Climate Change Will Impact Almost Every Major Area of Commercial Litigation

I. Overview

As the asserted effects of climate change have become more pronounced, climate-related litigation is multiplying, both in the increasing number of cases being filed worldwide and the increasingly diverse avenues through which claimants are pursuing relief. The Sabin Center for Climate Change Law at Columbia University puts the global climate change caseload at well over 2,550 cases—over two-thirds of which have been filed in the last 10 years. Although the United States continues to be the most popular forum for climate-change cases (with over 600 such cases filed since 2018), litigation in Europe has already been a key driver towards altering business practices. International tribunals such as the Court of Justice of the European Union, where over 40 cases have been filed, and courts in the Global South, where more than 130 cases have been filed, are becoming key battlegrounds.

Overall, more than 55% of climate cases have produced judicial outcomes that further incentivizes litigation. As climate change jurisprudence has matured, previously unsettled justiciability and jurisdictional questions have been clarified. However, whether it is possible and permissible to apportion or attribute liability to a particular state, company, or practice remains an open issue, particularly given the dearth of cases that have gone to trial and reached appellate review.

This Note provides an overview of business sectors in which allegations concerning human contribution to climate change are creating material litigation risk, particularly in the areas of fossil fuel energy, corporate governance and disclosure, greenwashing, constitutional and human rights, finance, real estate, insurance, environment and resource management, and antitrust. It briefly reviews some expected future litigation trends arising from climate change and provides actionable advice to in-house counsel and corporate boards regarding steps they might take to reduce climate litigation risk.

II. Business Sectors

a. <u>Fossil Fuels/Energy</u>

One of the longest running, but still growing, areas of climate change litigation is lawsuits against companies that either produce fossil fuel or manufacture products that use substantial amounts of fossil fuel energy. The first wave of these suits occurred in the early 2000s, where a small number of states, localities, and proposed classes sued private corporations and sought redress for a wide range of harms alleged to be caused by a changing climate. These suits, such as *Connecticut v. American Electric Power Co. ("AEP")* and *State of California v. General Motors Corp.*, primarily alleged claims for public or private nuisance under federal or state common law, and sought both compensatory damages and declaratory relief regarding defendants' obligations with respect to future damages allegedly caused by the Earth's changing climate.

Virtually all were brought in federal court and virtually all immediately floundered, as courts tended to dismiss the claims on standing grounds and/or based on the rationale that they presented non-justiciable questions more properly left to the executive and legislative branches. The U.S. Supreme Court's 2011 decision in the *AEP* case signaled the death knell of this first wave of fossil-fuel-related litigation. There, the Supreme Court unanimously concluded that federal common law in this area was displaced by the Clean Air Act ("CAA"). The Court further held that Congress had entrusted the Environmental Protection Agency ("EPA") in the first instance to decide if and how greenhouse gases should be regulated, and emphasized that it was not for federal courts to issue their own rules.

In reaction to the general failure of these first-wave cases, in two critical respects plaintiffs altered their tactics in the current (second) wave of fossil fuel-related suits. First, based on their perception that local judges and juries will be more sympathetic, and to avoid the potential application of *AEP*, most plaintiffs are now pursuing their cases in state court. Defendant oil and gas companies have responded by trying to remove cases to federal court based on an argument that the claims inherently involve federal issues and are not matters for individual state courts to resolve separately. The ensuing removal-remand fights have been lengthy, and often resulted in significant delays. However, the U.S. Supreme Court in April 2023 declined to review remand orders issued by several federal appellate courts in second-wave cases brought by local governments in California, Colorado, Hawaii, Maryland, and Rhode Island.

Second, plaintiffs' have moved beyond public nuisance claims. Plaintiffs have now modeled their suits along the lines of other mass tort cases, such as the tobacco and opioid litigations. Contending that the energy industry was aware of the alleged harms its products posed to the environment, and that defendants allegedly went to great lengths to conceal such information from the public, this new wave of litigation alleges violations of product liability statutes, failures to warn, deceptive promotion, and design defect claims. Plaintiffs' goal is to avoid preemption under the CAA (as the claims are ostensibly focused on public statements and omissions, rather than emissions) and to circumvent difficult causation questions (by arguing that a strict liability standard could apply). In October 2023, the Hawaii Supreme Court issued a decision allowing such claims to proceed past the motion to dismiss stage against several fossil fuel companies, and the outcome of defendants' ensuing petition for writ of certiorari to the U.S. Supreme Court may soon shed important light on whether plaintiffs' morphed strategy will be allowed to proceed.

There are also indications that a third wave of fossil-fuel-related suits may be on the horizon, one that—in an echo of the first wave—attempts more aggressive claims than the present cases. In November 2022, a group of 16 Puerto Rican municipalities filed a lawsuit in federal court against leading energy companies, including ExxonMobil, alleging violations under the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act and federal antitrust laws stemming from alleged damages related to the 2017 hurricane season. That action is subject to pleading challenges, but may be the vanguard of a new model for climate litigation in the United States, especially if the plaintiffs experience some success.

Illustrating the global reach of climate-related litigation risk, one of the most noteworthy decisions in the fossil fuel context occurred in the Netherlands, where a trio of judges in the Hague District Court ordered Shell in May 2021 to reduce its CO_2 emissions by 45% by 2030 to comply with the 2015 Paris Agreement. Proceedings before a Dutch appellate court in that matter, captioned *Milieudefensie v. Shell*, concluded in mid-April 2024 and a decision is expected on November 12, 2024.

Similar cases have been filed by environmental groups in Germany against Mercedes-Benz, BMW, and Volkswagen. These cases seek orders preventing the defendant companies from producing internal combustion engine cars after 2030 unless they can prove emission-neutrality. Based on these developments, one could reasonably predict that Europe—not the United States—will produce the most aggressive climate litigation decisions in the near future.

b. <u>Corporate Governance and Disclosure</u>

Climate change is also complicating corporate governance through new disclosure obligations and regulatory demands, which are likely to lead to lawsuits.

On March 6, 2024, the U.S. Securities and Exchange Commission ("SEC") adopted a final rule that requires registrants to disclose certain climate-related information in registration statements and annual reports. The rule would require companies to estimate their greenhouse gas emissions. Companies would need to estimate their direct emissions, but would not need to calculate or disclose indirect emissions from their supply chain. The first reporting deadlines fall in fiscal year 2026. The rule has already drawn legal challenges from business and from 25 state Attorneys General. Environmental groups have filed their own lawsuits arguing that the regulations are too weak. The Judicial Panel on Multidistrict Litigation transferred these cases to the Eighth Circuit. On April 4, 2024, the SEC informed the Eighth Circuit that it had entered a stay of its new rule pending completion of judicial review of the consolidated Eight Circuit actions.

States and municipalities have also enacted disclosure requirements. For example, in October 2023, California passed the Climate Corporate Data Accountability Act, which requires public and private companies with more than $1 billion in gross annual revenue to disclose emissions data. Impacted companies must calculate and disclose emissions from their direct operations, and must disclose indirect emissions from their energy use and supply chains. Companies that fail to report can face fines of up to $500,000 per year. California contemporaneously enacted a Climate-Related Financial Risk Act, which requires entities with total annual revenues of $500 million or more to post their climate-related risks on their websites with a description of how they plan to reduce or adapt to those risks. These new California disclosure requirements have already been challenged in court on First Amendment and federalism grounds, and under the dormant Commerce Clause. If the requirements are upheld, disclosures will be mandatory starting in 2026.

Companies that misrepresent emissions estimates or climate risks under these new laws could also be subject to shareholder suits, and to potential investigations and fines by the SEC and state agencies. Assuming the laws take effect, the new disclosure rules will also mean that more climate-related data will come into the public domain, which can then be mined by the plaintiffs' bar or environmental groups for inaccuracies or inconsistencies with past or current statements and practices.

Claims against board members for failure to comply with statutory duties or alleged failure to manage climate risk adequately should also be expected. For example, in the United Kingdom, climate change shareholder activist group Client Earth attempted to rely on duties under the English Companies Act of 2006 to obtain a declaration that Shell plc's directors had breached their duties and a mandatory injunction requiring the directors to: (1) adopt and implement a strategy to manage climate risk in compliance with their statutory duties, and (2) comply immediately with the Hague District Court's order in *Milieudefensie*. Although this claim was unsuccessful, it has generated a great

deal of publicity, and one can expect future attempts by NGOs and activists to impose personal liability on corporate directors.

c. **<u>Greenwashing</u>**

"Greenwashing" is the act or process of conveying a false impression or misleading information that a business's products are more environmentally friendly or less environmentally damaging than they really are. Cases involving greenwashing are on the rise, with 27 such cases filed in 2021 and 26 in 2022, as compared to nine cases in 2020 and six cases in 2019.

In the United States, most greenwashing litigation has been brought by private plaintiffs under state consumer protection and tort law against sellers of goods and services. For example, class actions have recently been filed against Delta Airlines, Nike, and Danone Waters of America that challenge their claims of carbon neutrality and reliance on carbon offsets to meet carbon neutrality goals.[1]

Prospective plaintiffs also may soon have a new tool at their disposal. The Federal Trade Commission ("FTC") is currently undertaking a review of its long-standing "Green Guides." The forthcoming amendments are expected to address statements regarding greenhouse gas emissions, use of renewable energy, and other climate-related issues. Although the Green Guides do not confer a private right of action, they can form the basis for actions by the FTC and are used as a yardstick by private plaintiffs.

Recent government litigation regarding greenwashing has focused primarily on financial institutions, particularly investment funds. In March 2021, the SEC announced the formation of the Climate and Environmental, Social, and Governance ("ESG") Task Force within the Division of Enforcement, which is focused on addressing alleged ESG "disclosure gaps" by issuers, asset managers, and advisors. The task force has initiated one notable greenwashing enforcement action against BNY Mellon Investment Adviser, Inc., for misstatements and omissions about ESG considerations it used in making investment decisions for mutual funds that it managed. The SEC alleged that, "from July 2018 to September 2021, BNY Mellon Investment Adviser represented or implied in various statements that all investments in the funds had undergone an ESG quality review, even though that was not always the case." Without admitting or denying the SEC's findings, BNY Mellon agreed to a cease-and-desist order, censure, and a $1.5 million penalty.

Similar greenwashing regulation and litigation has occurred outside of the United States. For instance, in September 2021, the United Kingdom's Competition and Markets Authority ("CMA") introduced its own Green Claims Code, stating principles that link green claims to obligations concerning misleading marketing that arise under consumer protection law. In early 2023, a Swedish court banned dairy company Arla Foods from using the phrase "net zero climate footprint" in marketing its products because of deception. In October 2023, an Austrian court ruled that Austrian Airlines AG had misled the public through advertisements purporting to offer CO_2-neutral flights that used 100% sustainable aviation fuel. And in August 2021, the Australasian Centre for Corporate Responsibility sued oil and gas company Santos in the Federal Court of Australia, alleging that Santos' claim that natural gas is a "clean fuel" that provides "clean energy" misrepresents its true effects, and

[1] A previous Quinn Emanuel Client Note, *Carbon Offsets: A Coming Wave of Litigation?*, published in September 2022, anticipated and analyzed such claims. *See* https://www.quinnemanuel.com/media/ibibuwj4/carbon-offsets_-a-coming-wave-of-litigation_-client-alert.pdf.

that Santos' claim that it has a clear and credible plan to achieve "net zero" emissions by 2040 is misleading.

With an ever-growing consumer focus on climate related issues, it is likely that more businesses will seek to promote the climate-related benefits of their products in some way. With more promotion will invariably come more litigation.

d. Constitutional and Human Rights Litigation

The last five years have seen a growing number of climate-related lawsuits in the United States grounded in human rights or constitutional arguments—often brought by or on behalf of young people. Although these cases have been largely unsuccessful at the federal level, advocates have recently found some success in state courts.

Constitutional claims related to climate change have historically been difficult to pursue in federal courts, often failing on standing grounds. For example, in *Juliana v. United States*, originally filed in 2015, a class of Americans under the age of 21 argued that, by promoting the export and production of fossil fuels and failing to mitigate climate change, the federal government had violated their rights under the Fifth and Ninth Amendments to "a stable climate system" and had contravened the Public Trust Doctrine. However, the Ninth Circuit Court of Appeals concluded that the class representatives lacked standing to allege a due process violation of a constitutional right to "a stable climate system" because the requested remedy lacked "a constitutional directive or legal standards [to] guide the courts' exercise of equitable power" and was therefore not redressable.

Plaintiffs have had more success in states with constitutions containing provisions that protect environmental rights, known as Environmental Rights Amendments ("ERAs").[2] Although their language varies, ERAs generally assert that state residents have a fundamental right to clean air, clean water, and a healthy environment.

In the first of these cases, *Robinson Township v. Commonwealth,* the Pennsylvania Supreme Court found that provisions of a state statute preventing municipalities from barring hydraulic fracturing were unconstitutional as contrary to Pennsylvania's ERA. In a landmark August 2023 decision, *Held v. Montana*, the Montana Supreme Court applied strict scrutiny review to invalidate provisions of a state law banning consideration of greenhouse gas emissions by state agencies in their environmental reviews of fossil fuel projects. The court held that, under the state constitution, Montanans have "a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system." And, in *Fresh Air for the Eastside Inc. v. State of New York*, a New York court allowed a community organization's claims under the state's newly adopted ERA to proceed against the state. The plaintiff alleges that a private landfill's odors and greenhouse gas emissions violated the ERA.

Cases in other states remain pending. *Navahine F. v. Hawaii Department of Transportation*, pending in Hawaii Circuit Court, is set for trial in June 2024 and represents the world's first constitutional climate change case by youth challenging alleged climate pollution from transportation systems.

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[2] Currently these include the states of Hawaii, Illinois, Massachusetts, Montana, New York, Pennsylvania, and Rhode Island, with "Green Amendment" proposals up for a vote this year in Arizona, California, Connecticut, Delaware, Florida, Iowa, Maine, New Jersey, New Mexico, Texas, Vermont, Washington, and West Virginia.

Natalie R. v. State of Utah, pending before the Utah Supreme Court, will decide the justiciability of youths' claims that Utah's statutory provisions regarding authorization of fossil fuels violate their constitutional rights. And, in *Layla H. v. Commonwealth of Virginia*, currently before the Virginia Court of Appeals, the plaintiffs contend that reliance on fossil fuels as Virginia's primary energy source violates their constitutional rights.

International and regional courts have been more willing to endorse human rights claims. Significantly, in *Verein KlimaSeniorinnen Schweiz*, which involves a claim against Switzerland brought by a Swiss climate NGO, the European Court of Human Rights established for the first time the existence of a Member State's positive obligation to protect the human rights to private and family life from the serious adverse effects allegedly caused by a changing climate. Member States now have a duty to put in place, and effectively implement in practice, "a binding regulatory framework" and other measures capable of mitigating the effects of a changing climate, and they must also undertake measures for the substantial and progressive reduction of their respective GHG emissions "with a view to reaching net neutrality within, in principle, the next three decades." Similar far-reaching human rights-based actions have experienced success in Australia, where the Human Rights Commission determined that the Australian government had violated the human rights of Indigenous Torres Strait Islanders through climate change inaction. In Brazil, whose Supreme Court determined in July 2022 that the 2015 Paris Agreement was a "supralegal" human rights treaty that supersedes contradictory state laws; and in Germany, whose Federal Constitutional Court struck down parts of the country's Federal Climate Protection Act as insufficiently robust to protect public health.

As more states pass ERAs, and with plaintiffs seeing increasing success in courts both in the United States and in Europe, constitutional and human rights-based litigation over climate change is likely to grow. Although those claims are typically brought against governments, they may also have important secondary effects on businesses affected by the challenged laws and regulations.

e. <u>Finance</u>

ESG investing is a philosophy that links asset-outlay decisions to an assessment of a company's sustainability efforts and societal impact. The impacts of a changing climate, coupled with the controversial ascendance of ESG, have created a veritable Catch-22 for the finance industry.

On one hand, some states have begun to use litigation to attack what Texas Governor Greg Abbott has called the "radical ESG agenda." For instance, in February 2024, the West Virginia State Treasurer sent notices to six financial institutions warning them of potential inclusion on the State's Restricted Financial Institution List based on their "harmful ESG policies." The next month, Mississippi Secretary of State Michael Watson sent investment management giant BlackRock a cease-and-desist order, alleging that BlackRock's offerings marketed as non-ESG funds contained "fraudulent statements, omissions and other misrepresentations" because BlackRock had pledged to bring all its assets to net-zero greenhouse gas emissions. By one count, 20 states have passed anti-ESG statutes, some of which seek to criminalize the use of ESG principles to make investment decisions, and 26 state Attorneys General have sued, now before the United States Court of Appeals for the Fifth Circuit, challenging a 2022 Department of Labor Rule that permits ESG factors to be considered in selecting retirement plan investments.

States are not the only source of legal risk to ESG investment practitioners. In February 2024, American Airlines lost its bid to dismiss an ERISA lawsuit brought by a pilot who claims that the

airline breached its duty to employees by choosing investment managers that use ESG-based strategies. Although American Airlines argued that the plaintiff had failed to demonstrate that the investment strategies had underperformed, the United States District Court for the Northern District of Texas held that American Airlines' selection of ESG-oriented investment managers "allow[s] the court to reasonably infer that defendants' process is flawed." A similar suit is currently pending in New York Supreme Court against three New York City pension funds. There, the plaintiff New York City employees argue that their retirement savings have been put at risk by former Mayor Bill de Blasio's decision to eliminate fossil fuel investments from public pension funds.

On the other hand, investment professionals who do not consider ESG metrics are also subject to potential liability. In *Roe v. Arch Coal, Inc.*, filed in the United States District Court for the Eastern District of Missouri, employees alleged that their employer's investment of their pension assets in Arch Coal stock was a breach of fiduciary duty because of the alleged known effects of a changing climate. Class actions against ExxonMobil by shareholders and employees have also been repeatedly attempted under the theory that the company intentionally mispresented the effects of a changing climate on its reserve values and long-term business, and thus the decision to invest in its stock was necessarily a breach of fiduciary duty. And, in contrast to a certain number of states, other states like New York and California have explicitly set "net-zero" carbon targets for their investment portfolios.

Given the political focus on ESG policies, the finance industry can expect that states and private plaintiffs will continue to bring conflicting claims challenging the use or neglect of ESG principles in investing—thereby placing money managers between Scylla and Charybdis when it comes to aligning investments with climate-friendly environmental objectives.

f. <u>Real Estate</u>

Perhaps not surprisingly, real estate regulations are another area of increasing focus for regulators and litigants. Cities across the United States are passing increasingly stringent climate-related laws that could saddle property owners with significant costs and liabilities. New York City's Local Law 97, for example, imposes limits on building emissions that will ratchet up over time, forcing owners to retrofit and replace heating, windows, lighting, and other systems. To achieve a 40% reduction of emissions from large buildings below 2005 levels by 2030, and 80% by 2050, the City will strictly enforce the law through penalties that can reach millions of dollars. Although challenges to Local Law 97 have failed, challenges to other municipalities' laws should be expected.

Similar litigation concerning climate mitigation efforts should also be expected. For example, in response to powerful storms and with the support of coastal landowners, South Carolina state officials erected seawalls to prevent erosion. But environmental groups then successfully sued to remove the seawalls, arguing that the seawalls threatened the habitats of sea turtles. Strong opposition to and interventions in the suit by ocean-facing landowners were insufficient to defeat the claims.

Finally, the real estate industry will be affected by the expansion and enforcement of environmental disclosure laws. Research has called into question whether flood, wildfire, coastal inundation, and habitability risks have been accurately factored into valuation decisions and/or sufficiently disclosed to prospective buyers. Such shortfalls could provide the basis for potential future claims by disaffected purchasers of commercial or residential properties or disappointed investors in real estate investment trusts ("REITs"). Similarly, builders have often relied both on certification

organizations that are not recognized by standards-setting organizations and on self-proclaimed protocols to signal environmental friendliness. These certifications and protocols may not ultimately match formal standards adopted by regulatory enforcement agencies, and any inadequacies could support ensuing legal action.

g. <u>Insurance</u>

Insurers use actuarial models to set insurance premiums, and some insurers are at risk of debilitating costs and disputes. For example, in Texas, an insurer determined that a power plant had an acceptable flood risk. When a hurricane caused severe flooding and toxic air emissions a short time later, a host of litigation ensued, including a governmental action against the plant owner seeking civil penalties and injunctive relief for violating Texas environmental laws and flood plan regulations. The owner revealed that its costs were covered primarily by its insurer.

Underwriters must also consider the risks of insuring carbon-intensive industries. Insurers often include pollution exclusions in commercial general liability policies; however, it is sometimes unclear whether defendants' conduct concerning carbon emissions fall within them. Insurers may challenge whether certain weather events or liability qualifies as an "occurrence," whether the harms caused by defendants' products are expected or intended, whether the harms were already ongoing when the policy was issued, and whether coverage is available for liabilities associated with defendants' products (particularly where the products are put to their intended use).

The Hawaii Supreme Court will consider at least some of these issues in *Aloha Petroleum Ltd. v. National Union Fire Insurance Company of Pittsburgh*, a case filed in 2022 in which an energy company alleges that its insurer breached its duty to defend the company in cases seeking to hold the company liable for alleged climate-related impacts. General liability policies are also limited through fortuity—*i.e.*, the principle that insurance is not available for intentional acts by a policyholder. Greenhouse gases have been recognized by the Virginia Supreme Court to be the "natural or probable consequences of an intentional act," meaning an insurer may not need to indemnify their policyholder in a lawsuit seeking related damages.

Given that directors and officers are becoming increasing targets of climate litigation, it is not surprising that coverage under directors' and officers' ("D&O") insurance has become more of an issue. Indeed, in a 2021 report for insurers, the Bank of England identified D&O liabilities as "the most likely to pay out" in hypothetical cases for greenwashing claims, breach of fiduciary duties, and indirect financing of carbon emissions. The beginnings of this kind of litigation could be taking root in the United States, as evidenced by a 2022 shareholder case filed against Enviva, a manufacturer of purportedly sustainable biofuel pellets, in which directors were accused of "flagrantly greenwashing."

There is at least one more insurance-related risk to consider: Insurers must be aware of how they are investing their own capital to protect insured assets, as certain segments of the public are increasingly unwilling to accept the practice of underwriters investing in carbon-reliant companies. Thus, the Hobson's choice faced by money managers may also affect insurance professionals.

h. <u>Environment and Resource Management</u>

The climate change movement is also affecting environmental and resource-management decisions at the state and local government level. Localities are increasingly considering carbon

emissions, climate adaptation, and climate mitigation as factors when conducting initial permitting and renewal decisions. Not only will these considerations affect future allocation of local resources, but community planning and permitting processes will also provide ripe opportunities for litigants to stall or derail controversial projects or—at the very least—increase costs for participants considered to be environmentally unfriendly.

Claims regarding the alleged causes and effects of a changing climate have also triggered a raft of litigation challenging new oil and gas projects, with plaintiffs in these cases often relying on environmental and public resource management laws. In early March 2024, for example, the California Court of Appeal sided with a plaintiff by ruling that Kern County's fast-track permitting process for oil and gas projects did not allow for sufficient environmental review, and thus violated the California Environmental Quality Act. In *Atencio v. State of New Mexico*, an as-yet-unresolved lawsuit, a group of New Mexico residents have challenged the State's oil and gas permitting regime as violative of a provision in the state constitution guaranteeing New Mexicans "a healthful and beautiful environment" and requiring the State to control "pollution to avoid despoiling its air, water, and other natural resources."

Similar cases have been pursued outside of the United States. For instance, in Norway, Greenpeace unsuccessfully asserted a claim in which it argued that the country's Ministry of Energy had violated the Norwegian constitution by issuing deep-sea oil and gas licenses. In contrast, in the United Kingdom, a longstanding dispute involving the proposed Banks Mining coal mine ended in March 2018 with a formal rejection of the plans by the U.K. government because of greenhouse gas emissions expected from the project. In a 2017 case brought in Ireland, Friends of the Irish Environment successfully blocked a five-year planning permission for a Dublin runway expansion, with Ireland's High Court recognizing an implied constitutional right to environmental protection for the first time.

This type of litigation has now gone beyond fossil-fuel-intensive projects and has begun to target even environmentally friendly development. As renewable energy has proliferated throughout the United States, so too have challenges to renewable projects, with mixed results. On the one hand, a New York appellate court recently affirmed a ruling against plaintiffs seeking to invalidate the state's siting regime for renewable energy projects. The ruling left in place a system that encourages renewable development with an eye toward meeting the State's aggressive greenhouse gas emissions goals. On the other hand, Norwegian wind power company Orsted recently cancelled a massive wind farm off the coast of New Jersey after cost overruns and permitting delays rendered the project prohibitively expensive. The permitting delays were caused in part by a lawsuit filed by three New Jersey advocacy groups, challenging the permitting process under the federal Coastal Zone Management Act.

The steep rise in permitting and siting litigation in recent years, exemplified by these cases, reveals key tensions within communities—including tension between local interests, conflicts between old and new permitting laws, and competing visions of how society should address and adapt to the Earth's everchanging climate. Such pressures are likely to be magnified in coming years as parties increasingly resort to litigation to advance their preferred goals.

i. Antitrust

Finally, as with many areas of business-to-business collaboration, coordinated efforts to tackle address climate issues may raise antitrust risk. Antitrust scrutiny in the United States to date has generally come from politicians and regulators aligned with energy companies' interests.

For instance, in 2019, the Trump Administration's Department of Justice launched an investigation into whether car manufacturers' agreement to adhere to California's more stringent carbon emission standards violated the Sherman Act. More recently, antitrust scrutiny has focused on more formal climate-related collaborations, such as the "Climate Action 100+" initiative—a coalition of approximately 100 of the largest carbon-emitting corporations in the world to reduce their carbon emissions voluntarily. This trend began in 2022, when several state Attorney Generals first expressed interest in investigating Climate Action 100+ and several financial institutions' participation in it. Letters sent to participants expressed broad concerns with ESG investing, indicating that more oversight of ESG ratings agencies or companies that attempt to attract ESG investors' dollars may be forthcoming.

Federal investigations soon followed. Late last year, the U.S. House Judiciary Committee subpoenaed several non-profits and financial institutions seeking, in broad terms, documents and communications between these institutions and their competitors regarding their decision to participate in climate-related collaborations, such as Climate Action 100+ and the Net Zero Asset Managers initiative.[3] In February 2024, the House Oversight Committee subpoenaed the Board of Governors of the Federal Reserve for written testimony relating to the Federal Reserve's apparent acceptance of ESG-related collaborations.

Under the Biden Administration, active federal enforcement of the Sherman Act against climate-related collaborations is unlikely. However, if politicians continue to view changes in the Earth's climate in political terms, it is likely that scrutiny will continue. And, although not guaranteed, information gleaned from government investigations is often used by the plaintiffs' bar to file private civil lawsuits, which could include antitrust and other competition-based claims.

III. Expected Trends and Actionable Advice

Legendary Kansas City Royals closer Dan Quisenberry once said, "I've seen the future and it's much like the present, only longer." Future trends in climate change litigation will also largely mirror those in the present, in magnified fashion. As claims of alleged climate-related losses continue to proliferate, more climate cases will be filed, more defendants will seek insurance defense coverage, and more insurers will challenge or decrease coverage responsibilities. As strategic litigation expands and enjoys greater global success, more litigation funders will join the fray. As this litigation area matures, plaintiffs will expand their targets beyond the fossil fuel industry, including to governments and companies whose practices bear indirect connections to climate change.

Extreme weather events and pollutants other than CO_2 (including short-lived pollutants such as nitrous oxide, methane, black carbon soot, tropospheric ozone, and hydrofluorocarbons) will also be bases for redress. Novel legal arguments and academic literature created specifically for climate-related litigation will continue to proliferate, and climate litigation will likely expand to intra-state

[3] Subpoenas have issued to, among others, BlackRock, State Street, Vanguard, and Arjuna Capital.

disputes. And the growth of litigation in both Europe and the Global South, combined with the rulings for plaintiffs thus far in those jurisdictions, means that jurisdictions other than the United States may create the most litigation risk (or the most advantageous litigation opportunities) for affected companies.

Although actionable advice can vary depending on the particulars of the company and the industry in which it operates, an informed understanding of the legal risks that may result from potential climate litigation claims is a necessary first step. More specifically:

- Given that shareholders, NGOs, and regulators are carefully examining net-zero commitments and transition plans, companies and their directors should scrutinize their public statements in these areas to ensure that they are accurate and defensible. Corporate climate change commitments should be backed up by adequate plans and policies. Product attributes should be truthfully described, and investments in or support for climate-related action should not be overstated. Boilerplate statements about the uncertainty of climate litigation risk may no longer be sufficient, and boards should proactively engage with regulators, shareholders, and key stakeholders to ensure detailed and accurate regulatory filings.

- Real estate due diligence should move beyond the backward-looking "All Appropriate Inquiries" standard for Phase I assessments promulgated by the EPA to assess potential climate-related risks. Flood maps beyond those published by the Federal Emergency Management Agency ("FEMA") should be utilized. Where possible, companies should consider retaining experts to conduct climate-related impact assessments before concluding material transactions. Companies should not rely on flood insurance as the sole risk mitigation, as such programs may not be sustainable in the long-term, and businesses should take care to ensure awareness of applicable greenhouse gas and building code regulations.

- Using tobacco and opioid litigation as a guide, defense costs in climate change litigation will be immense in the forthcoming years—particularly given the anticipated magnitude and expected duration of the cases, and the quality and quantity of legal talent required for their defense. Defendant companies will seek to confirm coverage, and there will thus be more cases like *Aloha Petroleum* in which insurers resist. In monitoring their portfolios, insurers should be cognizant of the tools at their disposal to manage defense risk effectively—including sublimits, endorsements, exclusions, and wordings—whereas companies and directors should also proactively familiarize themselves with the scope of their current policies and obtain additional insurance as needed.

- All companies—especially transnational entities—should stay as informed and nimble as possible. Climate-related claims can reasonably be expected in virtually any jurisdiction in which a company operates, and may be brought by regulators, Attorneys General, NGOs, shareholders, employees, consumers, and residents affected by a company's operations. Potential liability will often be difficult to ascertain given the relative scarcity of precedent, the untested avenues for possible claims, and changing public sentiment on climate issues. Accordingly, companies should actively monitor global legislative and judicial developments in areas relevant to their business operations. Companies and their boards should also

routinely retain experienced and informed counsel in the jurisdictions in which they do business to keep abreast of best practices and guard against possible litigation minefields.

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If you have questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to contact:

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April 30, 2024

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