA's internal documents relating to its involvement in oil and gas projects • Access has been granted, albeit allowing some redactions by CBA • Pending the claimants' findings, it may also expose CBA to further climate-related litigation	• Increasing shareholder scrutiny of bank investments in carbon-intensive activity and compliance with environmental policies • Potential for this to set a precedent encouraging similar shareholder action

3. Tier 1 Cases and Trends for Climate Litigation

Two broad criteria have been used to select this set of cases (referred to as 'Tier 1 cases'):

- plausibility; and
- likelihood of impact upon insurers (in some cases this impact may be indirect or delayed).

The following chart shows the distribution of Tier 1 cases by jurisdiction and geography:

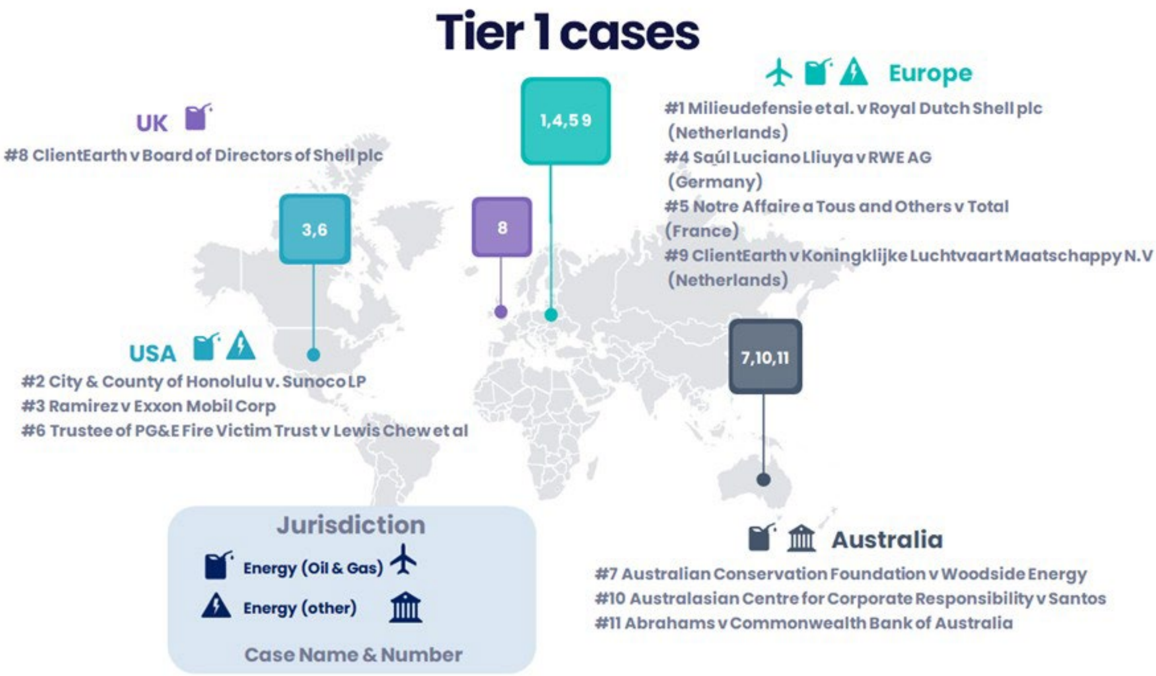

Figure 2: Distribution of Tier 1 cases

The cases throughout this document contain index terms of 'keywords' in each summary table; these terms can be leveraged to navigate the Climate Change Laws of the World database as search criteria, in the event of readers wanting to explore and read more about similar cases.

While reading through these cases, insurers are encouraged to consider and reflect on the implications of the following:

- Impact on key lines of business
- Cross line aggregations
- Geographical exposure of underwriting and investment portfolio
- Extent of concentration
- Direct implications for underwriting (e.g. under-reserving and new business premiums)
- Indirect implications for underwriting and assets (e.g. stranded assets impacting credit risk)
- Jurisdiction of headquarters.

Case 1: Milieudefensie et al. v Royal Dutch Shell plc (Netherlands)

Table 1: Key facts about Milieudefensie et al. v Royal Dutch Shell plc (Netherlands)

Category	Description
Claimants	Allowed the association VERENIGING MILIEUDEFENSIE, in Amsterdam, and THE OTHER PARTIES IT REPRESENTS; the foundation STICHTING GREENPEACE NEDERLAND in Amsterdam; the foundation STICHTING TER BEVORDERING FOSSIELVRIJ-BEWEGING in Amsterdam; the association LANDELIJKE VERENIGING TOT BEHOUD VAN DE WADDENZEE in Harlingen; the foundation STICHTING BOTH ENDS in Amsterdam; and the youth organisation JONGEREN MILIEU ACTIEF in Amsterdam. Rejected the foundation STICHTING ACTIONAID in Amsterdam; and 17,379 individual claimants.
Defendant	Royal Dutch Shell plc (“**RDS**”)
Sector	Oil and Gas
Category	Claims challenging climate policy/legislation or public permits
Index terms	1.5 Degrees Scenario, Climate Change, Climate Emergency, Duty of Care, Energy, Emissions, European Convention on Human Rights, Fossil Fuel Phase Out, Fossil Fuels, Future Fossil Fuel Emissions, Governance, Paris Agreement, Public Interest, Transition Planning, Trading Scheme, Scope 3, UNGPs, Urgenda
Jurisdiction	The Netherlands
Date claim was filed and status	5 April 2019 Subject to appeal
Relief sought	Non-monetary; order that Shell reduce its GHG emissions

Potential impact areas for insurers	• Jurisdiction of headquarters • Cross line aggregations • Extent of concentration • Indirect implications for underwriting and assets

Case overview

On 26 May 2021, The Hague District Court ordered RDS to reduce the CO2 emissions of the Shell Group's activities by net 45% by the end of 2030 (relative to its emissions in 2019) through its corporate policy. This reduction obligation is extensive, as it encompasses the aggregate of all Shell Group's emissions (from Scope 1 through to 3) across its entire energy portfolio. The court also stated that it was up to RDS to design how it will implement the emissions reduction, but framed it as an obligation of result for the Shell Group's activities, and a significant best-efforts obligation for the Shell Group's business relations (including end users). This means that, aside from addressing emissions generated from its own business activities, RDS may also be expected to take any necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by its third party business relations, and to use its influence to limit any lasting consequences as much as possible.

Whilst previous climate litigation against companies focused on obtaining damages for harm caused by past activities, the current class-action case is the first time a court has required a company to align its climate strategy (and Scope 3 emissions) with the goals of the Paris Agreement, thereby focusing on curtailing future emissions.

The court order is provisionally enforceable, notwithstanding that RDS has appealed the decision.

Grounds

The claimants argued that RDS had a duty of care under the Dutch Civil Code to take action to prevent dangerous climate change through the corporate policy it determines for the Shell Group. Further, they argued that RDS had violated this duty of care under Dutch law and its obligations under human rights law.

The case built on the previous decision in *State of the Netherlands v Urgenda Foundation* where the court found that the Dutch government's inaction against climate change violated its duty of care to its citizens. In *Milieudefensie et al. v Royal Dutch Shell plc*, the claimants extended this argument to private companies. They argued that, in light of the scientific evidence regarding the dangers of climate change and the goals of the Paris Agreement, RDS has a duty of care to take action to reduce its GHG emissions. This duty of care is based on a specific provision in Dutch law, in turn informed by the right to life and right to respect for private and family life under the European Convention on Human Rights ("**ECHR**").

Claimants and standing

The court limited the class action to the interests of current and future generations of Dutch residents and of the inhabitants of the Wadden Sea area, ruling that the collective claims insofar as they relate to the interest of the world's population were not allowable.

On this basis, the court rejected claims by Action Aid, as it did not sufficiently promote the interests of Dutch residents, and the individual claimants, as their interests were the same as the common interest of the class action. It allowed the class action by the remaining claimants as the interests of the action (i.e. the interests of current and future generations of Dutch residents) aligned with the objects stated in their articles of association.

Decision

1. Interpretation of the Dutch standard of care

The court concluded that, when applying Shell Group's corporate policies, RDS must observe due care in relation to those affected by its acts or omissions. The court took into account a range of factors in interpreting the standard of care, including **UNGPs**[23], the ECHR, and the Paris Agreement.

2. UNGPs

The court held that, due to the universally endorsed content of the UNGPs, it was irrelevant whether RDS itself had committed to them. The court found that there was an internationally endorsed need for companies to take responsibility for their Scope 3 emissions, particularly for fossil fuel producers where these form the majority of their CO_2 emissions[24]. Applying

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[23] The UNGPs envisage that companies will remedy or contribute towards remediation where they have caused or contributed to an adverse impact, and where there is only a business linkage (e.g. no contributory action), the organisation should use leverage to try to get its counterparty to remediate.

[24] In making this finding, the court referred to the following report: 'Mapping of current practices around net-zero targets' (University of Oxford, 2020), Mapping of current practices around net zero targets FINAL (netzeroclimate.org)

the UNGPs, the extent of RDS's Scope 3 responsibility is defined by the influence and control it can exercise over those emissions. The court interpreted this as a significant best efforts obligation and ruled that control and influence existed through RDS's purchasing policies and RDS's ability to determine the energy package it offers to its customers.

3. ECHR

The court held that the claimants could not directly invoke the right to life and right to respect for private and family life against RDS, as human rights apply in relationships between states and citizens. However, the court decided that these rights would factor into the relationship between the claimants and RDS, given their fundamental relevance and value for society as a whole. The court therefore took these into account in its interpretation of the Dutch standard of care.

4. Paris Agreement

The Paris Agreement is non-binding on state signatories and non-state parties such as RDS. Rather than relying on the Paris Agreement directly, the court relied on the Agreement in its construction of the Dutch standard of care under the code of obligation. The court concluded that the Paris Agreement, and the broad consensus for the requirement for non-state action in tackling dangerous climate change which it embodies, was relevant in its interpretation of the unwritten standard of care. As a result, the court held that RDS is under a duty to bring its climate transition plan in line with the goals of the Paris Agreement.

5. Climate transition plan

RDS sought to argue that the Shell Group was taking concrete steps to address the energy transition, and that its climate policy, intentions and ambitions were compatible with its reduction obligations. The court rejected this argument, and drew attention to a number of disclaimers and cautionary notes, which stated that RDS's plans depended on the pace at which global society moved towards the climate goals under the Paris Agreement. The court found that, by inserting these caveats and failing to set out reduction targets for 2030, RDS was reserving the right to undergo a less rapid energy transition if society were to move slower (i.e. not taking responsibility for its own reduction targets). The court concluded that RDS's climate plan is not concrete enough.

6. Application of EU ETS and other emissions trading schemes

The court rejected arguments by RDS that the European Emissions Trading Scheme ("**ETS**"), and similar systems, precluded a court order for further emissions reductions. The court did recognise that the ETS had an indemnifying effect, meaning that RDS would not have additional obligations with respect to emissions already regulated under the ETS. However, the court held that this effect only applied up to the reduction target of the relevant ETS. Where the reduction obligation exceeds this target, RDS would have to fulfil this individual obligation itself.

Implications for the insurance industry

- The requirement for more sophisticated climate data and reporting frameworks, particularly in relation to Scope 3 emissions, potentially extends exposure across the insured's supply chain.

- The Paris Agreement and UN Guiding Principles on Business and Human Rights, while not in themselves binding on companies, were fundamental to the duty of care imposed on Shell.
    - The court took into account a range of factors in interpreting the standard of care under Dutch law. It considered that, due to the wide acceptance of the UNGPs and similar soft law instruments, these were suitable as a guideline in interpreting the standard of care under Dutch law. The court similarly concluded that the Paris Agreement, which it felt embodied a broad consensus despite being non-binding, was also relevant in its interpretation of the Dutch standard of care. As a result, the court applied both the UNGPs and the Paris Agreement to RDS' actions, regardless of whether RDS itself had committed to them.
    - This indicates a willingness by the court to hold corporates (and potentially other institutions) to high and widely accepted standards. As a result, insurers and their clients should be aware of, and consider the application of, these standards when considering the adequacy or implementation of climate strategies.
- The public interest in addressing climate change may outweigh commercial interests
    - The court rejected RDS's argument that the reduction obligation was too onerous, and concluded that the interests served by the obligation outweighed the Shell Group's commercial interests. This could potentially set the precedent for a high burden of proof for corporates to show that show that the obligations are too onerous when compared with public interest of addressing dangerous climate change. However, we note that cases that run on human rights grounds have had more success in the Netherlands to date than in other jurisdictions[25].
- Precedent for wider litigation
    - This case has already inspired similar litigation in other jurisdictions, including *'Case 5: Notre Affaire à Tous et al. v Total'* and a number of claims filed against motor manufacturers in Germany seeking a ban on ICE vehicles after 2030 and a limit on sales of such vehicles in the interim. In addition, by recognising a duty of care in this manner, this claim may inspire claims for damages for breach of a similar duty (in the Netherlands and in other jurisdictions).
- Impact of provisional enforceability
    - In this case, the court weighed the interests of the parties and decided that the interests of the claimants for immediate compliance outweighed the interests of RDS in maintaining the status quo until a final decision was reached. Provisional enforceability may have far-reaching consequences which may be

[25] For example, the arguments run on human rights grounds were rejected in *Roao Friends of the Earth v. Secretary of State for Business Energy and Industrial Strategy* [2022] EWHC 1841 (Admin)

difficult to undo at a later stage, and is likely to have significant financial implications for RDS (as the ordered reduction is considerably more stringent than the Group's current climate plan), setting a potentially costly precedent for corporates going forward.

- Use of caveats and disclaimers
    - The court held that RDS's use of caveats and disclaimers and failure to set 2030 targets in its transition plan meant it was reserving the right to undergo a slower energy transition (should society also move slower) which undermined (or imposed a conditionality) on its reduction targets and meant that RDS was deemed not to be taking responsibility for its reduction targets. This is likely to present difficulties for companies. In developing its climate targets and transition plans, firms should be sensitive to the fact that delivery is to some extent subject to factors outside of its control. This will include how suppliers or customers behave, how governments regulate (or fail to regulate) and how markets react. Firms may wish to reconsider the use of any disclaimers or caveats intended to limit the impact of their transition plans. Indeed, it may be in light of this case that companies will wish to revisit their plans and ensure that disclaimers and caveats are not too broad, and focus precisely where possible on particular uncertainties and dependencies of concern.

Case 2: City & County of Honolulu v. Sunoco LP

Table 2: Key facts about City & County of Honolulu v. Sunoco LP

Category	Description
Claimant	City & County of Honolulu
Defendants	Marathon Petroleum Corp., BP America, Inc., Chevron USA Inc., ConocoPhillips Company, Sunoco LP, Bp Plc, Aloha Petroleum, Ltd., Shell Oil Products Company LLC; BHP Group Limited, Exxon Mobil Oil Corporation, Shell Oil Company, Chevron Corporation, Exxon Mobil Corporation, Phillips 66, BHP Hawaii Inc., BHP Plc, Royal Dutch Shell Plc, ConocoPhillips and Phillips 66 Company; Does, 1 Through 100 Inclusive
Sector	Oil and Gas
Category	Claims against private entities for climate-related harm
Index terms	Advertising, Climate Change, Climate Emergency, Disclosure, Environmental Impact, Fossil Fuels, Greenwashing, Sub-national, Satellite Litigation
Jurisdiction	Honolulu, Hawaii, USA
Date claim was filed and status	March 2020 Initial stages
Relief sought	Monetary; damages
Potential impact areas for insurers	• Impact on key lines of business • Cross line aggregations • Extent of concentration • Direct implications for underwriting

Case overview

In March 2020, the City and County of Honolulu filed a lawsuit in Hawaii state court alleging that the deceptive actions of the fossil fuel company defendants directly and proximately caused "a substantial portion of the climate crisis-related impacts" in their jurisdictions, and seeking damages under state common law for these impacts.

This case is one of tens of similar lawsuits brought by municipalities and states against major oil and gas companies under state common law theories such as nuisance and trespass. If allowed to proceed to an in-depth examination of the merits, the claims may rely on climate attribution science in order to tie the alleged local harms to the actions of the defendants and to apportion liability among them. In this regard, plaintiffs may look to prior precedents involving claims against major energy companies in relation to pollution issues caused by the chemical MBTE. Note that a separate case, *County of Maui v. Sunoco LP*, is being considered in conjunction with the case filed by Honolulu, given the similarity of the facts, claims, and relief sought.

Claims and alleged wrongful conduct

The case is notable in focusing on the alleged deceptive conduct of the defendants in "concealing the dangers of, promoting false and misleading information about, and engaging in massive campaigns to promote increasing use of their fossil fuel products." The plaintiffs contend that the defendants engaged in "denialist campaigns to misinform and confuse the public and obscure the role of defendants' products in causing global warming," and that, had these campaigns not taken place, climate crisis impacts in Honolulu would have been substantially mitigated or eliminated altogether.

The climate crisis impacts named in the suit include sea level rise, extreme weather, ocean warming and acidification, impacts on freshwater supplies, loss of habitat for endemic species, and "the cascading social, economic, and other consequences of those environmental changes". The plaintiffs alleged that these consequences will include injury to and destruction of critical city-owned or -operated facilities; the costs to be incurred for adaptation and resilience; and a reduction in tax revenue due to impacts on the tourism- and ocean-based economy.

Federal versus state jurisdiction

In April 2020, the fossil fuel defendants sought to transfer the case from state to federal court, advancing a number of theories for why the case raised federal rather than state-level issues. In February 2021, the federal district court for the District of Hawaii remanded the case back to Hawaii state court, rejecting all of the defendants' theories of federal jurisdiction. The defendants then appealed this decision to the federal appellate court for the Ninth Circuit, which, in July 2022, affirmed the federal district court's decision to remand the case to state court.

The case remains pending in Hawaii state court. In March 2022, the state trial court denied the defendants' motions to dismiss the claims. In the court's decision allowing the claims to proceed, it noted that, despite the unprecedented nature of the climate-related claims, the case was, in essence, a state tort case based on failures to disclose, failures to warn, and deceptive marketing, rather than an attempt at regulating emissions (which would be pre-empted by federal environmental law). The court also rooted its decision in the principle that states have a legitimate interest in combatting the adverse effects of climate change.

To date, this case is the only one to have survived a motion to dismiss in state court. In many other similar cases, the parties are currently litigating the issue of whether state or federal courts have jurisdiction over the claims. Several of the other cases have, like the Honolulu case, now been definitively remanded to state court by the relevant federal appellate courts but none yet have proceeded to a consideration of the merits of the claims.

Should the suit filed by Honolulu (or any one of the similar claims by cities and states) result in a merits judgement in favour of the claimants, it is highly likely to inspire a wave of copycat cases to be filed by other jurisdictions, or against other high-emitting industries or industries which support them (such as insurance, advertising and financial institutions). Given that the Honolulu case also focuses heavily on public statements and deceptive marketing, the facts and arguments asserted here may also be repurposed to other types of claims such as greenwashing suits based on public disclosures relating to fossil fuels or climate change more generally.

Implications for the insurance industry

- Inspiration to other sub-federal plaintiffs
    - As the sole municipal case to make it past a motion to dismiss, the Honolulu proceedings may provide a blueprint for other state and city plaintiffs to follow in pending or future litigation against energy companies, other high-emitting industries, or supporting industries such as insurance, advertising or financial institutions.

- Focus on misrepresentations and greenwashing of fossil fuels.
    - This case is premised squarely on failures to disclose, failures to warn, and deceptive marketing, in line with a large number of recent 'greenwashing' suits pursued by both public and private actors in the United States. The plaintiffs even argued that if the defendants corrected their disclosures and stopped concealing and misrepresenting the harms associated with fossil fuels, they could sell all the fossil fuels they are able to without incurring additional liability. Extrapolating from this case, plaintiffs may seek to leverage facts and arguments brought in these proceedings to pursue other greenwashing claims against entities which make public statements relating to climate change (including insured companies as well as insurers themselves) and link these allegedly misleading marketing materials to climate change impacts.

Case 3: Ramirez v Exxon Mobil Corp.

Table 3: Key facts about Ramirez v Exxon Mobil Corp.

Category	Description
Claimants	Pedro Ramirez, Jr., Individually and on Behalf of All Others Similarly Situated
Defendant	Exxon Mobil Corporation ("**Exxon**") and Individual Defendants Rex W. Tillerson ("**Tillerson**"), Andrew P. Swiger ("**Swiger**"), Jeffrey J. Woodbury ("**Woodbury**"), and David S. Rosenthal ("**Rosenthal**")
Sector	Oil and Gas
Category	Greenwashing (consumer protection/advertising claims)
Index terms	Advertising, Class Action, Climate Change, Climate Finance, Disclosure, Finance, Greenwashing, Investment, Oil and Gas
Jurisdiction	Texas, USA
Date claim was filed and status	7 November 2016 Defendant's motion to reconsider motion to dismiss denied; evidentiary hearing for class certification on June 7
Relief sought	Monetary in the form of damages and legal fees; appropriate injunctive relief
Potential impact areas for insurers	• Jurisdiction of headquarters

Case overview

In November 2016, Exxon investors filed a putative class action securities fraud lawsuit in the USA federal district court for the Northern District of Texas against Exxon and three of its officers alleging that the defendants made materially false and misleading statements concerning climate change risks and the value and amount of the company's oil and gas reserves. This case has notably survived a motion to dismiss and two motions for reconsideration of the motion to dismiss. Most recently, an evidentiary hearing was held on June 7, 2022 regarding class certification, which determines whether the proposed class (here, of investors) satisfies certain federal procedural requirements (namely, numerosity, commonality, typicality, and adequacy).

Claims and alleged wrongful conduct

Plaintiffs allege that Exxon made a series of materially false and misleading public statements regarding climate change risks that artificially inflated the price of its stock, leading to financial loss for investors. The consolidated complaint, filed in July 2017, contends that Exxon falsely claimed to use GHGs or carbon 'proxy costs' in its investment and asset valuation process and asset impairment evaluation processes, and misrepresented the state and value of several of its reserves, including its Canadian Bitumen Operations, Kearl Operation, and Rocky Mountain dry gas operations. Eventually, a series of news releases revealed Exxon's losses and misrepresentations, which allegedly led to sharp decreases in its stock price. Plaintiffs allege violations of anti-fraud provisions of USA federal securities laws, and seek monetary and injunctive relief.

Motion to Dismiss and Motion for Reconsideration

In September 2017, Exxon moved to dismiss the complaint for failure to state a claim, arguing that its statements were not misleading and had, in fact, correctly represented its valuation processes. Exxon asserted that the plaintiffs mistakenly combined two different measures: proxy cost of carbon and GHG cost. Exxon also argued that the complaint did not adequately plead fraudulent intent or loss causation. The court denied Exxon's motion to dismiss in August 2018, finding that plaintiffs had adequately pleaded claims that Exxon made material misstatements. The court also found that plaintiffs had sufficiently pleaded loss causation and demonstrated that the defendants (apart from one Exxon officer) possessed the requisite state of mind when making the allegedly misleading statements.

In September 2018, Exxon then sought reconsideration of the Court's denial of the motion to dismiss, asserting that the court wrongly found that the plaintiffs sufficiently demonstrated that the defendants possessed a culpable state of mind when making the allegedly misleading statements.

The Court denied this motion without providing reasoning.

Again, in July 2020, Exxon filed another motion for reconsideration based on a newly dismissed New York case, *People v. Exxon Mobile Corp*. Exxon argued that plaintiffs' case theory here is premised on the New York Attorney General's allegations about Exxon's business and accounting practices, which Exxon argued the New York State court rejected. In March 2022, the Court denied this motion without providing reasoning.

Implications for the insurance industry

- Inspiration to other copycat plaintiffs
    - Given that the case has survived a motion to dismiss and multiple motions for reconsideration, energy companies should be on alert for similar complaints from shareholders in other venues or based on other types of statements. Investors may also use similar theories to challenge climate accounting statements from other high-emitting industries or industries which support them (such as insurance, advertising, or other financial institutions).
- Focus on misrepresentations and greenwashing of climate-related risks.
    - Similar to other recent 'greenwashing' suits in the USA, this case is premised on allegations that Exxon failed to disclose climate-related risks and misrepresented its investors on how the changing climate will impact Exxon's reserve values. Plaintiffs may also seek to leverage facts and arguments brought in these proceedings to pursue other greenwashing claims against entities which make public statements relating to climate change (including insured companies as well as insurers themselves).

Case 4: Saúl Luciano Lliuya v RWE AG (Germany)

Table 4: Key facts about Sal Luciano Lliuya v RWE AG

Category	Description
Claimant	Saúl Luciano Lliuya
Defendant	RWE AG ("**RWE**")
Sector	Energy
Category	Claims against private entities for climate-related harm
Index terms	Climate Change, Climate Emergency, Coal, Emissions, Energy, Environmental Impact, Flooding, Fossil Fuel Emissions, Fossil Fuels, Glaciers, Individual Corporate Accountability, Polluter Pays
Jurisdiction	Germany
Date claim was filed and status	November 2015 Claim recognised as admissible on appeal; initial stages
Relief sought	Monetary; damages
Potential impact areas for insurers	• Jurisdiction of headquarters • Geographical exposure of underwriting and investment portfolio • Extent of concentration • Indirect implications for underwriting and assets

Case overview

In November 2015, a Peruvian farmer filed a claim in the District of Court Essen in Germany against RWE, one of Germany's largest electricity producers. The claimant alleged that RWE, having knowingly contributed to climate change by emitting substantial volumes of GHGs, was partly responsible for the melting of mountain glaciers near the city of Huarez in Peru. The claimant argued that, on this basis, RWE should reimburse him and the Huarez authorities for a portion of the costs they are expected to incur from setting up flood protections to prevent property from being destroyed or seriously damaged.

Although the case has not yet been decided, it already marks a significant legal development because of the court's recognition that a private company could potentially be held liable for climate change related damage resulting from its GHG emissions. This might also be the first case in which climate attribution science is tested in a legal context.

Grounds

The claimant owns a property in the city of Huarez, Peru which is located at the foot of the Peruvian Andes and below a glacial lake. The claimant argues that his estate is acutely threatened by floods due to glacial melting and that this is taking place at an increasingly accelerated pace as a result of climate change. The claimant further argues that the emissions released by RWE and its subsidiaries (in particular caused by coal) are partly responsible for this and that the emissions amount to a nuisance under the German Civil Code because they contribute to climate change and to the glacial melting. This provision can be used both for risk of nuisance (e.g. the threat of flooding) or actual nuisance (e.g. actual flooding), which means it can be used to request either the financing of adaptation measures or compensation for climate harms caused.

The claimant has requested that the court order RWE to reimburse him and the Huarez authorities for the costs incurred in setting up flood protections in an amount proportionate to RWE's estimated contribution to global industrial GHG emissions since industrialisation (from 1751 onwards). This proportionate share is calculated to amount to 0.47%.

Admissibility

The German district court dismissed the claimant's claim at first instance on the basis that it was illegitimate and unfounded. The court held that the claimant's situation would not change even if RWE ceased emitting and that the court therefore could not provide any effective redress. The court also noted that it could not effectively be shown that GHGs emitted by RWE and its subsidiaries were directly responsible for the climate change impacts experienced at the glacier lake above Huarez, Peru, and that it therefore could not find RWE responsible.

The German appeals court overturned the dismissal by the German district court, and ruled that the claim was admissible. In its decision, the court noted that the claimant had a legitimate interest in taking legal action.

This is a significant development on the basis of the acknowledgement by the German court that private companies may be held liable for the proportionate sum of their contribution to climate change impact on a general and global basis.

Going forward

The appeals court is yet to consider this case on its merits. The key questions to be determined are:

i. whether the claimant's home is threatened by flooding or mudslides as a result of the recent increase in the volume of the glacial lake nearby; and

ii. how RWE's GHG emissions have contributed to that particular risk.

The appeals court is set to review expert evidence on RWE's GHG emissions, the contribution of those emissions to climate change generally and the resulting impact on the Palcaraju Glacier. It will also consider RWE's contributory share of responsibility for any effects it may have caused. This evidence includes an on-site visit to the glacier, which has now taken place, after being postponed several times due to the COVID-19 pandemic.

Should this case result in a merits judgement in favour of the claimant, and the claimant be awarded damages in an amount considered proportionate to RWE's contribution, this will mark the first time that a corporate group has, in effect, been allocated and held responsible for a specific contributory share of damage caused by climate change.

The key question is how the court will determine whether, and how, RWE's emissions contributed to the melting of the Palcaraju Glacier (that is, whether it can be persuaded that GHG emissions have accelerated the glacial melt at this particular location to such an extent that it has brought forward the date on which the lake breaks and may flood the valley). As the district court noted in its initial dismissal, the relationship between specific GHG emissions and specific climate impacts may be difficult to prove. However, should the court accept that RWE's emissions have contributed to climate change on a more general level, and that it is therefore partly liable for any damage caused by climate change impacts (including glacial melting), this may have very far-reaching consequences for both RWE, and for determining who can (and will) be held responsible for historical climate impacts.

Implications for the insurance industry

- Legal recognition that a private company *could* be held liable for climate change related damage resulting from its GHG emissions
    - Even if this particular case does not succeed, the court has recognised that it is willing to consider holding private companies responsible for damage caused by their emissions. This, in itself, sets a precedent for future damage-based claims against private companies, including financial institutions directly. Separately, this may be an effective deterrent to 'carbon leakage' (e.g. moving carbon-intensive practices to a less restrictive jurisdiction).
- Potential allocation of responsibility for historical climate change impacts
    - This has a wide set of (potentially very costly) implications. If RWE (or any other company) is held responsible for a specific share of historical climate change, even if only in respect of glacial melting, this could lead to innumerable other claims for damages in respect of other harms caused by climate change. Although any award in damages may be low, the cost of the litigation itself may entail significant incurred claims costs. It may also lead to reputational damage if an insurer is significantly associated with enabling environmentally-damaging industries or practices. Underwriters may need to consider that policy wordings may respond to both direct and indirect environmental liability exposure. Furthermore, given the extent of potential implications, insurance companies should consider the response of the reinsurance and retrocession markets, and the impact of price and availability of coverage.
- Potential expansion of scope of corporate responsibility and liability for climate change, and associated data issues

- Underwriters should consider the robustness of emissions figures and transition plans provided during the underwriting process, and the extent to which historical Scope 1-3 emissions are captured (noting current issues with determining, calculating and reporting on Scope 3 emissions and the need for more sophisticated data and reporting frameworks).

Case 5: Notre Affaire à Tous et al. v Total

Table 5: Key facts about Notre Affaire a Tous et al. v Total

Category	Description
Claimants	Notre Affaire à Tous; Sherpa; Zéa; Les Éco-Maires; 13 French municipalities; and City of New York (as intervenor)
Defendant	TotalEnergies SE ("**Total**")
Sector	Oil and Gas
Category	Claims challenging climate policy/legislation or public permits
Index terms	1.5 Degrees Scenario, Climate Change, Climate Emergency, Duty of Care, Energy, Emissions, Disclosure, Fossil Fuel Phase Out, Fossil Fuels, Future Fossil Fuel Emissions, GHG Emissions, Governance, Paris Agreement, Public Interest, Transition Planning, Scope 3
Jurisdiction	France
Date claim was filed and status	June 2019; initial stages
Relief sought	Non-monetary; order that Total issue new corporate strategy
Potential impact areas for insurers	• Jurisdiction of headquarters • Extent of concentration

Joho345, 2022, Public domain

Case overview

On 18 June 2019, the claimants issued Total with a letter of formal notice (*mise en demeure*) in respect of its latest vigilance plan, and gave Total 3 months to include adequate GHG emissions reduction targets in its plan before they filed a claim. On 28 January 2020, the claimants filed their complaint in the Nanterre District Court, arguing that Total has not provided enough information in its vigilance plan on GHG emissions reductions, and that Total should bring its strategy in line with international climate agreements. The claimants seek a court order forcing Total to issue an updated plan and to reduce its net emissions by 40% by 2040 (relative to its emissions in 2019). On 21 July 2022, the City of New York published a statement of authority in which it joined the proceedings as intervenor.

Although this case is yet to be determined on its merits, it forms part of a growing cohort of cases (together with *Milieudefensie et al. v Royal Dutch Shell plc*) asking companies to curtail future emissions and align their climate strategies (and Scope 1-3 emissions) with the goals of the Paris Agreement.

Grounds

The claimants argue that Total's obligations to appropriately identify certain climate risks and comply with the goals of the Paris Agreement stem from two domestic law provisions:

1. A duty of care under the Environmental Charter of the French Civil Code, placing a general duty on the public to participate in preserving the environment; and
2. An obligation under the French Commercial Code to produce a 'vigilance plan' that identifies and seeks to mitigate risks to human rights, fundamental freedoms, the environment or public health resulting directly or indirectly from the Total group's operations. The law relating to vigilance plans allows investors or stakeholders to bring the company before a judge in cases of alleged non-compliance.

The claimants argue that Total has not adequately disclosed climate risks in its vigilance plan, and seek a court order forcing Total to issue an updated plan identifying risks arising out of GHG emissions generated by its business activities (e.g. the goods and services it produces) and the risks of serious climate-related harms (as outlined in the 2018 IPCC special report). The claimants have also asked that the court order that Total reduce its net emissions by 40% by 2040 (relative to its emissions in 2019).

Jurisdiction

Total responded on a procedural point of law, arguing that the District Court of Nanterre did not have the appropriate competence to oversee the case and requesting that the case be brought before the commercial courts.

On 11 February 2021, the pre-trial judge rejected Total's objection and confirmed jurisdiction of the judicial court. The judge noted that the NGO claimants, being 'non-traders', had the right to choose whether to bring the claim in the judicial court or in the commercial court. This was subsequently confirmed by the Versailles Court of Appeal, which held that the District Court of Nanterre's jurisdiction was based on the exclusive jurisdiction of certain French courts of law in matters of cessation and compensation for ecological damage.

Going forward

This case is still in its initial stages, with Total yet to respond to its merits. The District Court of Nanterre will need to consider a number of questions in its determination of the case, including whether it considers that Total has adequately disclosed relevant climate risks in its vigilance plan, whether Total's corporate strategy is adequately aligned with the goals of the Paris Agreement and, related, whether its strategy needs to be aligned in such a way.

Should this case result in a merits judgement in favour of the claimant in respect of all questions, it will mark the second judgement in a civil law jurisdiction (following the Dutch law case *Milieudefensie et al. v Royal Dutch Shell plc*) to force a major oil and gas company to amend its corporate strategy and curtail future emissions in line with the goals of the Paris Agreement.

Implications for the insurance industry

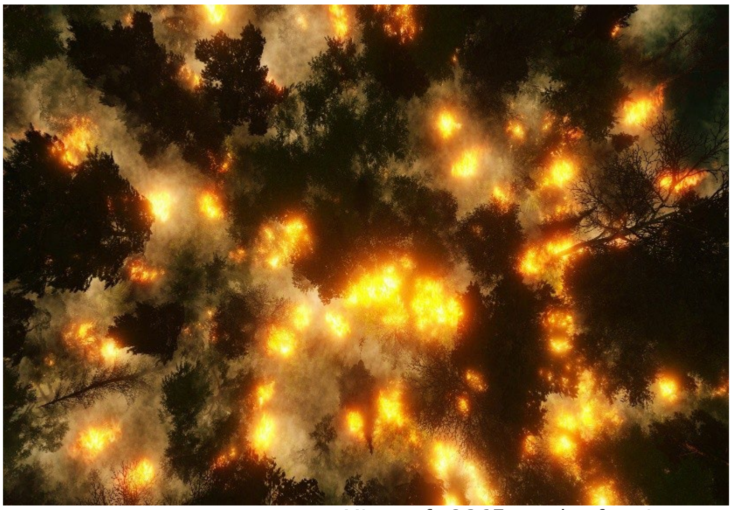
- Requirement for more sophisticated climate data and reporting frameworks (particularly in relation to Scope 3 emissions)
- UNGPs and the Paris Agreement as widely applicable guidelines
- Continuation of precedent for wider litigation focused on curtailing future emissions
- 'Test case' for the persuasiveness of Milieudefensie v Shell in civil law jurisdictions
    - There are a number of overlaps between this case and Milieudefensie v Shell. In both cases the claims have been brought against oil majors, and the groups of claimants relied, at least in part, on a domestic duty of care in their request for a future curtailment of emissions based on international climate goals. In this context, this case may prove to be a test case for the persuasiveness of Milieudefensie v Shell in its fellow civil law jurisdictions.

Case 6: Trustee of PG&E Fire Victim Trust v Lewis Chew et al. (USA)

Table 6: Key facts about Trustee of PG&E Fire Victim Trust v. Lewis Chew et al.

Category	Description
Claimant	John Trotter of the PG&E Fire Victim Trust
Defendant	Individual Defendants Lewis Chew ("**Chew**"), Anthony F. Earley, Jr. ("**Earley**"), Fred J. Fowler ("**Fowler**"), Richard C. Kelly ("**Kelly**"), Roger H. Kimmel ("**Kimmel**"), Richard A. Meserve ("**Meserve**"), Eric D. Mullins ("**Mullins**"), Forrest E. Miller ("**Miller**"), Rosendo G. Parra ("**Parra**"), Anne Shen Smith ("**Smith**"), Jason P. Wells ("**Wells**"), Patrick M. Hogan ("**Hogan**"), Geisha J. Williams ("**Williams**"), Barbara L. Rambo ("**Rambo**"), Barry Lawson Williams ("**B.L. Williams**"), Christopher P. Johns ("**Johns**"), Maryellen C. Herringer ("**Herringer**"), Kevin Dasso ("**Dasso**"), Julie M. Kane ("**Kane**"), Steve E. Malnight ("**Malnight**"), Dinyar B. Mistry ("**Mistry**"), and Does 4-50 Inclusive
Sector	Utilities
Category	Claims against individuals relating to individual accountability for climate harms/breach of director/fiduciary duties
Index terms	Climate Change Risks, Disaster Risk Management, Infrastructure, Wildfire
Jurisdiction	San Francisco, California, USA
Date claim was filed and status	March 2021 Settlement reached
Relief sought	Monetary; damages
Potential impact areas for insurers	• Geographical exposure of underwriting and investment portfolio • Direct implications for underwriting • Indirect implications for underwriting and assets

Case overview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In March 2021, the Fire Victim Trust, a fund responsible for compensating victims of the 2017 and 2018 Northern California wildfires caused by PG&E, filed suit in California state court alleging that defendants, executive officers at PG&E, breached their fiduciary duty by failing to implement critical safety measures, despite knowing the dangers posed by the utility's old infrastructure and deficient tree-trimming and removal work. The complaint alleges that such safety measures could have prevented or limited the damage created by the wildfires. Note that while PG&E was named as a defendant in the initial complaint filed in December 2018, it is not named in the amended complaint filed in March 2021.

This case is notable because it illustrates the use of state common law and business tort law to hold company officers liable for failure to prevent or limit the consequences of natural disasters. This case is one of several lawsuits brought by the Fire Victim Trust for the 2017 and 2018 Northern California wildfires. A separate case, *Trustee of the PG&E Fire Victim Trust v Davey Resources Group Inc et al.*, was brought against multiple PG&E contractors responsible for tree trimming, infrastructure inspections, and maintenance under theories of tort liability and breach of contract.

Claims and alleged wrongful conduct

The amended complaint contends that the defendant officers should have implemented a series of critical safety measures, including ensuring that a power shutoff system was installed for the PG&E grid. The power shutoff system was necessary given that the company failed to maintain vegetation in violation of applicable regulations. The defendant officers also failed to reprogram reclosers, which would have been another way to shut power off and avoid the wildfires.

Plaintiff also alleges that the 2018 fire was caused by defendants' failure to maintain and inspect equipment, which resulted in a 100-year-old transmission tower failing and sparking the fire. According to the complaint, defendants breached fiduciary duties by ignoring red flags that PG&E's business operations posed an unreasonable risk to the public including the company's history of accidents, large settlements, previous convictions, and internal board minutes. Other alleged breaches include implementing programmes offering financial incentives to PG&E employees, agents, and/or contractors to not protect public safety.

Plaintiff alleges various violations of California business tort law and seeks monetary relief.

In July 2022, a $117 million settlement was reached for damages caused to PG&E in connection with the 2017 North Bay Fires and the 2018 Camp Fire.

Implications for the insurance industry

- Legal recognition that a private company *could* be held liable for natural disasters resulting from mishandling of utilities.
    - Given that the case has been re-filed after a three-year stay until the close of PG&E's bankruptcy proceedings, utility companies should be on alert for similar claims under business tort law. Investors may also use similar theories to challenge internal controls, contractors or supporting industries, such as insurance, advertising, or other financial institutions.
- Focus on corporate liability and climate-related risks.
    - Similar to other corporate liability suits in the USA, this case is premised on allegations that PG&E's executives failed to take action that would have controlled a major natural disaster. Plaintiffs may seek to leverage responsibilities to disclose climate-related and environmental risk in future proceedings against entities that make public statements related to energy, infrastructure, environmental (including insured companies as well as insurers themselves).

Case 7: Australian Conservation Foundation v Woodside Energy (Australia)

Table 7: Key facts about Australian Conservation Foundation v Woodside Energy

Category	Description
Claimant	Australian Conservation Foundation ("**ACF**")
Defendant	Woodside Energy
Sector	Oil and Gas
Category	Claims challenging climate policy/legislation or public permits
Index terms	Climate Science, Coastal Erosion, Emissions, Environmental Degradation, Environmental Impact Assessment, Fossil Fuels, Gas, Great Barrier Reef, Offshore
Jurisdiction	Australia
Date claim was filed and status	June 2022 Initial stages
Relief sought	Non-monetary; injunctive relief
Potential impact areas for insurers	• Jurisdiction of headquarters • Impact on key lines of business • Geographical exposure of underwriting and investment portfolio • Direct implications for underwriting • Indirect implications for underwriting and assets

Case overview

In June 2022, the Australian Conservation Foundation filed a climate case in Melbourne against Woodside Energy in the Federal Court of Australia, seeking an injunction to halt Woodside's $16bn Scarborough gas field development project on the coast of Western Australia until its impact on the Great Barrier Reef off Queensland has undergone a proper environmental assessment. Australian law permits all offshore gas and oil projects to be assessed through the offshore regulator, the National Offshore Petroleum Safety and Environment Management Authority ("**NOPSEMA**"). In other instances, projects may not commence unless approved pursuant to the Environmental Protection and Biodiversity Conservation Act 1999 ("**EPBC**"), Australia's national climate legislation.

Although the case has yet to be decided, it already marks a notable effort to shift legal standards for oil and gas projects that may pose significant risks to the environment as a result of GHG emissions. It is also the first time the Federal Court has been asked to evaluate objective, scientific evidence to find that GHG emissions from a major offshore gas project will likely impact the Great Barrier Reef.

Claims and alleged wrongful conduct

Plaintiff alleges that the Scarborough gas field development project will likely have significant impacts to the heritage values of the Great Barrier Reef. Plaintiff also notes that although the gas will mostly be burned in other countries, the burning and coal consumption in other countries will still increase GHG emissions in the atmosphere and the global average surface temperature, therefore causing coral deaths and mass bleaching in the Great Barrier Reef.

Plaintiff argues that as a result of these significant impacts on the Great Barrier Reef, the development project should not be assessed by the NOPSEMA and instead be subject to approval under the EPBC. Plaintiff seeks injunctive relief and argues that the Scarborough gas project must be halted until the environmental impacts are assessed.

Implications for the insurance industry

- Inspiration to other copycat plaintiffs
    - Similar to other climate impact litigation suits globally, this case is premised on allegations that a private entity's actions are increasing GHG emissions, negatively impacting the environment. As a result, oil and gas companies should be on alert for similar complaints from environmental and conservation groups about their contributions to GHG emissions and effects on the climate. Investors may also use similar theories to challenge projects constructed by other high-emitting industries or supporting industries such as insurance, advertising, or other financial institutions.
- Focus on objective scientific data to provide injunctive relief for climate change related damage
    - If this case succeeds on its merits, the Federal Court will have used objective scientific data about a potential oil and gas project and its GHG emissions to determine that the environmental impact outweighs the project's operation, and that an environmental assessment is necessary before proceeding with the project. This, in itself, sets a precedent for future injunctive-based claims against private projects that may negatively impact the Great Barrier Reef.

Case 8: ClientEarth v Board of Directors of Shell plc

Table 8: Key facts about ClientEarth v Board of Directors of Shell plc

Category	Description
Claimant	ClientEarth
Defendant	Shell plc ("**Shell**")
Sector	Oil and Gas
Category	Claims against individuals relating to individual accountability for climate harms/breach of director/fiduciary duties
Index terms	1.5 Degrees Scenario, Climate Change, Climate Emergency, Emissions, Energy Transition, Fossil Fuel Phase Out, Fossil Fuels, Future Fossil Fuel Emissions, GHG Emissions, Governance, Investment, Net-zero, Paris Agreement, Public Interest, Scope 3, Shareholder Action
Jurisdiction	United Kingdom
Date claim was filed and status	March 2022; Initial stages – pre-action procedure
Relief sought	Non-monetary; order that Shell adopt a revised corporate strategy
Potential impact areas for insurers	• Jurisdiction of headquarters • Cross line aggregations • Extent of concentration

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Case overview

On 14 March 2022, the claimant launched legal action against the board of directors of Shell for breach of their directors' duties under UK company law, arguing that the board are mismanaging climate change related risks by failing to implement a climate strategy that is in line with the goals of the Paris Agreement. This claim is prompted, at least in part, by the ruling in the Dutch case *Milieudefensie et al. v Royal Dutch Shell plc*, where the Hague District Court required Shell to adopt a new climate strategy and reduce its GHG emissions by 45% (as compared to its 2019 emissions) by 2030. The Dutch court's judgement is provisionally enforceable, meaning that Shell must comply despite the case being under appeal. However, the claimant argues that Shell shows no intention of developing a revised climate strategy in line with the Dutch court's requirements, and that the company's overall emissions are set to increase by 4% by 2030, rather than decrease.

This is the first UK case in which a shareholder has sought to hold directors personally liable for perceived mismanagement of climate risk and could set a precedent for further climate litigation on the basis of breach of directors duties, particularly now that companies are being asked to make more climate and environmental commitments and disclose against these commitments in their annual reports and other published information.

Grounds

The claimant argues that the directors of Shell are mismanaging material and climate-related risks by failing to implement a corporate strategy that is aligned with the goals of the Paris Agreement, and that this constitutes a breach of two general directors' duties under UK company law:

1. The duty to promote the success of the company, which includes a duty to consider, among other things, the likely long-term consequences of any decisions made, the interests of company's employees, the impact of the company's operations on the community and environment; and

2. The duty to exercise reasonable care, skill and diligence.

The claimant argues that the directors are prioritising near-term profits at the expense of company viability and that this failure to properly prepare the company for the net-zero transition will increase Shell's vulnerability to stranded asset risk and write-downs of its fossil fuel assets. In particular, the claimant argues that Shell's current climate strategy is too heavily caveated and dependent on progress of others (which was similarly commented upon by the Dutch court in *Milieudefensie et al. v Shell*) and that Shell's 2030 targets do not factor in Scope 3 emissions, meaning that more than 90% of the emissions from which Shell derives revenue are excluded. The claimant further notes that Shell continues to invest in new oil and gas projects and that research shows its emissions are set to increase by 4% by 2030 (rather than decrease), despite the fact that the 2050 net-zero energy transition will require a rapid phase out of oil and gas, meaning that these projects may shortly become stranded assets.

Going forward

This case is still in its early stages. The claimant launched pre-action proceedings by sending a letter to Shell notifying the company of the claim against its board, and intends to file the claim toward the end of summer should the dispute not be resolved. These proceedings are being brought as a derivative action, meaning that the claimant has initiated the case against Shell's board of directors as a shareholder on behalf of the company. The claimant will need to secure permission from the court in order to proceed with this claim and, if granted, the claim will proceed as an ordinary civil case in the High Court of England and Wales.

Should the proceedings be approved, this will be the first case in the UK to consider whether directors could be held personally liable for failure to manage climate-related risk or implement an adequate climate strategy. This may add pressure for boards to consider and respond to climate risk, particularly in light of the growing trend in climate litigation forcing carbon majors to alter their corporate strategy and curb their emissions.

Implications for the insurance industry

- Potential to set precedent for new type of climate litigation against company directors
- Potential increase in shareholder action against companies (particularly carbon majors), meaning increased pressure and/or cost to accelerate climate transition
- Insurers may need to incorporate assessment of climate risk into Directors' and Officers' ("**D&O**") policies
    - Risk of personal liability by directors for management of climate risks could have serious implications for the insurance industry and its approach to D&O liability insurance. Insurers may need to consider whether (and how) they take into account underwriting for climate risk in relation to D&O policies.

Case 9: ClientEarth v Koninklijke Luchtvaart Maatschappij N.V.

Table 9: Key facts about ClientEarth v Koninklijke Luchtvaart Maatschappij N.V.

Category	Description
Claimants	FossielVrij NL; Reclame Fossielvrij; ClientEarth
Defendant	Koninklijke Luchtvaart Maatschappij N.V. ("**KLM**")
Sector	Aviation
Category	Greenwashing (consumer protection/advertising claims)
Index terms	Advertising, Airlines, Aviation, Biofuels, Carbon Offset, Climate Change, Climate Emergency, Emissions, Fuels, GHG Emissions, Greenwashing, Reforestation, Net-zero
Jurisdiction	The Netherlands
Date claim was filed and status	May 2022; Initial stages
Relief sought	Non-monetary; order that KLM stop advertising misleading claims
Potential impact areas for insurers	• Jurisdiction of headquarters • Impact on key lines of business • Cross line aggregations • Extent of concentration • Direct implications for underwriting • Indirect implications for underwriting and assets

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Case overview

On 24 May 2022, FossielVrij NL issued KLM with a letter of summons, stating that they would bring action under European consumer law if KLM did not cease making misleading advertisement claims under its 'Fly Responsibly' campaign, which it launched in 2019. The claimants argue that KLM's advertisement campaigns and carbon zero offset schemes violate European consumer law as they give a false impression of the sustainability of KLM's flights and its plans to address climate harm. This claim builds on a previous decision by the Dutch media watchdog, who ruled that elements of the 'Fly Responsibly' campaign violated the Dutch Advertisement Code. On 6 July 2022, the claimants filed their claim in the Amsterdam District Court.

Whilst airlines have faced allegations on a national level in relation to 'green' advertising campaigns (including KLM and Ryanair),[26] this case marks the first time that an airline company has faced greenwashing allegations under European consumer law. Should this case prove successful, it may have particular ramifications as to how airlines can market themselves in relation to climate going forward.

Grounds

The claimants argue that KLM's 'Fly Responsibly' campaign breaches the Dutch implementation of the EU's Unfair Commercial Practices Directive by giving its customers the false impression that its flights will not make climate change worse. The claimants argue that KLM's plan for continued increases

[26] In September 2019, the UK's Advertising Standards Authority ("**ASA**") found that Ryanair's advertising campaign claiming that it was "Europe's… Lowest Emissions Airline" and "Europe's… low CO2 emissions airline" were misleading and gave customers the false impression that their journey would be contributing lower CO2 emissions than if they travelled with any other European airline. The ASA ordered that the advertisements could not appear again in their current forms.

in flying, which is underpinned by this advertisement campaign presenting the airline as 'creating a more sustainable future' and is on track to reduce its emissions to net-zero by 2050, is incompatible with expert studies which warn that the aviation sector must decrease the overall number of flights to align with net-zero and that KLM's continued growth is therefore inconsistent with the promotion of its net-zero pledge. The claimants further argue that KLM's carbon offset product (called "**CO2ZERO**"), which allows customers to 'reduce their impact' by donating toward reforestation schemes or KLM's purchase and use of biofuels, is unlawful.

This case builds on the national decision by the Dutch Advertisement Commission on 8 April 2022, where the Commission ruled that elements of KLM's campaign, particularly where it indicated that customers could fly carbon-emission free, were misleading and violated the Dutch Advertisement Code. The Commission made the point that, whilst KLM did invest in internationally certified reforestation programmes, these emissions reductions certifications do not necessarily result in full compensation of KLM's GHG emissions as suggested by the 'Fly Responsibly' campaign and that KLM therefore could not claim that its flights were 'carbon neutral'.

Going forward

The claim is still in its early stages, with the Amsterdam District Court currently considering the claim's standing to proceed. Should the Court confirm standing, KLM will be asked to file its defence. KLM denies the claim, as well as any allegations of greenwashing. However, during a meeting with FossielVrij on 24 June 2022, KLM representatives noted that they were reviewing their reforestation offset marketing following the Dutch Advertisement Commission's finding against it.

Should the Court provide a merits judgement in favour of the claimants, KLM will be forced to withdraw its advertisement campaign and issue corrections in respect of its previous advertising. It will also be prohibited from issuing any similar advertisements in future.

For the wider airline industry, this could have potentially serious implications. In particular, airlines who operate or market themselves in the EU (or indeed any jurisdiction with equivalent consumer laws) with comparable campaigns may face claims on the same or similar grounds. This claim may also have implications for fossil fuel-related advertising more widely as Fossielvrij NL, ClientEarth, Reclame Fossielvrij and a number of other organisations, are also calling for a European ban on fossil fuel advertising, which would include all airline advertising. Although this claim specifically seeks to prohibit KLM from publishing misleading climate-related advertisements, a merits award in favour of the claimants would also necessarily require the court to acknowledge the harmful environmental effects resulting from the airline industry's usage of fossil fuel.

Implications for the insurance industry

- Potential to set precedent for consumer law-based litigation against airlines (not necessarily restricted to the EU)
- Potential serious restrictions for airline industry marketing and communications in relation to emissions reductions and net-zero goals, or material alteration in business operations

    - Airline companies are being placed in an increasingly difficult position. They are required (whether by law or due to stakeholder pressure) to evidence that they are addressing their carbon footprint and have set a number of climate-related targets. However, a lack of commercially viable low-carbon alternatives means that airlines face the choice between relying on carbon offsetting measures, or reducing the number of flights. To date, many airlines have relied on the former, but these greenwashing allegations may mean that airlines are either forced to rescind or materially alter their communications and potentially their net-zero pathways (meaning potentially material reputational impact), or reduce flights (meaning a potentially material financial impact).
- Potential for further climate litigation as airlines increasingly being recognised as carbon majors
    - Insurers should consider their exposure to climate litigation risk outside of the more obvious fossil-fuel producing industries. The recognition of fossil fuel-dependent industries, such as aviation, as carbon majors increases the number of sectors impacted by court judgements against fossil fuel producing companies; for example, see *'Case 1: Milieudefensie et al. v Royal Dutch Shell plc (Netherlands)'* and *'Case 5: Notre Affaire à Tous et al. v Total'*, and even specifically their Boards ('Case 8: ClientEarth v Board of Directors of Shell plc').

Case 10: Australasian Centre for Corporate Responsibility v Santos

Table 10: Key facts about Australasian Centre for Corporate Responsibility v Santos

Category	Description
Claimant	Australasian Centre for Corporate Responsibility ("**ACCR**")
Defendant	Santos
Sector	Oil and Gas
Category	Greenwashing (Disclosure-based claims)
Index terms	Disclosure, Energy, Energy Transition, Emissions, Fossil Fuels, Future Fossil Fuel Emissions, GHG Emissions, Greenwashing, Net-zero, Transition Planning, Oil and Gas, Climate-washing
Jurisdiction	Australia
Date claim was filed and status	25 August 2021; Initial stages
Relief sought	Monetary and non-monetary; payment of legal costs and order that Santos cease its misleading and deceptive claims and issue corrective statements
Potential impact areas for insurers	• Extent of concentration

Case overview

On 25 August 2021, the claimant brought proceedings in the Federal Court of Australia against listed oil and gas company Santos, alleging that it had made a number of misleading or deceptive claims in its annual report. The claimant argues that Santos' claims that its natural gas provides "clean energy" and that it has a "clear and credible plan" to achieve net-zero emissions by 2040 are misleading or deceptive, and that these are in breach of Australian corporate and consumer law.

This case is generally perceived as the first case to challenge an oil and gas major's net-zero emissions targets, as well as a test case for the viability of relying on future carbon capture and storage and blue hydrogen in transition plans (despite the fact that neither are currently commercially viable on a large scale). Many carbon majors' net-zero pathways rely, at least in part, on the somewhat speculative use of future 'green' technologies, which means that this case could have significant implications as to how these corporations can legally establish and communicate their net-zero transition goals.

Grounds

The claimant's original grounds argue that Santos made misleading and deceptive claims in its 2020 annual report, specifically:

1. that natural gas is 'clean fuel' and that Santos therefore provided 'clean energy'; and
2. that Santos had a "clear and credible plan" to achieve net-zero emissions by 2040, making use of carbon capture storage (among other methods).

The claimant argues that these claims are misleading on the basis that natural gas cannot be considered clean fuel as the extraction and generation of natural gas releases significant amounts of carbon dioxide and/or methane, both of which are GHGs which contribute heavily toward climate change. The claimant further argues that Santos' energy transition plan is heavily dependent on undisclosed assumptions, particularly in relation to the effectiveness of emergent 'green' technologies such as carbon capture and storage (which is not yet commercially viable on a large scale), that Santos has not yet committed to a net-zero roadmap, and that it is intending to expand its production at certain sites which would lead to an increase in GHG emissions (rather than a decrease).

The claimant argues that these claims amount to misrepresentations and which are in violation of Australian corporate and consumer protection laws.

On 25 August 2022, the claimant filed to expand its case to include alleged greenwashing in Santos' 2020 Investor Day Briefing and its 2021 Climate Change Report. These additional claims have been brought following additional information produced by Santos in the litigation discovery process.

Going forward

The Federal Court of Australia is yet to consider this case on its merits. One of the key questions will centre around whether the claims constitute 'current representations' or 'future representations', as this determination will have a significant impact as to which party will bear the burden of proof (and what that burden will consist of). If the court determines that Santos' claims constitute current representations, the claimant will bear the burden of proving that these statements cannot be sufficiently substantiated.

Should the court determine that these claims are future representations (which is particularly relevant in respect of Santos' reliance on emergent technologies), Santos will bear the burden of proving that it had a reasonable basis for making these claims.

Implications for the insurance industry

- Corporations (particularly carbon majors) should carefully assess any public climate-related claims to ensure these can be factually and credibly substantiated
- Indicates increasing investor scrutiny of net-zero transition plans
    - This case indicates that investors are no longer satisfied by a corporation simply adopting a net-zero transition plan, but rather than they expect this to be scientifically and commercially credible. It also indicates that investors are willing to undertake action across various jurisdictions (noting the recent cases *Milieudefensie et al. v Shell* in the Netherlands and *Notre Affaire a Tous v Total* in France) in order to challenge transition plans that fall short of expectations.
- Potential for carbon majors' reliance on emergent technologies in net-zero transition plans to be challenged

Case 11: Abrahams v Commonwealth Bank of Australia

Table 11: Key facts about Abrahams v Commonwealth Bank

Category	Description
Claimants	Guy Abrahams and Kim Abrahams as trustees for the Abrahams family trust
Defendant	Commonwealth Bank of Australia ("**CBA**")
Sector	Financial
Category	Claims challenging climate policy/legislation or public permits
Index terms	Banking, Climate Finance, Coal, Disclosure, Energy, Environmental Policies, Finance, Fossil Fuels, Oil and Gas, Paris Agreement, Pipeline, Shareholder Action
Jurisdiction	Australia
Date claim was filed and status	26 August 2021 Petition granted
Relief sought	Non-monetary; order that CBA make certain documents available for inspection
Potential impact areas for insurers	• Extent of concentration

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Case overview

On 26 August 2021, the claimants (as shareholders of CBA) filed an application in the Federal Court of Australia requesting access to a number of the bank's internal documents relating to its involvement with certain oil and gas projects that might infringe on its environmental policies. CBA's policies require the bank to carry out an assessment of each project it invests in, including an assessment as to whether the project is in line with the goals of the Paris Agreement, and the claimants requested access to the documents to confirm that these projects were in compliance.

On 4 November, the Federal Court granted access to the documents, albeit allowing some redactions by CBA. This decision is regarded as the first of its kind, and may encourage similar shareholder action (and scrutiny) against financial institutions. Pending the claimants' findings, it may also expose CBA to further climate-related litigation.

Grounds

The claimants made the application under a specific provision in the Australian Corporations Act 2001, which allows members of a company to apply to the Court for an order to inspect the company's books. Specifically, the claimants requested access to all documents relating to CBA's gas projects and further fossil fuel projects, including a natural gas pipeline in the USA; several new LNG vessels; a coal seam gas project in Queensland, Australia; and the Cambo oil field development in Scotland.

The claimants noted that they wished to inspect these documents for compliance with the requirements in CBA's Environmental and Social Framework ("**E&S Framework**") and Environmental and Social Policy ("**E&S Policy**"), which require an assessment of any environmental, social and economic impacts of the relevant projects, and an assessment as to whether the projects are line with the goals of the Paris Agreement.

Proceedings to date

On 4 November 2021, the Federal Court considered and granted proposed consent orders which had been previously agreed between parties, allowing the claimants to inspect a limited scope of the documents requested in their initial complaint. CBA was asked to produce the documents in two separate tranches, on 9 December 2021 and 10 February 2022, and the consent orders allowed CBA to make certain redactions to the documents, including material commercial or financial information (to the extent that it does not fall within the scope of information that is relevant under the claim) and any legally privileged materials.

The claimants reserved the right to apply to the Court for the remaining documents requested in the initial application, should the documents provided by CBA under the consent orders not prove sufficient to alleviate their concerns.

Implications for the insurance industry

- Demonstrates increasing shareholder scrutiny of bank investments in fossil fuel industry and compliance with environmental policies
    - This claim demonstrates that financial institutions themselves may have direct operational exposure to climate litigation risk.

Shareholders are beginning to take a more active role in scrutinising financial institutions' lending or investment decisions and their compliance with their Environmental, Social and Governance ("**ESG**") policies. Should shareholders consider these decisions unsuitable or in breach of internal policies, financial institutions may face further litigation. Financial institutions (and professional services companies more generally) may therefore need to consider the ESG implications of any investment or client-related decisions they make, and ensure that this is (at the very least) in accordance with internal policy.

- An important mitigant for this risk in the case of insurers, for example, is to clearly define and externally communicate appetite for insuring traditional carbon-intensive sectors.

- Potential for this to set a precedent encouraging similar shareholder action (both in Australia and in any jurisdiction with similar provisions under company law)

4. Tier 2 Cases and Trends for Climate Litigation

Tier 2 cases represent a group of closely watched cases that represent possible future directions for climate litigation. These cases have been selected using an expanded version of the selection criteria for Tier 1 (i.e. they represent the 'next most' plausible and impactful for the insurance industry).

The figure below shows the distribution of Tier 2 cases by jurisdiction and sector:

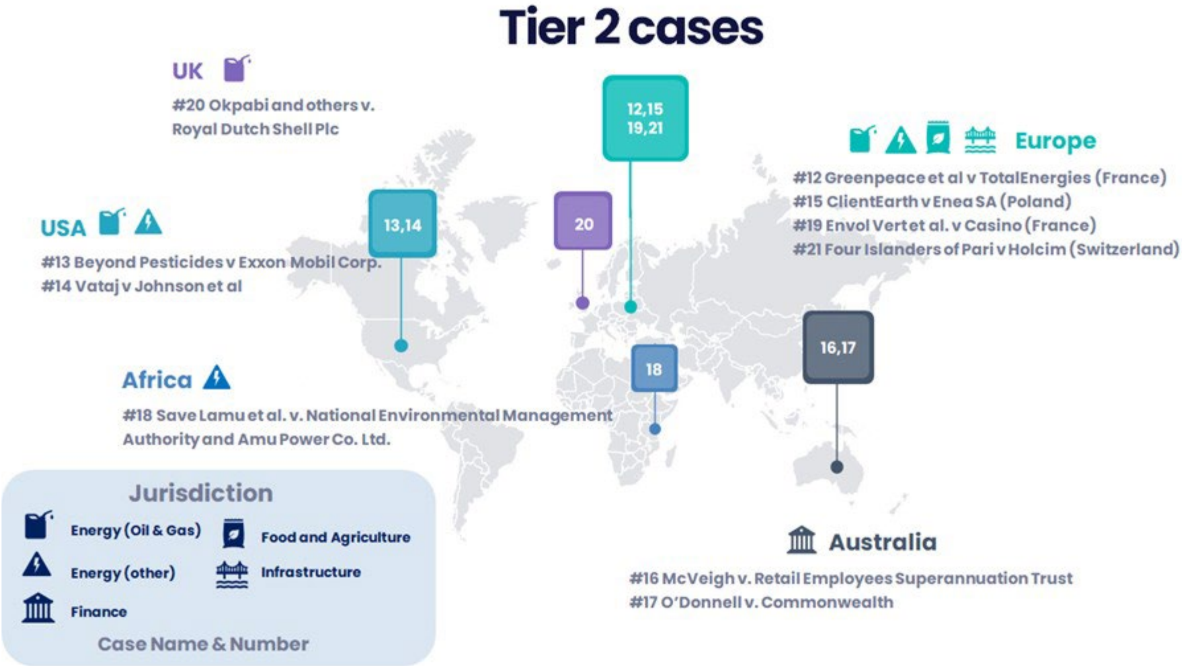

Figure 3: Distribution of Tier 1 cases

Case 12: Greenpeace et al. v TotalEnergies

Table 12: Key facts about Greenpeace et al. v Total

Category	Description
Claimants	Greenpeace France; Les Amis de la Terre France; Notre Affaire à Tous; ClientEarth (third-party intervener)
Defendant	TotalEnergies SE; and TotalEnergies Electricité et Gaz France (together "**TotalEnergies**")
Sector	Oil and Gas
Category	Greenwashing (consumer protection/advertising claims)
Index terms	Advertising, Biofuel, Carbon Neutral, Energy, Energy Transition, Fossil Fuels, Fossil Fuel Phase Out, Gas, GHG Emissions, Greenwashing, Net-zero, Transition Planning
Jurisdiction	France
Date claim was filed and status	March 2022; initial stages
Relief sought	Monetary and non-monetary

Case overview

On 2 March 2022, the claimants filed a claim against TotalEnergies arguing that the group's "reinvention advertising campaign" (launched on 29 May 2021) breaches the prohibition on misleading and unfair commercial practices in the French Consumer Code, on the basis that TotalEnergies' claims to be aiming for net-zero by 2050 and to becoming a major player in the energy transition are false, and that the claims promoting the environmental virtues and transition role of gas and biofuels are misleading.

The claimants argue that TotalEnergies' campaign highlights the group's ambition to be "carbon neutral by 2050" and to play a "major role in the transition" when this may not reflect what the company is doing in practice or the environmental properties of the group's products. The claimants assert that the TotalEnergies campaign therefore entails a substantial alteration of the economic behaviour of the consumer and should be considered as misleading commercial practices.

The claimants are seeking:

1. an injunction to stop the campaign;
2. the publication of the decision on TotalEnergies' websites, social media platforms and newspapers;
3. the compensation of moral damages set at €10,000 to each claimant; and
4. the payment of €10,000 for legal fees already incurred, as well as the repayment of legal fees.

Implications for the insurance industry

The claimants argue that net-zero marketing is misleading when compared to current scientific evidence of net-zero pathways, and that this breaches consumer protection requirements. Particular attention has been paid to the use of the term 'carbon neutrality' and how this can mislead the public.

Insurers should consider the continuing risk of greenwashing and challenge on the basis that public statements (including in their advertising campaigns or those of their clients) may not appropriately reflect their own climate strategy and commitments. The market's understanding of what certain technical terms mean (including 'carbon neutrality') is evolving. It is therefore important to review how these terms are used, to ensure consistency with what has been said before and to take care to fully and clearly explain what is intended.

Insurers should also consider sector risks, particularly in relation to energy companies which are a particular target of greenwashing claims.

Case 13: Beyond Pesticides v Exxon Mobil Corp.

Table 13: Key facts about Beyond Pesticides v Exxon Mobil Corp.

Category	Description
Claimant	Beyond Pesticides
Defendants	Exxon Mobil Corporation ("**ExxonMobil**")
Sector	Oil and Gas
Category	Greenwashing (consumer protection/advertising claims)
Index terms	Advertising, Energy, Energy Transition, Fossil Fuels, Fossil Fuel Phase Out, GHG Emissions, Gas, Greenwashing
Jurisdiction	District of Columbia, USA
Date claim was filed and status	May 2020 Initial stages
Relief sought	Non-monetary; injunctive relief

Case overview

In May 2020, non-profit organisation Beyond Pesticides filed a lawsuit in the District of Columbia Superior Court alleging that ExxonMobil's "false and deceptive marketing" misrepresented to consumers that it "has invested significantly in the production and use of clean energy and environmentally beneficial technology", directly and indirectly contributing to the climate crisis in those consumers' jurisdictions. The complaint contends that ExxonMobil continues to partake in deceptive practices despite knowing that the majority of ExxonMobil's business uses petroleum, natural gas, and petrochemicals, including pesticides.

Claims and alleged wrongful conduct

Plaintiff alleges that ExxonMobil's false and misleading representations and omissions violate the District of Columbia Consumer Protection Procedures Act ("**DC CPPA**") because "reasonable customers are misled and deceived by [ExxonMobil's] representations into believing that [ExxonMobil] is committed to" engaging in clean and renewable energy as well as environmentally beneficial technology. Plaintiff also alleges that ExxonMobil has "actual and constructive knowledge" that its business practices do not meet reasonable consumers' expectations based on the company's representations and that consumers frequently rely on those representations.

In July 2020, Exxon removed the case to federal court, on the basis that the amount in dispute was enough to meet the $75,000 diversity jurisdiction threshold and that the matter was brought on behalf of a class of D.C. consumers under the CAFA (Class Action Fairness Act) which in turn, would trigger federal jurisdiction. In March 2021, the judge granted plaintiff's motion to remand the case back to local court, rejecting Exxon's federal jurisdiction claims.

Implications for the insurance industry

- Inspiration to other consumer protection claims
    - The Beyond Pesticide proceedings may provide a blueprint for other non-profit plaintiffs to follow in pending or future litigation against energy companies, other high-emitting industries, or supporting industries such as insurance, advertising or financial institutions.
- Focus on misrepresentations and greenwashing of fossil fuels.
    - This case is premised squarely on deceptive marketing under state law, in line with a large number of recent 'greenwashing' suits pursued by both public and private actors in the United States. Plaintiffs may seek to leverage facts and arguments brought in these proceedings to pursue other greenwashing claims against entities which make public statements relating to climate change (including insured companies as well as insurers themselves) and link these allegedly misleading marketing materials to climate change impacts through consumer protection claims.

Case 14: Vataj v Johnson et al.

Table 14: Key facts about Vataj v Johnson et al.

Category	Description
Claimant	Christopher Vataj ("**Vataj**"), Individually and on Behalf of All Others Similarly Situated
Defendants	William D. Johnson ("**Johnson**"), John R. Simon ("**Simon**"), Geisha Williams ("**Williams**"), Jason P. Wells ("**Wells**")
Sector	Utilities
Category	Greenwashing (Disclosure-based claims)
Index terms	Climate Change Risks, Disclosure, Disaster Risk Management, Infrastructure, Investment, Shareholder Action, Wildfire
Jurisdiction	USA (Northern District of California)
Date claim was filed and status	October 2019 Settled
Relief sought	Monetary; damages

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Case overview

In October 2019, plaintiffs filed a class action suit with a federal court in the Northern District of California alleging that PG&E executives mishandled planned power outages in the aftermath of the widely publicised Northern California Wildfires in 2015, 2017, and 2018, which led to a decline in the company's stock price. The amended complaint contends that plaintiffs relied on allegedly materially false and misleading financial and management statements made by PG&E and "suffered damages in connection with their purchases of the Company's securities".

Claims and alleged wrongful conduct

Plaintiffs proposed a shareholder class that would include PG&E investors who purchased shares of PG&E between December 11, 2018 (the day following PG&E's allegedly misleading efforts to mitigate wildfires) and October 11, 2019 (the day before a media report was released that detailed the extensive effects of the PG&E outages). The media reports highlight PG&E's downed internal systems, public website going offline, and lack of cooperation with local government, despite the company having published statements about its de-energization efforts with local government and critical service providers, among other things. Plaintiffs alleged that after various media reports revealing the company's mishandling were published, PG&E shares closed at prices significantly lower than the previous trading days. Plaintiffs alleged violations of federal securities law, and sought monetary relief.

In November 2021, the Northern District of California approved the $10 million settlement and $2.5 million awarded in attorneys' fees.

Implications for the insurance industry

This case is premised on misrepresentations under federal securities law, in line with a large number of recent suits pursued by investors in the United States. Investors may seek to leverage facts and arguments brought in these proceedings to pursue other claims against entities which make public statements relating to climate change or utility maintenance (including insured companies as well as insurers themselves) and link these allegedly misleading materials to climate change impacts or natural disaster through federal securities law claims.

Case 15: ClientEarth v Enea SA

Table 15: Key facts about ClientEarth v Enea SA

Category	Description
Claimant	ClientEarth
Defendant	Enea SA ("**Enea**")
Sector	Energy and Utilities
Category	Claims challenging climate policy/legislation or public permits
Index terms	Coal, Coal Phase Out, Energy, Fossil Fuel Phase Out, Fossil Fuels, Permit, Power Plant, Shareholder Action
Jurisdiction	Poland
Date claim was filed and status	October 2018 – August 2019
Relief sought	Non-monetary; order to annul consent to construction of power plant

Case overview

On 19 September 2018, the claimant's lawyers wrote to Enea regarding the €1.2bn 1GW Ostrołęka C coal-fired power plant, stating that the claimant regarded the proposed consent resolution for construction of the plant as "clearly and obviously harmful to the interests of Enea and its shareholders" and warning Enea that any ongoing action in relation to the plant risked "breaching board members' fiduciary duties of due diligence and to act in the best interests of the company and its shareholders". The claim was filed on 24 October 2018 in the Regional Court in Poznań (*Sąd Okręgowy w Poznaniu*).

Grounds and judgement

The claimant brought the proceedings as shareholder of the project's co-owner Enea on the basis that the investment constituted major financial risks to the company and its shareholders. The claimant argued that the power plant was "a stranded asset in the making" and that it was highly exposed to the rising carbon prices in the EU, casting into doubt the project's financial viability.

The claimant challenged the consent resolution specifically on the grounds that:

1. it was an impermissible instruction to the management board of the company and therefore legally invalid; and
2. would harm the economic interests of the company and should therefore be annulled.

On 1 August 2019, the Regional Court found in favour of the claimant on the first ground, namely that the resolution consenting to the construction was legally invalid, making it unnecessary to determine the second ground. This judgement was later upheld in the Court of Appeal.

Implications for the insurance industry

This case may set a precedent for shareholder action directly against actions of the company and, whilst the court made no determination as to the economic implications of the power plant, this case does set the stage for claims to be brought on similar grounds (see also ClientEarth's shareholder action against the Board of Shell Plc in the UK).

Separately, this case marks a significant turn in attitude with respect to the financial viability of coal-based assets (and, potentially, towards fossil fuel assets more generally).

Case 16: McVeigh v. Retail Employees Superannuation Trust

Table 16: Key facts about McVeigh v. REST

Category	Description
Claimant	Mark McVeigh
Defendants	Retail Employees Superannuation Trust ("**REST**")
Sector	Financial
Category	Claims against individuals relating to individual accountability for climate harms/breach of director/fiduciary duties
Index terms	Business Risk, Climate Change Risks, Disclosure, Finance, Investment, Pension Fund
Jurisdiction	Australia
Date claim was filed and status	July 2018 Settlement reached November 2020
Relief sought	Declaratory relief, injunctive relief

Case overview

In November 2020, Mark McVeigh filed a lawsuit in the Federal Court of Australia alleging that REST violated the Corporations Act and the Superannuation Industry (Supervision) Act 1993 ("**SIS ACT**") by failing to disclose required information in response to his climate change information request regarding climate change-related business risks and REST's compliance with the Corporations Act and SIS Act.

Grounds and judgement

Plaintiff alleges that REST failed to require its investment managers to provide the information that was the subject of the Climate Change Information Requests and did not set in place processes or take the steps necessary to enable its officers to inform its Board of Directors, or the Board's Investment Committee, about REST's climate change-related business risks in accordance with the recommendations of the Task Force for Climate-related Financial Disclosures ("**TCFD**"). Plaintiffs alleges that REST's conduct breached its due diligence risk duties under the SIS Act and violated Section 1017C of Corporation Act, which are respectively intended to supervise the provision of prudent management of superannuation funds and the requests of information related to a superannuation product.

In November 2020, the parties reached a settlement agreement in which REST acknowledged "that climate change could lead to catastrophic economic and social consequences and is an important concern of REST's members**".** As part of the agreement, REST agreed to take "further steps to ensure that investment managers take active steps to consider, measure and manage financial risks posed by climate change and other relevant ESG risks…and that compliance with these efforts be reported back to REST"**.** REST's new policy will "require[] that the management of climate change risks also involves the disclosure to members of those risks, as well as the systems, policies and procedures maintained by the trustee to address those risks**".**

Implications for the insurance industry

- Inspiration to other plaintiffs
  - These proceedings may provide a blueprint for other plaintiffs to follow in pending or future litigation against superannuation corporations or the like. Plaintiffs may seek to leverage the facts, arguments and the exposure to climate change business risks brought in these proceedings to pursue other claims against entities which fail to disclose such risks.
  - These proceedings may serve to inspire other superannuation corporations to implement policies to actively mitigate and manage the risks of climate change, consider climate change in the context of their overall investment strategies and weigh the importance of disclosure to their members of such risks to avoid potential litigation.

Case 17: O'Donnell v. Commonwealth

Table 17: Key facts about O'Donnell v. Commonwealth

Category	Description
Claimant	Kathleen (Katta) O'Donnell
Defendants	Australian Government
Sector	Financial
Category	Claims challenging climate policy/legislation or public permits
Index terms	Bond Purchase, Climate Change Risks, Disclosure, Finance, Government, Investment
Jurisdiction	Federal Court of Australia
Date claim was filed and status	July 2020 Third Further Amended Claim Statement filed October 2021
Relief sought	Declaratory relief, injunctive relief

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Case overview

In July 2020, Equity Generation Lawyers filed a lawsuit in the Federal Court of Australia on behalf of Kathleen (Katta) O'Donnell against the Australian government and certain government officials, alleging that the value of Australian government bonds will be significantly affected by climate change as well as the Australian government's response to climate change. The complaint alleges that investors who trade in Australian government bonds face material risks from climate change that should be disclosed, and that the Australian government breached its duty of disclosure and misled or deceived investors in failing to disclose such risks.

Grounds and judgement

Plaintiff alleges that the Australian government has not sufficiently disclosed the risks associated with investing in Australian Government Bonds ("**AGBs**"). Plaintiff further alleges that as a result of physical impacts of climate change to Australia as well as the transition impacts that are, or will be, caused by actions taken to prevent climate change, there will be, or is likely to be, material adverse impacts on certain matters prior to the maturity dates of the bonds held by the plaintiff. These matters are factors that are, or are likely to be, material to the value of the bonds.

In October 2021, a judgement was issued in response to a hearing in July 2021 in which the government sought to strike out the claim in its entirety. The judgement rejected the government's argument and permitted the claim of misleading or deceptive conduct to proceed. Claims with respect to duty of care and against Commonwealth officials were struck out.

Plaintiff filed the Third Further Amended Statement of Claim shortly thereafter.

Implications for the insurance industry

- Inspiration to other plaintiffs
    - These proceedings may provide a blueprint for other plaintiffs to follow in pending or future litigation against government entities providing investment opportunities that could potentially be affected by climate change. Plaintiffs may seek to leverage the facts, arguments and the exposure to climate change business risks alleged or utilised in these proceedings to pursue other claims against entities which fail to disclose such risks.

Case 18: Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.

Table 18: Key facts about Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.

Category	Description
Claimant	Save Lamu et al.
Defendants	National Environmental Management Authority and Amu Power Co. Ltd.
Sector	Energy and Utilities
Category	Claims challenging climate policy/legislation or public permits
Index terms	Air Pollution, Biodiversity, Climate Change Act, Coal, Community, Energy, Environmental Impact Assessment, Emissions, Health, Healthy Environment, Licences, Fossil Fuels, Power Plant
Jurisdiction	Kenya
Date claim was filed and status	November 2016 Judgement issued June 2019
Relief sought	Declaratory relief, injunctive relief

Case overview

In September 2016, the National Environmental Management Authority ("**NEMA**") issued an Environmental Impact Assessment (**"EIA"**) Licence to AMU Power Company Limited ("**AMU**") based on an Environmental & Social Impact Assessment ("**ESIA**") study of its coal power plant provided by AMU and prepared by Kurrent Technologies Limited. Save Lamu, a community-based organisation, filed an appeal in November 2016 along with certain individuals, challenging the issuance of the EIA Licence as well as the process by which it was obtained.

Grounds and judgement

The appellants alleged that there was "poor analysis of alternatives and economic justification and failure to take into account economic issues and to identify and analyse alternatives to the proposed project" and that the ESIA study report "was flawed and plagued with misrepresentations, inconsistencies and omissions**".** The appellants' other allegations include that the NEMA failed to put conditions in the EIA licence for mitigation measures to address coal pollution caused by coal handling and storage; that the project would contribute to climate change, making it inconsistent with Kenya's low carbon development commitments; and that the project would have a negative impact on Kenya's air quality with adverse effects on human health and biodiversity.

In June 2019, the National Environmental Tribunal issued a judgement finding that AMU's ESIA was incomplete and scientifically insufficient in violation of relevant regulations, in part due to the inadequate consideration of climate change under the Climate Change Act of 2016. The Tribunal ordered the AMU Power Company to conduct a new ESIA study including consideration of the Climate Change Act of 2016, the Energy Act of 2019 and the Natural Resources Act of 2016.

Implications for the insurance industry

- Inspiration to other plaintiffs
  - These proceedings may provide a blueprint for other plaintiffs to follow in pending or future litigation to challenge similar projects which could have an adverse impact on climate change.
  - These proceedings demonstrate the importance of energy companies considering climate change in the context of their overall project operations and construction to avoid similar litigation.

Case 19: Envol Vert et al. v Casino

Table 19: Key facts about Envol Vert et al. v Casino

Category	Description
Claimants	Envol Vert; Sherpa; Canopée; Notre Affaire à Tous; France Nature Environnement; Mighty Earth; Commissão Pastoral da Terra; Coordenação das Organizações Indígenas da Amazonia Brasileira; Federação dos Povos Indígenas do Pará; Federação das Organizações e Povos Indígenas do Mato Grosso; Organizacion Nacional de los Pueblos Indígenas de la Amazonia Colombia.
Defendant	Casino, Guichard-Perrachon S.A. ("**Casino**")
Sector	Retail
Category	Cases specifically relying on an alleged breach of human rights
Index terms	Amazon Forest, Cattle, Deforestation, Disclosure, Environmental Impact, Human Rights, Indigenous People, Livestock, Meat Production
Jurisdiction	France
Date claim was filed and status	2 March 2021; initial stages
Relief sought	Monetary and non-monetary; order to compensate affected Brazilian Indigenous groups and to establish, implement and publish a new vigilance plan

Case overview

On 2 March 2022, the claimants brought a claim in the Saint-Étienne Judicial Court against French supermarket chain Casino, alleging that its involvement in the Brazilian and Columbian cattle industry has caused environmental and human rights harms. The claimants argue that Casino's actions are in breach of French vigilance law and are seeking an order for Casino to compensate affected Brazilian indigenous groups and establish, implement and publish a new vigilance plan.

This is understood to be the first time that a supermarket chain has been sued under French vigilance law for deforestation and human rights violations in its supply chain.

Grounds

The claimants allege that that Casino has failed to comply with its French law duty to review its vigilance measures ensuring there are no human rights or environmental abuses in its supply chain, and that its yearly vigilance plan does not adequately identify and address relevant harms. In particular, the claimants allege that:

1. Casino's Brazilian subsidiary is still sourcing significant amounts of its cattle from deforested areas or farms established on indigenous territories, which is prohibited under a 2009 agreement signed by Brazilian Federal Prosecutor's Office and over a hundred slaughterhouses;
2. Casino has failed to include its Columbian subsidiary in its vigilance plan (despite Columbia having one of the highest deforestation rates in the world); and

3. Casino has failed to set any commitments in respect of its South American businesses to exclude meat or processed products linked to deforestation.

Implications for the insurance industry

This case marks a step away from climate litigation solely against carbon majors and indicates potentially increased focus on harms taking place in supply chains. Whilst this is a particular concern for the retail sector (e.g. supermarkets and fashion retailers), this could have wide-ranging implications for any business with a supply chain. Insurers may need to consider potential harms in clients' supply chains, as well as any potential liability resulting from their own value chain.

This case may also set a key precedent for similar claims under EU law. The European Commission has published proposals for a Directive on Corporate Sustainability Due Diligence ("**CSDD**") which would require certain large EU and non-EU companies to establish mandatory due diligence processes to identify and address, prevent or mitigate adverse human rights or environmental impacts caused by their businesses. Although this case is based on a French national due diligence duty, should it result in a merits judgement in favour of the claimants, it could establish a possible benchmark for similar claims under national implementations of the CSDD in other EU Member States.

Case 20: Okpabi et al. v Royal Dutch Shell Plc

Table 20: Key facts about Okpabi et al. v Royal Dutch Shell Plc

Category	Description
Claimants	HRH Emere Godwin Bebe Okpabi & others; and Lucky Alame & others
Defendant	Royal Dutch Shell Plc ("**RDS**"); andShell Petroleum Development Co of Nigeria Ltd ("**SPDC**")
Sector	Oil and Gas
Category	Claims against private entities for climate-related harm
Index terms	Duty of Care, Disaster Risk Management, Environmental Impact, Fossil Fuels, Oil, Parent Company Liability, Pipeline, Polluter Pays
Jurisdiction	United Kingdom
Date claim was filed and status	14 October 2015 (Ogale) and 22 December 2015 (Bille); jurisdiction accepted
Relief sought	Monetary; damages

Case overview

On 14 October 2015 and 22 December 2015 respectively, the claimants filed claims against RDS and SPDC in the English High Court seeking damages for ongoing environmental damage caused by oil pipeline leaks in and around their communities in Nigeria. The claimants argue that RDS is responsible for SPDC's conduct or operations and that it owes them a common law duty of care which was breached by the oil spills. RDS and SPDC challenged both claims on the basis that they believed that the English courts did not have jurisdiction. However, on 12 February 2021, the UK Supreme Court held that these cases could proceed to trial in the English courts.

This case builds on the earlier Supreme Court decision in *Lungowe v Vedanta Resources PLC* and further clarifies how the English courts will approach claims relating to alleged parent company duty of care in respect of a foreign subsidiary.

Grounds and proceedings

The claimants set out two key arguments:

1. that SPDC was liable for the damage caused by its oil spills; and
2. that RDS owed them a common law duty of care because it had exercised "a high degree of control, direction and oversight in respect of SPDC's pollution and environmental compliance and the operation of its oil infrastructure", including mandatory environmental, health and safety ("**EHS**") standards, which failed to protect them against the risk of foreseeable harm from SPDC's operations.

RDS and SPDC challenged both cases on the basis of jurisdiction and argued that these cases had only been brought against RDS to create a connection to the English courts. The High Court and Court of Appeal each found in favour of the defendants. However, on appeal, the UK Supreme Court held that the matter could proceed to trial under the English court system (pending any further jurisdictional challenges).

In its decision, the Supreme Court made reference to its earlier decision in *Lungowe v Vedanta Resources PLC*, which considered the potential liability of Vedanta for any environmental damage or human rights violations allegedly caused by the operation of its Zambian subsidiary's copper mine. The Court recast the claimants' arguments into so-called '*Vedanta* routes', which may facilitate future arguments seeking to establish parent company duty of care, but noted that there is no special test for establishing tortious responsibility of a parent company (i.e. this continues to take place under general tort law):

1. RDS taking over the management or joint management of the relevant activity of SPDC;
2. RDS providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by SPDC;
3. RDS promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by SPDC; and

4. RDS holding out that it exercises a particular degree of supervision and control of SPDC.

Implications for the insurance industry

This case helps to clarify how the English courts will approach claims against UK parent companies for losses caused by its foreign subsidiaries. Insurers may want to consider the extent to which UK-based corporates with international operations manage and/or purport to exercise control over the actions of their subsidiaries in relation to environmental and climate change-related matters (e.g. environmental policies, climate transition plans, etc.), noting that corporates will need to strike a fine balance between too much involvement (opening themselves up to claims alleging parent company liability) and too little involvement (running the risk of claims for failure to prevent harm).

Although this recent case law[27] relates to parent company tortious liability in respect of environmental damage, this does feasibly provide a natural stepping stone for future claims in respect of liability for climate change impacts.

[27] Notably *Okpabi et al. v Royal Dutch Shell Plc* (see current case overview), *Lungowe v Vedanta Resources PLC* and *Município de Mariana v BHP Group UK Ltd 1* (in which the Court of Appeal accepted jurisdiction for a £5bn mass tort claim against BHP in respect of the Fundão Dam collapse in Brazil).

Case 21: Four Islanders of Pari v Holcim

Table 21: Key facts about Four Islanders of Pari v Holcim

Category	Description
Claimants	Four islanders of the Indonesian island of Pari
Defendant	Holcim
Sector	Infrastructure
Category	Claims against private entities for climate-related harm
Index terms	Carbon Offset, Climate Change, Climate Emergency, Climate Change Risk, Coastal Erosion, Community, Environmental Impact, Flooding, GHG Emissions, Individual Corporate Accountability, Polluter Pays
Jurisdiction	Switzerland
Date claim was filed and status	11 July 2022
Relief sought	Monetary and non-monetary; damages and order that Holcim reduce its GHG emissions

Case overview

On 11 July 2022, four Indonesian fishermen from the island of Pari brought legal proceedings against Holcim, a Swiss cement company, before the Justice of the Peace of the Canton of Zug, Switzerland. The claimants are seeking compensation for damage caused to the island by rising sea levels, funds to build flood defences and an order that Holcim reduce its GHG emissions.

This claim is understood to be the first major climate-related suit against a cement company and is modelled on the similar case of Saúl Luciano Lliuya (see *'Case 4: Saúl Luciano Lliuya v RWE AG (Germany)'*), where the claimants requested contributory damages to establish flood defences against the acute threat of glacial melting as a result of climate change, to which RWE's GHG emissions had allegedly contributed.

Grounds and proceedings

The claimants allege that they are experiencing serious negative climate change impacts and in particular the threat of flooding due to rising sea levels. The claimants argue that Holcim, in its capacity as global cement manufacturer and one of the top 50 GHG emitters worldwide[28], bears a

[28] According to the University of Massachusetts Amhert's 2021 greenhouse polluters index: PERI - Greenhouse 100 Polluters Index (umass.edu)

"significant share of responsibility" both for the global climate crisis and the climate impacts faced by Pari, and request orders that Holcim:

1. pay compensation for climate-related damages caused on Pari (on a proportional basis);
2. make a financial contribution to climate adaptation measures (such as flood protections) on Pari; and
3. reduce its GHG emissions by 43% (relative to its emissions in 2019)

This case is still in its early stages, with the claimants so far having filed a request for conciliation at first instance as required under the Swiss Civil Procedure Code. Should the conciliation fail, the claimants will have the option to file the claim in a competent court.

Implications for the insurance industry

This case pulls together a number of trends in private sector climate litigation, and demonstrates the rapidly expanding scope of claims against carbon majors (previously restricted to energy or oil and gas majors). This case also marks an increasing interest in holding carbon majors to account for their historical climate change impacts, and follows on from cases such as *Milieudefensie et al. v Royal Dutch Shell plc* and *Notre Affaire a Tous and Others v Total* in attempting to force corporates to take immediate action in reducing their GHG emissions. This case marks a significant development in case law by combining requests for both historical liability and forward-looking curtailment of emissions.

Insurers may want to consider how they cover or incorporate the risk of similar (or similarly multi-faceted) claims against clients into their products, particularly where those clients are considered to be operating in traditionally highly emitting industries.

5. Recommendations and Next Steps

The climate litigation landscape is rapidly evolving, with significant potential implications for insurers and their business models, as illustrated by the case analysis above.

As such, it is vital for insurers and financial institutions to critically assess their potential exposure and proactively mitigate the risks posed by climate litigation and judicial precedents. Companies that do not prepare accordingly run the risk of severe reputational damage, incurring huge financial settlements, and disruptive threats to their business models.

A set of key steps are proposed below to help firms to develop their approach to climate litigation risk. These key steps are derived in part by the case law precedents discussed in **Section 3** and **Section 4**, as well as additional insights and recommendations from a variety of contributors across the financial services, legal and regulatory sectors.

While these actions are focused on insurers, many, if not all, will be applicable to most financial institutions, given the relationship of firms within the financial sector with their counterparties and the holistic nature of many of the precedents described in earlier sections.

The recommendations below are broadly split into two overarching categories:

- Risk management, which involves a sequence of steps to understand and act on the risk posed by climate litigation; and
- Business strategy, which outlines potential large-scale strategic moves that firms may consider in a bid to pre-emptively mitigate their exposure to climate-related litigation risk.

Risk Management

Governance and Oversight

Incorporating climate litigation risk within firms' universe of risks is the first step to embedding litigation risk within their conceptualisation and assessment of risk. This risk assessment is integral to informing how a firm can, and should, establish appropriate operations and controls in light of its risks. For example, firms can use their assessments to articulate risk appetite statements, as well as how to include climate litigation risk within their broader risk taxonomy.

This in turn will help companies to explore how climate litigation risk interacts with other risks, the materiality of the risk, and who should be held accountable for litigation risk management. It is important to note that for some firms, litigation risk will appear 'cross-cutting' (i.e. it may fall under a number of broader risk categories, and so may not be explicitly considered as a distinct risk).

In order to establish ownership and accountability, appointing a board member to hold responsibility over this risk will enable financial institutions to better manage their exposure to litigation risk; this remit may fall under the Chief Risk Officer, the Chief Sustainability Officer or equivalent, or another role entirely. Having a coherent governance structure in relation to this risk will also help in the face of increased public, regulatory and especially shareholder scrutiny.

Governance extends beyond the C-suite level; financial institutions may begin to see increased scrutiny applied to internal controls and monitoring processes. Furthermore, it is important that governance and oversight is cross-disciplinary (i.e. members from multiple teams across the firm are engaged in order to monitor and manage climate litigation risk). For example, it is critical to include the legal, actuarial and underwriting departments to assess litigation exposure from a variety of lenses to ensure all crucial perspectives are being taken into account.

In light of climate disasters occurring more frequently and causing greater loss and damage, plaintiffs are bringing forward lawsuits against executives who they believe are responsible for failing to adequately prepare for these disasters. For example, former executive officers of PG&E are alleged to have not implemented critical safety measures within their operations, thus exacerbating the damage caused by the subsequent wildfires (see *'Case 6: Trustee of PG&E Fire Victim Trust v Lewis Chew et al. (USA)'*). This sets a precedent of executive officers and institutions being held responsible for potential breaches of fiduciary duties, which could significantly expose insurers with D&O lines of business.

Therefore, financial institutions should not only be reassessing their own governance structures with regards to litigation risk, but also actively encouraging their counterparties to also do so where appropriate.

Identification of Exposure

Exposure to litigation risk can manifest in a number of ways, including through underwriting liabilities, business operations, and investments. Therefore, it is important to critically review a firm's business model to identify where litigation exposure may lie. As highlighted in the Geneva Association's publication, "Climate Change Risk Assessment for the Insurance Industry"[29], in order for insurers to conduct 'decision relevant' climate-related risk assessments, they should employ a holistic approach, looking at both sides of the balance sheet in turn and in combination. The focus of these exercises may be different between general and life & health insurance companies, for example:

- Climate litigation brought against carbon-intensive sectors may generate liability-side exposure for general insurers' financial lines (particularly D&O). It may also increase the risk of stranded product lines in certain areas, such as those set out in **Annex B**. A parallel impact may be seen on the assets side, where general insurers may hold investments in the same corporates or groups targeted by climate litigation.
- Life and health (re)insurers may be more concerned with corporate and sovereign asset impairment arising from climate litigation. Life insurers may be at potentially higher risk due to their longer-term investment horizon.

[29] The Geneva Association. 2021. *Climate Change Risk Assessment for the Insurance Industry.* Authors: Maryam Golnaraghi et al.

The Geneva Association report provides a useful framework for considering asset and liability exposure to climate-related risks, and encourages firms to start simply by exploring the impacts of each climate change risk type to both their assets and liabilities, while considering short- and long-term time horizons. With further iterations, institutions can build up the level of complexity by assessing the interactions of physical, transition and litigation risks and exploring how these risks manifest within and across business functions.

Using the selection of emerging climate litigation cases in this chapter should help to guide firms in understanding which areas of their own business model are now most exposed. This will often lie in sectors which have the highest Scope 1 and 2 emission levels, but analysis should not be restricted to simply the most carbon-intensive sectors.

For general insurers, especially those who are exposed to sectors that are highly vulnerable to climate litigation, an essential area to review includes the language in policies and their associated terms and conditions. This will help to identify which, if any, policies may be obligated to cover climate-related litigation costs. Upon identification of policies or lines of business obligated to do so, insurance firms should systematically evaluate whether such exposures should be retained and repriced or run-off going forward.

Insurance firms should perform a similar exercise to review their investment portfolios to identify where there is exposure to high-risk counterparties. Equally, asset managers and banks should undertake reviews of their portfolios to identify counterparties with higher risk of climate risk litigation materialisation.

Firms with global footprints should also be wary of the increasing tendency for litigation to be emulated across multiple countries. There are multiple examples of grounds for litigation being replicated in another jurisdiction, especially if the initial lawsuit was successful. Multinational firms should therefore perform this identification exercise across all of their subsidiaries and entities with similar thoroughness, rather than focusing at Group level or on individual business units. It is important however to note that different jurisdictions will treat climate cases differently, and so replicating a legal case is non-trivial.

Financial institutions should also be regularly monitoring emerging legal trends and outcomes of milestone cases. Useful resources such as the Grantham Research Institute on Climate Change and the Environment's 'Climate Change Laws of the World' provide a market scan of case developments across the world.

Business Operations Exposure

It is easy to consider the exposure of financial services companies to be largely driven by counterparties, such as their investee companies and insureds.

However, it is equally important to recognise the potential exposure to climate risk litigation through a financial institution's own operations. This might arise from allegations of greenwashing within marketing of financial products, or documentation and transition plans that are seen as insufficient or not credible as we move towards a global low-carbon economy, or actively investing in assets that are not compliant with sustainability-related expectations, which may elicit challenge from NGOs and other stakeholders (see '*Case 11: Abrahams v Commonwealth Bank of Australia*'). Greenwashing in particular is likely to be of particular concern; '*Case 9: ClientEarth v Koninklijke Luchtvaart Maatschappij N.V.'* demonstrates how greenwashing lawsuits can arise, and this area of litigation will undoubtedly extend to other sectors such as finance.

The Geneva Association's report, "Anchoring Climate Change Risk Assessment for Core Business Decisions in Insurance", also highlights the potential reputational risks that may arise from a disconnect between companies' net-zero commitments informed by approaches such as the UN Net-Zero Asset Owner Alliance ("**NZAOA**") and the Science-Based Targets Initiative ("**SBTi**"), and the pace of change of the global economy. The report highlights that because the real economy is not moving as quickly as needed by science, this disconnect could open the door to a range of risks, both financial and non-financial.[30]

Firms should note that they can be attributed "detrimental impacts of climate actions"[31] due to their actions. While this has been historically difficult due to poor data availability and less scientific consensus on the human influence on climate actions, these factors have been somewhat mitigated through additional research and evidence. Establishing a causal link between the actions of a firm and climate-related outcomes is now more feasible and holds greater weight. It is important for firms to be aware of this growing type of litigation and ensure they are engaged with transition-aligned activities, in order to mitigate the risk of attribution.

Supply chains are an additional area of increasing focus for litigation. For example, a supermarket chain is facing a lawsuit on the grounds of its supply chain breaching human rights (see '*Case 19: Envol Vert et al. v Casino*'). This case may create a precedent for firms to be held responsible for their activities through their supply chains; firms should recognise that while suppliers may be notoriously difficult to track and monitor, especially in terms of their emissions, firms should be proactive in reviewing their supply chains and performing sustainability-related due diligence to mitigate litigation exposure.

More broadly, this example emphasises the importance to financial institutions of understanding their third-party exposures. Much debate remains around how to accurately measure Scope 3 emissions, given the lack of sophisticated data capture mechanisms, yet firms are facing increasing scrutiny for Scope 3. For example, a key ruling in the Shell case was that RDS must reduce their emissions across Scope 1, 2 and 3, and so RDS must actively identify the scale and location of their Scope 3 emissions. This illustrates the pressing need for financial institutions to understand their own Scope 3 emissions, or be at risk of direct climate litigation.

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[30] The Geneva Association. 2022. *Anchoring Climate Change Risk Assessment in Core Business Decisions in Insurance.* Authors: Maryam Golnaraghi et al.

[31] NGFS. 2021. *Climate-related litigation: Raising awareness about a growing source of risk.*

It is therefore highly important for firms to carefully examine any areas of their business model that may be exposed to litigation with similar rigour to their counterparty due diligence to ensure litigation exposure is minimised.

Data and Documentation Requirements

Financial institutions should begin to identify and request relevant documents directly from their counterparties, in order to be able to help them determine their exposures. For example, insurers will require more data on the operations of their policyholder corporates, such as their approach to transition risk, level of emissions, and external communications to customers and the wider public (which may be at risk of greenwashing allegations).

This information may not be immediately available, and relevant information will vary by country, sector and counterparty. Inconsistency in reporting methodologies and use of proxies in the absence of actual data may limit the capacity to accurately compile the relevant data and documentation of counterparties[32]. Furthermore, there is a significant lack of empirical evidence to robustly quantify the impact of climate change, and by implication the potential range for climate litigation costs. For example, there is no clear consensus on the precise impact of climate litigation upon asset prices, given the limited number of examples. Therefore, historical data may be a limited and unreliable indicator of future litigation, as illustrated by the non-linear nature of climate impacts.

However, this should not deter financial institutions from performing this step around gathering data, but rather act as a cautionary note when doing so. For sectors that are more vulnerable to litigation risk, it is of paramount importance that insurers gather sufficient data and perform appropriate levels of due diligence to be able to determine the merits of a potential legal case against each policyholder corporate.

Actions that insurers can take include reviewing the transition plans of prospective policyholders and assessing the commitments and the credibility of those plans. This could involve considering the emission reductions milestones and determining whether these are reasonable targets for the targeted emissions pathway. This is becoming increasingly important as more companies are coming under pressure for the content and credibility of their public transition statements, namely their TCFD disclosures; '*Case 1: Milieudefensie et al. v Royal Dutch Shell plc (Netherlands)*' outlines how RDS came under scrutiny for the use of caveats and vagueness in its transition plan for 2030. In order to do this effectively, firms must invest in the capability and expertise required to assess climate-related disclosures at the point of entering into a relationship.

Firms should be looking to collect these incremental data points from policyholders deemed to be most vulnerable to this risk and conduct appropriate due diligence. However, given how rapidly climate litigation is developing, it may be that all sectors in all regions may be at risk, and financial institutions should be responding accordingly.

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[32] CFRF. 2021. *Disclosures – Managing Legal Risk.* Authors: Vanessa Havard-Williams et al.

Counterparty Engagement

The responses from participants of the CBES exercise raised the possibility that some corporate sectors (particularly some carbon-intensive sectors) may struggle to access finance as the transition progresses, especially from banks. Limits in the supply of credit to fossil fuel producers could outpace the new investment in sustainable energy alternatives and improvements in energy efficiency. Unless this transition is managed carefully, this could have significant impacts on businesses and consumers, and through them the financial sector[33].

This poses severe consequences and even the possibility of individual corporates becoming insolvent, including carbon-intensive companies that have credible transition plans into a sustainable business model in place. These impacts could even aggregate into dramatic sectoral-shaping implications and subsequent negative global impacts, exacerbating the consequences of transition risk. One example would be banks and insurers outright refusing to provide finance to fossil-fuel dependent energy companies, including those that have plans in place to pivot to a significant renewable energy supply.

This philosophy naturally extends to climate litigation risk; insurers electing to forego providing insurance policies to certain counterparties may have unintended destabilising consequences. Indeed, counterparties may decide to countersue for not being able to access insurance, for example.

It is critical for firms to engage with their insured and investee companies to minimise climate litigation risk. Financial institutions associated with counterparties who are themselves most vulnerable to climate litigation, or are in sectors deemed highly vulnerable to litigation risk, may be uniquely placed to work with those counterparties to mitigate their litigation risk exposure. This form of corporate stewardship promises to be a powerful tool in enabling a smoother transition while ensuring robust action is taken to reduce exposure.

However, the due diligence conducted on counterparties will be critical to avoiding litigation issues down the line. Projects that are deemed to be economically viable yet are inherently carbon-intensive, such as a new oil and gas refinery, or projects being constructed by high carbon-emitting industries, may receive increasing challenge on whether they should be allowed to be built, given the environmental impact, as shown by *'Case 7: Australian Conservation Foundation v Woodside Energy (Australia)'*. Insuring and investing in such projects may no longer be viable, and even incur significant reputational damage and risk being perceived as an 'indirect polluter'.

Therefore, while financial institutions engaging with their major counterparties (who are most directly affected by climate litigation risk) is an important dimension in ensuring a stable net-zero transition, firms should exercise caution when considering becoming involved in carbon-intensive projects.

[33] The Bank of England. 2022. *Results of the 2021 Climate Biennial Exploratory Scenario (CBES).*

In addition, insurance firms are increasingly embedding ESG criteria into the mandates that they provide to their asset managers. These mandates need to be developed and made more comprehensive, particularly the inclusion of climate litigation risk screening. In light of the greater scrutiny and risk of litigation, it is even more important to ensure climate considerations are being given sufficient importance in investment decisions.

For example, asset owners may decide to demonstrate corporate stewardship by engaging with certain investees or performing enhanced due diligence to obtain more detailed information.

A further recent development in this space relates to the concerns that some financial institutions may be reconsidering their climate commitments, in fear of increased vulnerability to climate litigation. For example, major banks who are signatories to the Glasgow Financial Alliance for Net Zero ("**GFANZ**") are questioning certain signatory criteria which are being seen as overly demanding[34], such as commitments to completely phase out involvement with fossil fuels in order to remain a signatory.

Given the increasing rate of climate litigation and ever-increasing expectations of climate action, firms may be understandably concerned with their capacity to engage with these partnerships, agreements and public commitments. This may indicate a watershed moment with regards to international climate-related alliances, or simply a nervousness within specific firms.

Scenario Analysis and Stress Testing

Scenario analysis is being increasingly used as an important tool for businesses to understand and examine their climate risks and opportunities over the coming decades.

The Bank encouraged many firms to perform extensive scenario analysis through the CBES exercise in 2021, part of which climate litigation risk was a specific component, and many firms have continued that momentum by developing their own internal, bespoke scenario analyses with in-house modelling and / or external support.

Scenario analysis and stress testing could be a powerful tool for managing climate litigation risk, particularly given the uncertainty around future case volumes and decisions. Firms should be aware of adverse situations and the financial implications, such as if precedents are set for financial penalties against companies who are seen to be enabling carbon majors.

An important step is for financial institutions to analyse their business models under certain litigation scenarios with a focus on the tail risk. Scenarios could be divided by line of business, by asset-side or liability-side impacts, and by jurisdiction. This will help to estimate exposure to litigation risk by asset class (from an asset-side perspective) and line of business (from a liability-side perspective) and enable management to begin to take further corrective actions as necessary, including quantifying the level of capital and reserve sufficiency required.

[34] IPE. 2022. *The future of net-zero: banks rethink climate commitments.* Author: Sophie Robinson-Tillett.

The CBES exercise highlighted that a key challenge for institutions is the lack of availability of data to accurately assess their exposures to hypothetical case rulings[35]. This may involve assessing both direct and indirect litigation costs, as well as the potential associated alternative dispute resolutions. The Bank noted that insurers who used multi-disciplinary teams, drawing in expertise across underwriting, claims, actuarial, legal and risk management functions, were able to begin to mitigate these challenges more effectively. This is also underscored by the Geneva Association, which emphasised the need for firms to develop viable targets, strategies and plans based on assessing the resilience of their business model, as well as actions that they can take under different climate scenarios and company-specific scenarios[36].

For example, firms can establish a scenario or set of scenarios where some of the cases outlined in this chapter rule in favour of the plaintiffs, thus setting precedent. Firms can then understand their exposure to litigation in light of those precedents, and calculate the impact to their average annual losses ("**AAL**"). Scenarios could even be assigned likelihood probabilities depending on case ruling likelihoods, as well as an expected range for damages (for cases in which damages are being sought), although this is notably difficult given the nature, context and jurisdiction of these cases.

Case Study: Modelling Climate Change Liability Scenarios with Verisk's Arium Platform

Background

Verisk's Arium liability catastrophe modelling platform allows (re)insurers and brokers to quantify the impacts of liability accumulations across their organisations. Arium has been developing models to estimate how climate change liability scenarios may result in catastrophic liability losses. These scenarios can be used for portfolio management, monitoring capital adequacy, and evaluating reinsurance treaties.

Liability for contributing to climate change

One type of climate change liability scenario estimates the potential losses to corporates if they are held liable for contributing to climate change and subsequent damages to third parties (see *'Case 4: Saúl Luciano Lliuya v RWE AG (Germany)'*).

Arium has developed a scenario quantifying the potential losses from litigation seeking compensation for damages from sea level rise due to climate change. To capture the uncertainty of this event, the scenario provides a range of potential loss severities and the potential industries that could be impacted, beyond just the oil and gas sector. The scenario estimates a potential insurable loss of over $100 billion in the most severe litigation outcome.

[35] The Bank of England. 2022. *Results of the 2021 Climate Biennial Exploratory Scenario (CBES).*

[36] The Geneva Association. 2022. *Anchoring Climate Change Risk Assessment in Core Business Decisions in Insurance.* Authors: Maryam Golnaraghi et al.

Liability for failing to disclose or misleading about climate change risks

Another scenario type focuses on risks to corporates for failing to disclose or misleading about climate change risks or climate-related metrics (see *'Case 10: Australasian Centre for Corporate Responsibility v Santos'*).

Arium has developed a scenario that assumes that increased regulatory and investor pressure for climate-related disclosures may expose failure and misrepresentations. This may lead to stock price declines that then trigger shareholder class actions and other claims (see *'Case 3: Ramirez v Exxon Mobil Corp.'*). While such loss events are not novel, changing regulatory and investor expectations may lead to a systemic uptick in these types of events, potentially clustered in certain industries that are especially vulnerable. This scenario can be used to identify potentially concerning accumulations and clash risks across lines of business in a portfolio.

Liability for failing to prepare for or mitigate against climate change risks

Arium scenarios model the potential for corporates to be held liable for failing to prepare, mitigate, or plan for known and foreseeable natural hazard risks due to climate change.

For example, climate change appears to be changing certain underlying climatic conditions that could increase the risk of wildfires. This, combined with other factors such as increasing property exposure in wildfire-prone areas, may change how these liability events may occur in the future. The scenario provides a view of how wildfire liability event frequencies and severities may change, and in particular, how culpability may be assigned. This type of scenario can help to understand how changes to entire liability event types may impact portfolios and loss experiences.

Strategic Management Actions

Once the steps described above have been conducted, a range of strategic actions will likely emerge, in order to reduce, transfer, mitigate or reject the risk that climate litigation risk poses. Each firm should conduct its own review of its position to determine a set of actions they would like to embark on.

These actions could include the reassessment of investment strategies (namely reviewing the strategic asset allocation and exclusion policies), risk appetites, and asset manager mandates, with a view to pre-emptively avoid climate litigation exposure. It is important for firms to balance their intentions to support the transition by enabling counterparties who have credible transition plans with enforcing their revised risk appetites after adjusting for climate litigation risk. For example, through the lens of ESG considerations that firms are increasingly expecting asset managers to incorporate within their work (see *'Case 16: McVeigh v. Retail Employees Superannuation Trust'*), additional expectations and limits can be set to avoid sub-sectors and even individual counterparties that could be at risk of climate-related lawsuits.

From an insurer's perspective, critical actions will likely include an underwriting review of current policy wordings, as mentioned above. General insurers in particular should take into account occurrence and claims made bases, retroactive dates and tail coverages. Nevertheless, it may be important for insurers to explore options for reinsuring their litigation risk, as well as to be clear on exclusions on policies that may have a climate-related component, such as D&O lines of business, and for that to be communicated clearly to customers.

D&O lines will be a particular source of concern for insurers with regards to climate litigation. *'Case 8: ClientEarth v Board of Directors of Shell plc'* has highlighted a likely future tendency to hold executives and senior leadership of companies accountable for climate-related activities, and so it will be of critical importance for insurers and reinsurers to be explicit in what will be covered under their D&O policies. This may also include pricing the risk posed by climate litigation into their policies, in the event of claim amounts increasing more than expected, or the projected impact of climate risk on future exposure necessitates an additional charge on premiums, thus increasing the prices of D&O liability insurance across the board[37].

An increase in claim numbers and settlement amounts from such lines of business in the coming years may be inevitable as climate litigation grows, leading to potentially higher reserves needing to be held against policies and a greater demand for higher liquidity; this could have significant knock-on impacts on investment strategies and the cost of capital. Ultimately, the underwriting performed to initially price the policy likely did not factor in the increasing vulnerability of some firms to climate litigation, leading to potential underprovisioning[38].

Also, insurers are now beginning to develop specific exclusion clauses in light of the proliferation of climate-related cases, as there is a general expectation that claim amounts and numbers will vastly increase, and insurers want to limit their exposure. For example, Lloyd's have developed a model policy exclusion for climate change[39] as follows:

> "Notwithstanding any other provision in this Policy or any endorsement hereto, this Policy excludes any loss, liability, cost or expense arising out of any allegation or claim that the (Re)Insured caused or contributed to Climate Change or its consequences. For the purposes of this clause Climate Change means a change of climate which is attributed directly or indirectly to human activity".

Meanwhile, pressure to ensure activities of financial institutions take climate risk seriously is inevitably growing. Shareholders are more actively scrutinising firms' activities, such as bank lending and insurance provisions, and are more inclined to challenge this, which has been seen in *'Case 11:*

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[37] FT. 2022. *Climate litigation threatens to push up companies' insurance costs.* Authors: Camilla Hodgson and Ian Smith.

[38] NGFS. 2021. *Climate-related litigation: Raising awareness about a growing source of risk.*

[39] Lloyd's Market Association. 2021. *LMA Model Climate Change Exclusion.* Author: David Powell.

Abrahams v Commonwealth Bank of Australia'. This highlights the importance of conducting reviews on financial activities, such as the D&O lines of business review as outlined above.

Disclosures

The "move towards mandatory climate-related reporting" has continued to accelerate, particularly for financial institutions, who are experiencing a significant shift in their regulatory requirements[40].

In light of this, firms are now disclosing their climate-related footprint in a variety of ways, from TCFD reporting to bespoke sustainability reports to publishing progress against SBTs. It is encouraging to see the financial services industry develop its climate reporting standards to a higher degree in a short space of time, with laggards being implicitly pressured to follow suit. Disclosures are fast becoming the standard, rather than the dream.

However, public disclosures, and in particular transition plans, are facing increasing scrutiny for their credibility, not just by regulators and investors, but also the public. A clear example of where this scrutiny can develop into a case for litigation is the lawsuit against RDS, where the court (see *'Case 1: Milieudefensie et al. v Royal Dutch Shell plc (Netherlands)'*) ruled that RDS's use of caveats and disclaimers in its transition plan disregarded its own obligations towards the global net-zero transition. To meet the increasing expectations will likely entail obtaining more sophisticated climate data and a diligent review of public disclosures to ensure it is not overly broad or, for example, excessively dependent on emerging 'green' technology.

On a related note, greenwashing-related suits have proliferated in recent years, brought forward by both public and private agents. It is notable that pressure is coming both externally (e.g. NGOs and members of the general community) and internally (e.g. shareholders and other investors). Misleading marketing materials and disingenuous claims of enacting green behaviour are being challenged. Furthermore, greenwashing allegations may be raised using a variety of grounds, some of which may entail more tenuous connections to the disclosures made by financial institutions. It is therefore important for any public claims of green characteristics to not only be firmly supported by evidence or credible documentation, but also thoroughly scrutinised for any potential scope for litigation.

This thematic area is also one of the few climate-related litigation types that are being brought against not just oil and gas companies, but any institution, especially high emitting sectors such as aviation, shipping, and textiles[41]. Examples in this report include those against oil and gas companies (see *'Case 2: City & County of Honolulu v. Sunoco LP)'* and against an airline (see *'Case 9: ClientEarth v Koninklijke Luchtvaart Maatschappij N.V)'*. Financial institutions may be highly vulnerable to these claims, especially if their net-zero targets and plans are deemed insufficient or not credible; if their

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[40] CFRF. 2021. *Disclosures – Managing Legal Risk.* Authors: Vanessa Havard-Williams et al.

[41] Grantham Research Institute on Climate Change and the Environment, CCCEP, and LSE. 2022. *Global trends in climate change litigation: 2022 snapshot*. Authors: Joana Setzer and Catherine Higham.

investees and associated parties are not seen as net-zero transition-compliant; or if their products and services are presented as misleadingly green.

Therefore, there is an increasing need for insurers and other asset owners and managers to apply scrutiny to any publicly available documents and materials to ensure they are not at risk of greenwashing allegations or being overly vague. Any public disclosures should be factually substantiated and deemed credible given current scientific standpoints, although it is important to acknowledge the lack of data and market consensus on a number of climate-related topics, which leads to accurate disclosures being a more challenging exercise. Sections that refer to data that may be incomplete or a proxy should include framing wording to illustrate such limitations. As noted in a previous CFRF chapter, litigation can culminate from a failure "to disclose a climate-related risk" adequately in a firm's reporting, or insufficient preparation of accounts more broadly with regards to climate risk[42].

Arguably more pressingly, it will be important for insurers to review the disclosures made by their insured companies, given this heightened level of public and private scrutiny. For example, investors and insurers are increasingly requesting potential clients to confirm whether their transition plans and net-zero strategies have been independently reviewed[43].

Corporates who violate these legal precedents around disclosures may be at risk of significant settlements, part of which insurers may be liable for. Insurers should engage with counterparties who they have significant exposure to in this space to ensure disclosures are as tight and clear as possible.

For further information on the various developments in the UK climate-related disclosures regime since October 2021, the CFRF's chapter entitled "*Disclosures – Managing Legal Risks"* published in 2022 is a useful resource[44].

Business Strategy

Addressing climate litigation risk should be a priority for all firms within the financial services sector, not just those who are pioneering in ESG and sustainability. Climate litigation is emerging from all directions and may manifest unexpectedly. Indeed, firms least interested in the net-zero transition may be most ill-equipped to mitigate litigation risk.

The steps that are outlined in the section above broadly focus on management of this emerging risk. However, below we explore entity and even Group level strategic moves that are gaining interest and appetite

[42] CFRF. 2021. *Disclosures – Managing Legal Risk.* Authors: Vanessa Havard-Williams et al.

[43] FT. 2022. *Climate litigation threatens to push up companies' insurance costs.* Authors: Camilla Hodgson and Ian Smith.

[44] CFRF. 2022. *Disclosures – Managing Legal Risks.* Authors: Kim Rybarczyk and Daniel Hirschfield.

across the industry, although they are much more intensive and focus on restructuring.

Secondary Markets

For example, the higher risk for insuring carbon-intensive sectors, yet the lack of data to be able to reprice premiums in line with this additional risk, may lead to the creation of a secondary market for policies in such sectors. Specialist acquirers may emerge to purchase such policies from insurers unwilling to keep these policies within their portfolio for fear of uncertain claim amounts. This would have significant implications on the wider industry, given the potential volume of cases that would have links to climate change.

A similar market for differentiated insurance could emerge, which would effectively be reinsurance for policies with highly carbon-intensive counterparties and insureds, with premium loadings reflecting the crystallisation and improvement of understanding of climate risk.

Captive insurance companies, or captives, are "insurance companies wholly owned by a non-insurance company to act as a direct insurer or reinsurer for the parent company and its subsidiaries"[45]. Captives are a form of insurer that may be particularly exposed to climate litigation risk, and may be particularly interested in the creation of a secondary market, given the nature of their business.

This will largely be driven by the fact that captives generally insure firms who struggle to secure insurance through conventional insurers for their activities. Oil and gas majors will be prominent examples of such firms, and so such activities are likely to be highly at risk of climate litigation. Captives will be in a unique position in that they often will be expected to align with their parent companies, and so will be less able to reject risks deemed too risky to insure.

As climate litigation risk continues to crystallise, captives may be forced to insure even greater levels of business, which will likely increase their own vulnerability to climate litigation risk. Parent companies which have captives should perform the risk management steps outlined above rigorously to their captives, to ensure that they are not in a precarious position.

Firms have a variety of large-scale options available to pursue in response to these developments. For example, restructuring an insurance portfolio to divest carbon-intensive lines and policies to specialist acquirers, as they are created, may be a useful route to de-risking the portfolio for climate litigation. This is likely a more profitable route than simply running off the lines of business.

Ringfencing

Another approach to explore is creating a separate entity to ringfence lines of business relating to carbon-intensive sectors, such as financial lines for fossil fuel-related companies. While this would involve significant corporate restructuring and will depend on Group operations and jurisdictions, this

[45] Zurich. 2019. *Our guide to captives.*

offers an opportunity to treat insurance policies at risk of climate litigation in a way that their inherent climate risk profile demands.

Precedent for both of these options has been set by the surge of asbestos cases in the 1990s due to its long-tail risk. The sheer proliferation of asbestos litigation led to an estimated total liability cost of between $200 and $275 billion[46] and the bankruptcy of multiple financial institutions, indicating the impact of concerted litigation for significant damages in a relatively short space of time.

Given the scale of damages that climate-induced disasters can cause and the trajectory that climate litigation is heading, climate-related litigation promises to create even more liabilities for firms, especially as more and more precedents are set across the world. Policy limits can be extremely high for some lines that may be exposed to climate litigation, exacerbating the potential losses that insurers could incur. This impresses the importance upon firms to manage their potential climate-related liabilities appropriately, such as by ringfencing particularly vulnerable lines into a separate entity, or be at risk of incurring significant liability costs over the coming years.

Pooled Reinsurance

Another response to policies and lines of business that are deemed uninsurable may emerge through pooling of insurers and reinsurers to provide insurance to customers. This would take widespread industry consensus to enact, given that insurers would have to agree to provide services together.

However, a more powerful driver would be government-advocated and subsidised pooling, where the government may compel insurers to enter a scheme to ensure climate-vulnerable customers remain able to access insurance in an affordable manner; this could take the form of a public-private partnership with the government acting as the 'reinsurer' through a central fund or levy, but insurers would be required to pay a regular fee into this levy (i.e. a similar mechanism to the UK's Flood Re scheme).

This could emerge for lines of business such as D&O and PI in carbon-intensive sectors. However, given the need for the entire world to transition to meet the targets of the Paris Agreement, this mechanism may be needed to extend to all sectors and industries.

Many steps would need to be taken to create such a mechanism, given the complexity of such a scheme and the need for consensus across government and insurers, but this could be an important tool for protecting the integrity of the insurance sector in light of increased litigation, assuming sufficient appetite.

Ultimately, these moves reflect the upcoming situation of fundamentally uninsurable risks in their current state, and offer potential long-term solutions for the purposes of future business planning, as these risks will not simply fade away.

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[46] Yale Law School. 2003. *Understanding the Asbestos Crisis.* Author: Michelle White.

6. Conclusions

The cases identified within this chapter illustrate that climate litigation risk is rapidly emerging, and may manifest in a range of consequences for insurers' D&O, PI, General Liability and Energy lines long before significant additional losses are felt from the effects of climate change via physical natural catastrophe perils. Insurers and other financial institutions may also find themselves directly targeted by climate litigation due to potential shortcomings in their own climate-related risk management.

The scope of climate litigation continues to evolve, and climate cases are being filed against key stakeholders within the financial system, such as financial institutions, board members and trustees. These cases cover entire business models and supply chains, with a fast-developing scrutiny upon public disclosures and transition plans under the guise of greenwashing allegations.

The 2015 Paris Agreement may prove a waterfront for determining exposure to this emerging risk, and in this chapter we have outlined a series of recommendations and next steps to enable insurers and other financial institutions to begin to develop their approaches to climate litigation risk management.

Key challenges for insurers will include understanding the extent of their historical exposure to climate litigation risk, and being able to control future exposure by building the underwriting expertise to interrogate the transition plans provided by insured companies as part of the underwriting process. Firms can choose to undergo key risk management processes to mitigate their exposure, take larger-scale strategic routes to further adapt to the climate litigation landscape, or a mixture of both.

Regardless of how financial institutions act, it is critical that they do, as climate-related litigation risk will only continue to grow.

Annex

Annex A. Key Additional Climate Litigation Cases

Below, we include a selection of additional climate-related litigation cases in summarised form that supplement our analysis and recommendations throughout this chapter. These are cases that are believed to be of 2nd and 3rd order likelihood and impact for the insurance industry, but are further illustrative examples across all of the different thematic areas where we are currently seeing litigation cases arise.

1. Greenwashing: consumer protection or advertising claims

a. Earth Island Institute v The Coca-Cola Company

Category	Description
Claimant	Earth Island Institute
Defendants	The Coca-Cola Company
Sector	Retail
Index terms	Advertising, Environmental Impact, Greenwashing, Plastics, Pollution, Public Interest
Jurisdiction	USA
Date claim was filed and status	4 June 2021; initial stages
Summary	A lawsuit was filed by the NGO alleging that the defendant engaged in false and deceptive advertising by portraying itself as "a sustainable and environmentally friendly company, despite being one of the largest contributors of plastic pollution in the world", which is alleged to be in violation of the District of Columbia's Consumer Protection Procedures Act ("**CPPA**"). The plaintiff is seeking a declaration that the defendant's conduct herein is in violation of the CPPA, an order enjoining the defendant's conduct found to be in violation of the CPPA and an order granting plaintiff costs and disbursements including reasonable attorneys' fees and expert fees, and prejudgement interest at the maximum rate allowed under law. On 24 March 2022, the Court granted Earth Island's motion to remand the case to state court as the amount in question does not exceed $75,000. On 14 September 2022, a hearing was held to hear oral arguments on Coca-Cola's motion to dismiss (filed on 13 June 2022) and a ruling is currently pending.

2. Greenwashing: disclosure-based claims

a. Baden-Württemberg Consumer Centre v DekaBank

Category	Description
Claimant	Baden-Württemberg Consumer Centre
Defendants	DekaBank
Sector	Financial
Index terms	Advertising, Banking, Disclosure, Environmental Impact, Finance, Greenwashing, Investment
Jurisdiction	Germany
Date claim was filed and status	12 February 2021; initial stages
Summary	A civil claim was filed by a German-based consumer protection agency arguing that the defendant has been misleading clients about the possible positive environmental impacts of investments in the relevant fund. The fund has rejected the allegations, but it has since removed the 'impact calculator' it uses to determine the environmental impact of any investment from its website to avoid the lawsuit.

b. O'Donnell (as class action representative) v Commonwealth of Australia

Category	Description
Claimant	O'Donnell (as class action representative)
Defendants	Commonwealth of Australia
Sector	Financial
Index terms	Advertising, Banking, Bond Purchase, Class Action, Disclosure, Environmental Impact, Finance, Greenwashing, Government, Investment
Jurisdiction	Australia
Date claim was filed and status	23 December 2020; first instance merits
Summary	A class-action was brought against the Commonwealth of Australia alleging breach of its duty of disclosure and

	misleading or deceiving investors by failing to disclose climate change risks in information statements published as part of its government bond issuances. The plaintiff argued that such climate change risks would likely lead to significant increases in Commonwealth expenditure and significant decreases in Commonwealth revenue, and sought declarations that the Commonwealth Government and particular Commonwealth officers are in breach of statutory prohibitions against misleading or deceptive conduct and statutory and fiduciary disclosure duties.

3. Claims against private entities for climate-related harm

a. Copycat cases similar to City & County of Honolulu v. Sunoco LP et al.

Category	**Description**
Claimants and Defendants	City & County of Honolulu v. Sunoco LP et al.; State of Vermont v. Various Oil and Gas Companies; City of New York v. Various Oil and Gas Companies; State of Connecticut v. Exxon Mobil Corporation; City of Annapolis, Maryland v. BP p.l.c. et al.; Anne Arundel County, Maryland v. BP p.l.c. et al.; County of Maui v. Chevron USA Inc.; County of Maui v. Sunoco LP, et al.; City & County of Honolulu v. Sunoco LP; State of Minnesota v. American Petroleum Institute, et al.; City of Hoboken v. Exxon Mobil Corp.; State of Delaware v. BP America Inc, et al.; City of Charleston v. Brabham Oil Co.; Board of County Commissioners of Boulder County v. Suncor Energy (USA), Inc.; King County v. BP p.l.c.; Rhode Island v. Shell Oil Products Co.; Rhode Island v. Chevron Corp.; BP p.l.c. v. Mayor & City Council of Baltimore; Mayor & City Council of Baltimore v. BP p.l.c.; City of New York v. BP p.l.c.; County of San Mateo v. Chevron Corp.; City of Imperial Beach v. Chevron Corp.; County of Marin v. Chevron Corp.; County of San Mateo v. Chevron Corp.; City of Oakland v. BP p.l.c.; People of State of California v. BP p.l.c. (San Francisco); People of State of California v. BP p.l.c. (Oakland); County of Santa Cruz v. Chevron Corp.; City of Santa Cruz v. Chevron Corp.; City of Richmond v. Chevron Corp.
Sector	Oil and Gas
Index terms	Advertising, Climate Change, Disclosure, Energy, Environmental Impact, Flooding, Fossil Fuels, Greenwashing, Sub-national, Satellite Litigation, Oil, Oil and Gas

Jurisdiction	USA
Date claim was filed and status	Various
Summary	A high volume of consumer protection and tort municipal cases have been filed in city and county-level governments across the USA, seeking to hold a number of energy companies liable for (i) misleading and deceptive practices related to climate change risks and disclosure, and (ii) alleged climate change-related injuries (i.e. flooding, extreme weather, damage to infrastructure, etc.).

4. Claims challenging climate policy/legislation or public permits

a. 19 American states et al. v USA Environmental Protection Agency

Category	Description
Claimant	19 American states (West Virginia; State of Alabama; Montana; Alaska; Nebraska; Arkansas; Ohio; Georgia; Oklahoma; Indiana; South Carolina; Kansas; South Dakota; Louisiana; Texas; Missouri; Utah; Wyoming); Tate Reeves (Governor State of Mississippi); The North American Coal Corporation; Westmoreland Mining Holdings LLC
Defendants	U.S Environmental Protection Agency ("**EPA**") Michael Regan (Administrator of the USA Environmental Protection Agency)
Sector	Public policy
Index terms	Climate Change, Clean Air Act, Coal, Coal Phase Out, Emissions, Energy, Energy Transition, Fossil Fuel Phase Out, Fossil Fuels, Future Fossil Fuel Emissions, GHG Emissions, Government, Power Plant, Transition Planning
Jurisdiction	USA
Date claim was filed and status	3 November 2015; initial stages
Summary	A lawsuit was filed by 19 state attorney-generals and two coal companies regarding the USA EPA's power to regulate GHG emissions from power plants under the Clean Air Act. On 30 June 2022, the USA's Supreme Court held that the EPA exceeded its statutory authority in promulgating the Clean Power Plan. The case has been

	remanded to the lower court for further proceedings consistent with the Court's opinion.

b. Municipality of Grande-Synthe v The French State

Category	Description
Claimant	Municipality of Grande-Synthe; and Oxfam France; Greenpeace France; Notre Affaire à Tous; Fondation pour la Nature et l'Homme; Municipality of Paris; Municipality of Grenoble (each being third party interveners)
Defendants	The French State
Sector	Public policy
Index terms	Climate Change, Climate Emergency, European Convention on Human Rights, Emissions, Future Fossil Fuel Emissions, Energy Transition, GHG Emissions, Government, Human Rights, International Climate Commitments, Net-zero, Paris Agreement, Public Interest, Transition Planning
Jurisdiction	France
Date claim was filed and status	23 January 2019; subject to appeal
Summary	An administrative claim was raised by the municipality of Grande-Synthe (supported by a group of NGOs) arguing that the French State's inaction on reducing GHG emissions violates domestic and international law (including the European Convention on Human Rights, the Paris Agreement, the French Environmental Code, and the French Environmental Charter). On 1 July 2021, France's Supreme Administrative Court ordered the French State to take all necessary measures to curb GHG emissions and reach the objectives of the 2015 Paris Agreement by 31 March 2022. On 31 March 2022, the claimants announced their intention to file a new claim to obtain recognition that the French State had not complied with the judgement. This claim is now under consideration with the French Court.

5. Claims against individuals relating to individual accountability for climate harms/breach of director/fiduciary duties

a. Ewan McGaughey et al. v. Universities Superannuation Scheme Limited

Category	Description
Claimants	Lawrence Ewan McGaughey; Neil Martin Davies
Defendants	Universities Superannuation Scheme Limited
Sector	Financial
Key words	Banking, Business Risk, Climate Finance, Divestment, Fiduciary Duties, Fossil Fuels, Investment, Oil and Gas,
Jurisdiction	United Kingdom
Date claim was filed and status	29 October 2021; under appeal
Summary	Derivative claim (i.e. a claim brought by the members of a company, in the name of the company) by two members of the Universities Superannuation Scheme against the directors of the scheme alleging that the directors breached their statutory and/or fiduciary duties in a number of ways, including by failing to divest their fossil fuel investments. In May 2022 the English High Court found that the case should not proceed to trial because the claimants had not been able to demonstrate that the pension scheme had suffered any immediate financial loss. In addition, the trustee directors had taken demonstrable steps to diversify investment risk and ensure the security, liquidity and profitability of the portfolio.

6. Cases specifically relying on an alleged breach of human rights

a. Urgenda Foundation v State of the Netherlands

Category	Description
Claimant	Urgenda Foundation
Defendants	State of the Netherlands (Ministry of Economic Affairs and Climate Policy)
Sector	Public policy
Index terms	1.5 Degrees Scenario, Climate Change, Climate Emergency, Duty of Care, Energy Transition, European Convention of Human Rights, Future Fossil Fuel Emissions, GHG Emissions, Government, Human Rights, Net-zero, Public Interest, Transition Planning, Urgenda

Jurisdiction	Netherlands
Date claim was filed and status	20 November 2013; final decision reached
Summary	A class action claim was brought by the NGO/Dutch citizens arguing that the emissions reduction target set by the Dutch State was not sufficient and that the State had a duty of care under the European Convention on Human Rights to adopt adequate measures to reduce GHG emissions. The Dutch Supreme Court upheld the Court of Appeal decision to order the State to reduce Dutch GHG emissions by 25% (compared to 1990 levels) by the end of 2020.

7. 'Energy discrimination' cases

a. RWE v State of the Netherlands

Category	Description
Claimant	RWE AG; RWE Eemshaven Holding II BV
Defendants	State of the Netherlands
Sector	Oil and Gas
Index terms	Coal, Coal Phase Out, Energy, Energy Transition, Fossil Fuel Curbing Measures, Fossil Fuel Phase Out, Fossil Fuels. GHG Emissions, Government, Limits on Fossil Fuels, Oil and Gas, Transition Planning
Jurisdiction	Netherlands
Date claim was filed and status	2 February 2021; initial stages
Summary	This is an investor arbitration claim by a German investor in a major Dutch coal-fired power plant against the Netherlands in connection with the Dutch government's decision to phase-out coal by 2030. The investor is seeking €1.4 billion in compensation. The case is an interesting recent example of a wider trend: foreign investors pursuing investment treaty claims against States in connection with legislative or regulatory changes which materially adversely affect their investments.

8. Other

a. Aloha Petroleum, Ltd. v National Union Fire Insurance Company of Pittsburgh, PA

Category	Description
Claimant	Aloha Petroleum, Ltd.
Defendants	National Union Fire Insurance Company of Pittsburgh, PA
Sector	Oil and Gas
Index terms	Business Risk, Climate Change, Climate Change Risk, Finance, Insurance, Oil and Gas, Pollution
Jurisdiction	USA
Date claim was filed and status	10 August 2022; initial stages
Summary	A complaint was filed in Hawaii District Court by Aloha Petroleum, a subsidiary of the USA-based Sunoco, against insurer AIG's National Union Fire Insurance Company of Pittsburgh ("**National Union**"), relating to the obligation to defend, and cover litigation costs of, climate-related claims brought by local governments in Hawaii. While Aloha alleges that the National Union had a duty to defend and indemnify Aloha under its Commercial General Liability policies, National Union denies any potential for coverage with respect to climate change lawsuits on the basis that that climate litigation is covered by exclusions for "pollution" in Aloha's general liability policy.

Annex B. Insurance Products expected to be affected by Climate Litigation Risk

Financial Lines

Directors' & Officers' (D&O): Exists such that the insurer will indemnify any director, officer or employee for their liability for any actual or alleged breach of duty, neglect, misstatements, errors and omissions. The insurer will also indemnify the company itself where it has reimbursed a director, officer or employee for such liability. D&O Insurance may be written with different coverages:

- Side A: Indemnifies directors and officers for acts for which the corporate organisation is not legally required to indemnify the directors and officers.
- Side B: Reimburses the Company for the indemnification of insured directors and officers.
- Side C: Indemnifies the Company for claims made against it. Outside the USA and for USA public companies, this is limited to securities claims. For private USA companies, this covers all claims.

Professional Indemnity: indemnifies individuals for losses arising from legal liabilities to third parties for loss or damage arising from their own professional negligence or that of their employees.

Casualty

Environmental Impairment Liability: Indemnifies the insured for legal liability in relation to either sudden & accidental, or gradual, pollution or other environmental impairment. Covers third party liabilities, on-site and off-site cleanup, biodiversity damage, business interruption expenses, third party nuisance claims and transportation.

General Liability: General liability insurance packages cover the following, which may also be sold on a standalone basis:

- Public Liability: provides coverage for an insured when negligent acts and/or omissions result in bodily injury and or/property damage on the premises of a business, or when someone is injured in the general operation of a business
- Product Liability: provides coverage where someone is injured as the result of using the product manufactured or distributed by a business

Specialty

Energy: Individual insurance programmes for both offshore (oil exploration and production) and onshore (oil & petrochemical, power generation & utilities, mining and chemical industries), including environmental liability programmes.

Political Risk: insurance for investors in foreign infrastructure, natural resource development and industrial production in emerging markets. Covers certain political risks caused by the actions of government or political events e.g. inability to perform contractual obligations due to war, forced abandonment of assets etc.

Annex C. Table of Figures

Annex D. Table of Tables

Annex E. Bibliography

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