

The Heat is On! How is the EU Regulation Wave Going to Shape Litigation Within and Outside Europe?

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The Heat is On! How is the EU Regulation Wave Going to Shape Litigation Within and Outside Europe?



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**WE CARE, SO
SPEAK UP**

Some figures / data



Global trends in climate change litigation: 2023 snapshot

Joana Setzer and Catherine Higham

Key trends, 1 June 2022–31 May 2023

- 2,341 cases have been captured in the Sabin Center's climate change litigation databases, 190 of which were filed in the last 12 months. The growth rate in cases appears to be slowing but diversity in cases is still expanding.
- Climate change litigation has now been additionally identified in Bulgaria, China, Finland, Romania, Russia, Thailand and Turkey.
- More cases are being filed against corporate actors, with a more complex range of legal arguments. Around 20 cases filed by US cities and states against the Carbon Majors are now likely to go to trial.
- There has been growth in 'climate-washing' cases challenging the accuracy of green claims and commitments. Some cases seeking financial damages are also challenging disinformation, with many relying on consumer protection law.
- Challenges to the climate policy response of governments and companies have grown significantly in number outside the US.
- Litigation concerning investment decisions is increasing and can help clarify the parameters within which decisions should be made in the context of climate change.



SABIN CENTER FOR CLIMATE CHANGE LAW



Centre for
Climate Change
Economics and Policy

- **'Government framework' cases:** 81 cases have been filed against governments outside the US, which seek to challenge their overall climate policy response. Cases may be focused on challenging the lack of ambition of the response, or a failure to implement policies or legislation, or both.
- **'Corporate framework' cases:** 17 cases have been filed against large corporations challenging their climate plans and/or targets on the basis that these are inadequate. Some of these cases may also involve arguments about 'climate-washing' (see below).
- **'Integrating climate considerations' cases:** 206 cases that seek to integrate climate considerations, standards or principles into a given decision have been filed globally. Such cases are often filed with the dual goal of stopping specific harmful policies and/or projects and making climate concerns more mainstream among policymakers. Many such cases challenge the development of new fossil fuel projects.
- **'Turning off the taps' cases:** 28 cases aimed at preventing the flow of finance to high-emitting or harmful projects or activities have been filed globally, 14 against public bodies or state-owned financial institutions (such as export credit agencies), and 12 against private parties including banks and pension funds.
- **'Failure-to-adapt' cases:** 14 cases challenge a government or corporation for failure to adapt to the requirements of the climate crisis, either by failing to adapt property or operations to physical risks or by failing to consider transition risks.

- **'Polluter pays' (compensation) cases:** 17 cases seeking monetary damages or awards from defendants based on an alleged contribution to climate change harms have been filed. These include cases seeking compensation for past and present loss and damage associated with climate change; contributions to the costs of adapting to anticipated future climate impacts; compensation to 'offset' emissions, where defendants' activities have caused damage to carbon climate sinks.
- **'Climate-washing' cases:** 57 cases challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future, or misinformation about climate science. The overwhelming majority of these (52) have been filed against corporations.
- **'Personal responsibility' cases:** 8 cases seek to incentivise the prioritisation of climate issues among public and private decision-makers, by attributing personal responsibility, whether criminal or civil, for a failure to adequately manage climate risks.

The last few years have seen an explosion of 'climate-washing' cases

One strategy that has seen significant growth in recent years has been the focus on companies' so-called 'climate-washing' activities, concerning both climate misinformation and misleading green claims. In addition to looking at non-US cases, in Part II of the report we took a more in-depth look at the growth in both US and non-US cases filed against companies and changes in this figure over time. We find that a total of 81 climate-washing cases against companies were filed between 2015 and 2022. Of these, 27 were filed in 2021 and 26 were filed in 2022, compared with just 9 cases in 2020 and 6 cases in 2019.

But what is climate litigation?

Is the Flint-water scandal climate-change litigation?

Are Hurricane Harvey aftermath construction defect cases climate-change litigation?

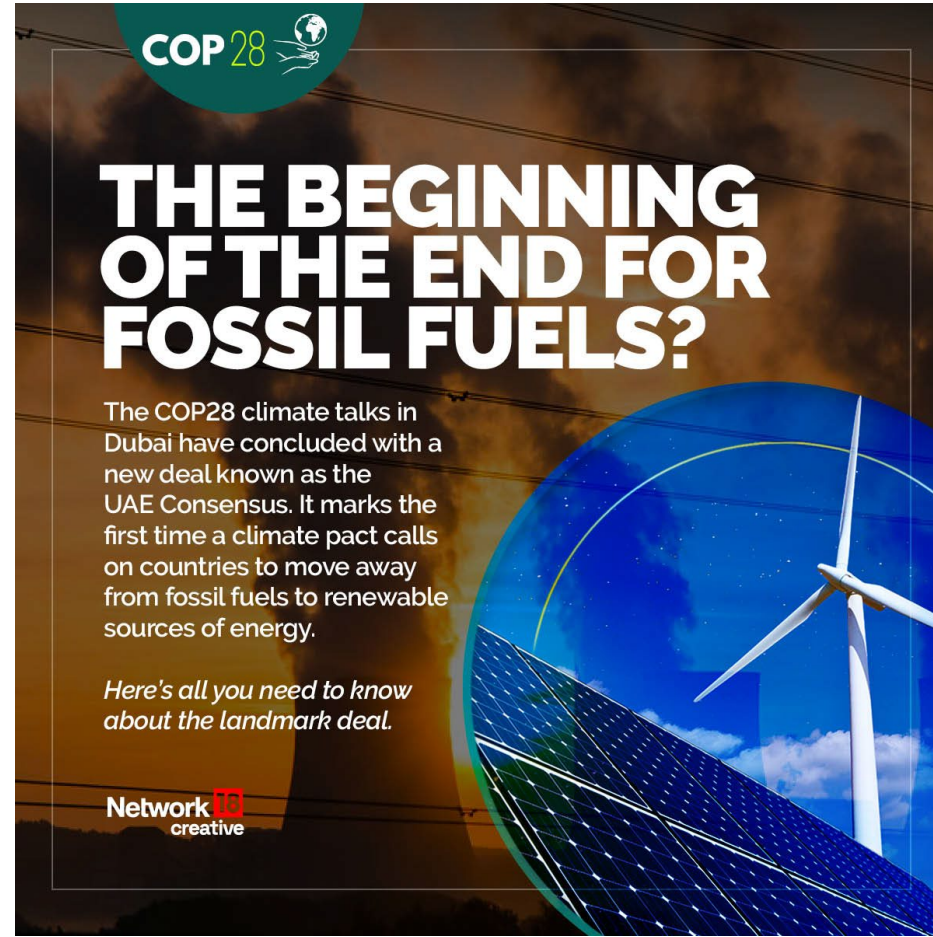
Are the Texas Winter Storm's death related cases climate-change litigation?

Is litigation against companies relating to the transparency of their ESG-measures climate-change litigation?

Is litigation relating to a product which is not repairable a climate-change litigation?

Is a soil-pollution case a climate-change litigation?

Obvious climate-change litigation



COP28

THE BEGINNING OF THE END FOR FOSSIL FUELS?

The COP28 climate talks in Dubai have concluded with a new deal known as the UAE Consensus. It marks the first time a climate pact calls on countries to move away from fossil fuels to renewable sources of energy.

Here's all you need to know about the landmark deal.

Network **10** creative

But... massive regulatory changes are ongoing

In the EU – since December 2019 and the presentation of the Green Deal, there has been more than 80 regulatory proposals discussed...

New transport [proposals target greater efficiency and more sustainable travel](#)

Proposal of a [Circular Economy Action Plan](#) focusing on sustainable resource use

Proposal for a [European climate law](#) to ensure a climate neutral European Union by 2050

[Political agreement on strong EU targets to reduce CO2 emissions from new trucks and urban buses](#)

[Zero pollution Action Plan](#)

Adoption of the [European Industrial Strategy](#), a plan for a future-ready economy

Presentation of the '[Farm to fork strategy](#)' to make food systems more sustainable

Political agreement on [common rules to promote the repair of goods for consumers](#)

New trends



CERTILOGO

Greenwashing:

a marketing tactic used by companies to **make their products or services appear more green and environmentally friendly than they actually are** to gain a competitive advantage over competitors.



































It may seem effective, but it **undermines legitimate green initiatives** and it is **bad for the environment** as it distracts from actual sustainability efforts.




New trends – claims against banks & insurers



<https://www.amisdelaterre.org/wp-content/uploads/2017/03/guide-banque-web.pdf>

New Trends - Corporate Sustainability Due Diligence Litigation

2019	2020	2021	2022	2023
 <p>Contribution to climate change and alignment with the Paris Agreement's objectives</p> 	 <p>Right to water in Chile</p> 	 <p>Biometric data capture technology in Kenya</p> 	 <p>War in Russia</p>	 <p>Environment - Colombia</p>
 <p>Oil mega-project in Uganda, land expropriations and biodiversity risks</p> 	 <p>Workers' rights in the road transport and logistics company's value chain</p>		 <p>Human rights violations at a gas plant in Yemen</p> 	 <p>GROUPE BPCE</p>
 <p>Windpark project in Mexico and indigenous peoples' rights</p> 	 <p>Freedom to join a union and discriminations against women</p> 		 <p>Nuclear - Violations of human rights and fundamental freedoms by the Russian State</p>	 <p>Carrefour</p> <p>Fishing impact</p>
 <p>Workers' rights in the company's subsidiaries</p> 	 <p>Subcontracting and workers' rights</p> 		 <p>Workers' rights in Brazil and France</p>	 <p>ST</p> <p>Environment</p>
	 <p>Deforestation, indigenous' rights abuses and forced labour in the beef supply chain in Brazil and Colombia</p> 		 <p>Financing fossil fuels</p> 	
			 <p>Financing deforestation in Brazil</p> 	
			 <p>DANONE</p>  <p>Plastic pollution</p>	

 Pending cases
 Decisions rendered
 Settlements

New trends – Derivative action & board liability

In February 2023, **we filed a case against Shell’s Board of Directors** for failing to move away from fossil fuels fast enough. **This is the first ever case of its kind seeking to hold corporate directors personally liable.**


In May 2023, the UK High Court **dismissed** the case, and now, our application to appeal the decision has been **rejected**.

We are deeply disappointed by the Court of Appeal’s refusal to hear our lawsuit against Shell’s Board of Directors, which we think is wrong. **This case was a world-first, seeking to hold corporate directors personally liable**, and a groundbreaking attempt to secure much-needed clarification on the legal obligations of directors in a time of environmental crisis.

Client Earth

Derivative Litigation Can Result From Many Underlying Issues

(Date of first derivative suit and event are listed for each entity)

		
<p>June 2014 — Executive Compensation</p>	<p>March 2014 — Product Recall</p>	<p>January 2014 — Subprime Securities</p>
<ul style="list-style-type: none"> Chairman Mark Zuckerberg and his Board have adopted “excessive” compensation plans which grant individual Directors’ pay up to 2.5M shares per year. In the most recent year, the average pay for non-employee Directors was \$461K in stock, exceeding industry peers by as much as 43%. Shareholder litigation filed in Delaware alleges breach of fiduciary duties, waste of corporate assets and unjust enrichment, and asks the judge to “recoup the unfair excessive compensation.” 	<ul style="list-style-type: none"> Product recall of 2.6M vehicles to repair ignition switches that could unintentionally turn the vehicle off and in turn prevent airbags from deploying in the event of a crash. Four derivative suits have been filed alleging breach of fiduciary duty by GM’s directors in connection with monitoring, remediation and disclosure of the issues underlying the ignition switch recall. 	<ul style="list-style-type: none"> In 2013 the company paid out \$20B in fines and penalties due in large part to their problems with the sale of subprime securities and the large losses incurred by betting on complex derivative trades. Derivative complaint alleges that the “defendants put their own short-term financial interest ahead of the long-term financial interests of the company” and is asking for the court to award damages, restitution, disgorgement of all illicit proceeds, and injunctive relief to reform the company’s corporate governance policies.
		
<p>November 2012 — Acquisition</p>	<p>May 2012 — Anti-Bribery</p>	<p>November 2011 — Business Decision</p>
<ul style="list-style-type: none"> A year after the 2011 acquisition of Autonomy for \$11B, HP disclosed that they were taking an \$8B+ write-down of their book value, leading to an immediate \$3B drop in HP’s market value. A securities class action lawsuit ensued contending that the company ignored warnings by whistleblowers about accounting irregularities at Autonomy and failed to properly vet its inances prior to the acquisition. The litigation claimed breach of fiduciary duties, waste of corporate assets, engaging in “abuse of control” and unjust enrichment. 	<ul style="list-style-type: none"> In April 2012, a <i>New York Times</i> article revealed that when confronted with evidence of widespread corruption in Mexico, top executives focused more on damage control than on rooting out wrongdoing. Complaint alleges breach of fiduciary duties in connection with oversight of FCPA compliance. 	<ul style="list-style-type: none"> In July 2011 the company announced the splitting of DVD and streaming services with a new pricing model, resulting in cancellation of over 800,000 subscriptions and substantial erosion of market cap. Derivative lawsuit alleges breach of fiduciary duties, issuance of false and misleading statements regarding the streaming business, violation of accounting rules concerning segment reporting and wasted corporate assets.

Why this trend and how to adjust as defense counsel?

- Change in burden of proof?
- Change in what can be brought as evidence at trial?
- Change in the role of the judges?
- Higher amounts of damages?
- Cases against reputation

What's your experience?

