

ESG Deception or Overreach

Understanding the landscape of greenwashing litigation



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In addition to the risk of regulatory enforcement actions and penalties, the court system continues to be used as a battleground for climate issues through litigation against oil and gas companies.¹

“As of December 2022, there have been 2,180 climate-related cases filed in 65 jurisdictions, including international and regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, such as Special Procedures at the United Nations and arbitration tribunals,”² notes the United Nations Environment Programme’s *Global Climate Litigation Report*.

These lawsuits have been brought by state and local governments, environmental groups, indigenous people, climate change protestors, citizen groups and others that seek to hold energy companies liable for climate-related damages.³ Some, however, view these as political tactics that intend to harm domestic energy production and use, thereby increasing energy costs.⁴

The first legal strategy relating to climate change was brought forth by the Global Warming Legal Action Project in 2001,⁵ which included four goals:

1 climatecasechart.com/search/?fwp_sort=filing_year_desc

2 *Id.*

3 climatecasechart.com/search/?fwp_filing_year=2020%2C2021%2C2022%2C2023

4 Kirk Herbertson, “Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs,” EarthRights, March 21, 2018, earthrights.org/blog/oil-companies-vs-citizens-battle-begins-will-pay-climate-costs

5 web.archive.org/web/20131117012507/http://www.civilsocietyinstitute.org/global_warm_action.cfm

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- Develop and apply a tort law approach to global warming that will require greenhouse gas emitters and fossil fuel companies to internalize the costs of their contributions to global warming.
- Serve as a forum for sharing strategy and ideas with attorneys nationwide and worldwide who are seeking to use legal action to promote progress on reducing global warming.
- Educate members of the bar and the public regarding the industry's potential liability for global warming injuries by participating in legal symposia, publication of articles and similar activities.
- Understand additional legal work that will further the Civil Society Institute's mission of combating global warming and promoting clean energy solutions.

Thereafter, the GWLAP joined attorney generals from multiple states to file an initial tort case against American Electric Power, which ultimately was appealed to the U.S. Supreme Court.⁶ In an 8-0 decision, the court held that corporations cannot be sued for greenhouse gas emissions under federal common law, primarily because the Clean Air Act delegates the management of carbon dioxide and other GHG emissions to the Environmental Protection Agency.

Since such time, there has been a massive uptick in climate-related litigation as a result of environmental, social, and governance issues having become a major focal point for a large number of politicians, public and private corporations, and citizens in general. These cases attempt to force liability through alignment to current laws and regulations, climate attribution science, public mobilization efforts, and broad allegations relating to alleged ESG deception efforts, which include "greencrowding,"⁷ "greenlighting,"⁸ "greenshifting,"⁹ "greenlabeling,"¹⁰ "greenrinsing,"¹¹ or "greenhushing."¹² As such, there are more stringent and sophisticated ESG-related policies and regulations, along with an increased concentration on ESG practices and disclosures of information. With a wider pool of litigants, and more avenues for those litigants to pursue, oil and gas companies need to make sure they have consistent and

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compliant ESG-related knowledge and corresponding capabilities to defend against such claims, which can carry significant reputational, regulatory and/or financial consequences.

One type of claim that has been gaining momentum involves allegations of "greenwashing," which is a term associated with the act of making false or misleading statements about products or ESG practices to appeal to consumer interest through (claimed) eco-friendly products and/or sustainable practices. The causes of action vary by state but can include claims of public nuisance,¹³ private

⁶ *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410.

⁷ i.e., hiding in a group while moving at the speed of the slowest adopter of sustainability policies.

⁸ i.e., when a company highlights a specific "green" feature of its products or activities.

⁹ i.e., implying that the consumer is at fault and shifting the blame to the consumer.

¹⁰ i.e., where marketing calls something sustainable or green, but that is ultimately misleading.

¹¹ i.e., when a company regularly changes its ESG targets or policies before they are achieved.

¹² i.e., when a company deliberately chooses to underreport/disclose or hide its ESG credentials from public view.

¹³ i.e., an act or omission that interferes with the rights of the community or public generally. For example, a claim that defendants' production and promotion of fossil fuels contributed, and continues to contribute, to global warming-induced impacts and that these impacts create a public nuisance interfering with the rights of the communities represented.

nuisance,¹⁴ trespass,¹⁵ negligence,¹⁶ strict liability,¹⁷ civil conspiracy,¹⁸ unjust enrichment,¹⁹ unfair and deceptive practices,²⁰ and shareholder litigation.²¹ These causes of action typically involve, amongst others, challenges against oil and gas companies' alleged misleading, misrepresented and/or omitted disclosures about: governmental or corporate commitments; climate investments, financial risks, and corresponding harms; efforts to downplay the effect of fossil fuel usage on climate change; the effects of fossil fuel products to consumers; and the level of investment in cleaner energy sources.²²

While oil and gas companies have strategically attempted to either dismiss pending lawsuits in their early stages or sought to remove them to federal courts, plaintiffs have successfully discovered how to bring greenwashing lawsuits against oil and gas companies in their preferred forum — i.e., state courts — and survive dismissal. Additionally, the Federal Trade Commission has pursued greenwashing litigation against companies for purportedly deceptive environmental claims.²³ Similarly, the Securities and Exchange Commission launched its Enforcement Task Force focused on climate and ESG issues in 2021, with the goal of developing initiatives to identify ESG-related misconduct and focusing initially on greenwashing actions or omissions. Thus, it is apparent that companies need to be increasingly prepared to face litigation and implement strategies to avoid or mitigate significant regulatory, reputational and financial harms.

So, how can a company in the petrochemicals sector

prepare for and/or mitigate risk against greenwashing claims or lawsuits? By taking a proactive approach and focusing on its principles, practices, governance, and disclosures concerning the eco-sustainability of its activities, products, and transactions. For example, oil and gas companies should:

- Fully understand that greenwashing is about false or misleading practices concerning ESG credentials, products, or practices, which carries significant regulatory, reputational and financial risks.
- Stay up to date on ESG-related developments, including greenwashing, to ensure they can adapt to and comply with governmental policies, rules and regulations.
- Evaluate their compliance with the most current FTC Green Guides.²⁴
- Have internal policies and procedures that provide guidance on potential risks and mitigation associated with greenwashing, while accounting for current — and potentially future — legislation, rules and regulations.
- Confirm that company practices, statements, and corporate documents match environmental claims/disclosures.
- Use accurate, logical and verifiable representations or disclosures, including the explanation of evidence-based information and terms that are related to ESG issues or practices.

14 i.e., interferes with an individual's enjoyment of their property.

15 i.e., interferes with an individual's enjoyment of their property through a physical invasion of the property.

16 i.e., OG companies owe a duty of care in relation to climate change, claiming that but for the emissions of said company, they would not have suffered the particular, measurable harm.

17 i.e., hold companies liable for defective products and for failure to warn of the risks associated with their use, where instead of alleging fault they claim strict liability for flaws or errors in a product's design that render it inherently dangerous.

18 i.e., plotting with another person to commit an unlawful act or to conspire to deprive a third party of a legal right.

19 i.e., a doctrine that prohibits the unjust enrichment of one person at another's expense.

20 i.e., engaging in deceptive marketing and promotion of products by, inter alia, disseminating misleading marketing materials and publications refuting the scientific knowledge generally accepted at that time, advancing pseudo-scientific theories of their own and developing public relations materials that prevented reasonable consumers from recognizing the risk that fossil fuels would cause climate change.

21 i.e., typically arguing that the lack of knowledge about climate risks undermines shareholders' ability to exercise their rights and/or that the company's misleading use of knowledge has harmed their interests as shareholders.

22 See: *City of New York v. Exxon Mobil Corp.*, which alleges oil and gas companies systematically and intentionally mislead consumers about their products' role in causing climate change; *Vermont v. Exxon Mobil Corp.*, which is a consumer protection lawsuit brought by the state of Vermont against fossil fuel companies alleging deceptive and unfair business practices in connection with the companies' sale of their products; *District of Columbia v. Exxon Mobil Corp.*, which alleges oil and gas companies violated the Consumer Protection Procedures Act by misleading consumers about "the central role their products play in causing climate change"; *City of Hoboken v. Exxon Mobil Corp.*, which seeks to recover climate change-related damages allegedly resulting from the defendant energy companies' production of fossil fuels and concealment of fossil fuels' harms; *Delaware v. BP America Inc.*, which seeks to hold the fossil fuel industry liable for the physical, environmental, social and economic consequences of climate change in Delaware; *city & county of Honolulu v. Sunoco LP*, which seeks damages and other relief from fossil fuel companies for alleged conduct that the City and County of Honolulu contends actually and proximately caused climate change impacts; and *Rhode Island v. Shell Oil Products Co.*, which seeks to hold fossil fuel companies liable for causing climate change impacts that adversely affect Rhode Island and jeopardize state-owned or state-operated facilities, real property and other assets.

23 See, *U.S. v. Walmart Inc.*, No. 22-cv-965, Dkt. No. 3 (D.D.C. Apr. 8, 2022).

24 [ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf](https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf)

- Analyze whether their use of words, images, colors or other descriptors can be considered an environmental claim.
- Examine external claims about company practices and products to confirm they are not misleading but are justifiable and evidence based.
- Measure what ESG-related commitments and claims are achievable through timely planning and execution.
- Identify and cure any discrepancies between what is disclosed versus what is done in any ESG claim or disclosure.
- Use third parties to verify any ESG-related claims or disclosures, including having legal counsel review disclosures or ESG-related claims.
- Manage and retain all data necessary to defend against environmental claims.
- Use disclaimers, qualifications or other explanations to mitigate the risk of inaccurate or misleading claims.
- Analyze and evaluate ESG-related compliance and due diligence obligations as required by law.

It is a good idea for all companies that are concerned about the possibility of greenwashing lawsuits to take a comprehensive look at their principles, practices, governance and disclosures in comparison to the continuously developing statutes, regulations and case law so that they can confirm there is evidentiary support for company ESG activities and statements. Remember, the best defenses to greenwashing claims will be found in a company's principles, practices, due diligence and disclosures, along with the ESG profile for its product, activity, or transaction. ▲

ABOUT THE AUTHOR

Molly Pela is a partner with Oliva Gibbs. Her approach to case management is informed by an understanding that her clients' future may be shaped by what happens in the courtroom. She has a talent for developing case themes early based on the needs and interests of particular clients and focuses discovery efforts accordingly. This often leads to successful negotiations and favorable outcomes for her clients, minimizing the need for lengthy and costly trials. She can be reached at mpela@oglawyers.com.

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