Climate Change Litigation: What Can Liability Insurers Expect in 2024?

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Climate litigation against companies is increasing and the stakes are getting higher. Last year saw more headline-making claims being brought against corporations and a slew of important decisions from courts in jurisdictions around the world, and this trend looks set to continue in 2024. We are moving ever closer to a potential moment of legal reckoning for the fossil fuel industry. The main barrier to progress in the high-profile US-based litigation against oil and gas companies, the issue of forum, has largely been resolved (in the plaintiffs' favour), paving the way for the substance of these claims to finally be examined in court. The stage is now set for such cases to proceed to trial in state courts, and a verdict on the merits in one of these cases is now a realistic prospect.

Increasing litigation

Since 2018 we have seen an explosion of what has been termed 'climate lawfare.' According to the most recent report of the Grantham Research Institute on Climate Change and the Environment,[1] there were 2,341 climate litigation cases recorded globally as at 31 May 2023, of which 1,590 are filed in the US.[2] Amongst these are "strategic" cases, the most well-known of these targeting oil and gas companies as the largest emitters of CO2, with the ultimate aim that "Big Oil" will be held accountable for loss and damage caused by climate change and accelerate the transition to green or clean energy.

In pursuit of those aims, we are seeing cases that seek compensation for past and ongoing loss and damage associated with climate change and a contribution to the costs of adapting to anticipated future climate impacts, forward-looking litigation that demands a change in corporate behaviour (for example, aligning company activities with the goals of the Paris Agreement as in *Milieudefensie v Shell*[3]) and, in some instances, both. Climate change litigation against Big Oil began in the US, but the *Lliuya v RWE*[4] case in Germany shows that such cases can potentially be brought anywhere the applicable law – and court – allows. However, it is the Big Oil lawsuits in the US brought by states and municipalities that have dominated most of the media coverage on climate litigation, in part because they raise important questions about the role, responsibility, and power of these companies in the global economy. Perhaps more pertinently, these cases now have the attention of the liability insurance market, as those oil and gas defendants start to make notifications under their liability

[1] Global trends in climate change litigation: 2023 snapshot by Joana Setzer and Catherine Higham (June 2023)

[2] The figures used are taken from the climate litigation databases compiled by the Sabin Centre for Climate Change Law

[3] *Milieudefensie at al. v Royal Dutch Shell Plc*, The Hague District Court, case number C/09/571932

[4] *Luciano Lliuya v RWE AG*, Higher Regional Court of Essen, Case No.2 O 285/15

policies. Liability insurers are responding to the increased risk with exclusions such as LMA 5570, which mirrors policy exclusions for asbestos and MTBE.

Gaining momentum in 2023

None of these lawsuits have yet gone to trial. Lengthy disputes over forum – whether these cases should be heard in state or federal court – have stalled the progress of this litigation for years, delaying courts' consideration of these cases on the merits and the difficult substantive issues they will present. Plaintiffs have pushed to litigate their cases in state courts because of a perceived advantage in presenting their case before local judges and juries more likely to be sympathetic to plaintiffs' arguments. The defendant oil and gas companies have sought to get these cases heard in federal court, arguing that the claims made against them involve issues of a federal nature and are not matters for state courts to resolve by applying different state laws. 24 April 2023 proved a watershed moment when the US Supreme Court settled this question by confirming that it would not grant review of federal appellate courts' remand orders issued in cases brought by local governments in California, Colorado, Hawaii, Maryland and Rhode Island,[5] thus guaranteeing that the cases would proceed in state court.

In October 2023, we saw an important decision from the Hawaii Supreme Court, in the case of *City and County of Honolulu v. Sunoco LP.*[6] This is a lawsuit brought by the City of Honolulu and Honolulu Board of Water Supply against oil and gas defendants alleging public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn and trespass. Following the US Supreme Court's denial of defendants' application for a writ of certiorari in April 2023, the Hawaii Supreme Court duly heard defendants' appeal of the Hawaii Circuit Court's denial of motions to dismiss for lack of jurisdiction and failure to state a claim. On 31 October 2023, the Hawaii Supreme Court rejected defendants' appeal and allowed the case to proceed to trial.

This decision attracted a lot of attention, much of it focused on the strategy plaintiffs are using to circumvent defendants' stock arguments in these types of cases. Central to plaintiffs' claim is that the case before the court is a traditional tort action. All five counts rely on the same theory of liability, namely that: defendants knew of the dangers of using their products yet knowingly concealed and misrepresented those dangers, causing increased fossil fuel consumption and greenhouse gas emissions, which in turn exacerbated the impacts of climate change in Honolulu, causing Honolulu to suffer property and infrastructure damage and increased costs of adaptation. The core issue, therefore, is whether defendants misled the public.

As expected, defendants seek to characterise the claims made against them as an attempt to regulate interstate and international greenhouse gas emissions, and to argue that the claims are preempted by federal law, including the federal Clean Air Act ("CAA"). Oil and gas defendants have taken this approach in other cases alleging tortious failure to warn and deceptive promotion, as a hook for

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[5] The Supreme Court's ruling addressed four cases brought by municipalities and counties in California *(Chevron v. San Mateo County, 22-495)*, Colorado *(Suncor v. Board of County Commissioners of Boulder County, 21-1550)*, Hawaii *(Sunoco v. City and County of Honolulu, 22-523)*, and Maryland *(BP v. Mayor and City Council of Baltimore, 22-361)*, and a fifth case brought by the state of Rhode Island *(Shell Oil Products v. Rhode Island, 22-524)*. The US Supreme Court denied the defendants' application for a writ of certiorari seeking review of decisions remanding the case to state court. https://www.zellelaw.com/news-publications-767

[6] 153 Hawai'i 326; 537 P.3d 1173 (2023).

claiming federal jurisdiction and seeking a legislative solution as opposed to a patchwork of uncertain and problematic state court judgments.

In a unanimous opinion, the court agreed with plaintiffs that the lawsuit does not seek to regulate emissions, limit production or seek damages for interstate emissions; rather, it challenges the failure to warn of the dangers of oil and gas products, and the deceptive promotion of them, which has allegedly caused harm to plaintiffs. The court emphasised this distinction throughout its opinion, repeating that plaintiffs' alleged injuries do not arise from defendants' fossil fuel production activities, but through their alleged tortious failure to warn of the dangers of using those products and disinformation campaign; it quotes from plaintiff's Complaint to make the point: *"so long as Defendants start warning of their products' climate impacts and stop spreading disinformation, they can sell as much fossil fuel as they wish without fear of incurring further liability."*[7]

The court found that plaintiffs had simply brought a case concerning torts committed in Hawaii that caused alleged injuries in Hawaii, and in framing their claim in this way, plaintiffs overcame any jurisdictional arguments. Further, because the claim is based on alleged deception, the court found that the CAA does not preempt plaintiffs' claims under state law,[8] reasoning that the:

> *"CAA does not concern itself in any way with the acts that trigger liability under Plaintiffs' Complaint, namely: the use of deception to promote the consumption of fossil fuel products… The CAA does not bar Defendants from warning consumers about the dangers of using their fossil fuel products;"*[9] and *"…the state specifically permits lawsuits to hold companies responsible for allegedly deceptive marketing claims about any product, including oil and gas products. We decline to unduly limit Hawai'i's ability to use it police powers to protect its citizens from alleged deceptive marketing."*[10]

Pleading deceptive promotion and failure to warn of a product's harmful consequences also potentially allows plaintiffs to avoid the thorny issues of the legal production and legitimate use of the product, defences that have been relied on in similar tort cases. (In *Honolulu*, defendants argue that the lawsuit seeks *"to hold Defendants liable under Hawai'i tort law for harms allegedly attributable to global climate change… these emissions flow from billions of daily choices, over more than a century, by governments, companies, and individuals,"*[11] a recurring defence by fossil fuel companies in climate litigation.) This now familiar strategy has proved successful for plaintiffs seeking damages in other mass tort claims against tobacco, firearms sellers and opioid litigation in the US. We are not yet at the merits stage of the litigation where plaintiffs must prove causation and what they would have done differently had they been warned. However, when that time comes it will be a jury of local people—who live firsthand with the adverse effects of climate change— that will ultimately make this judgment call.

The end of 2023 saw two separate lawsuits filed by tribal governments in Washington Superior Court against Big Oil for deception, S*hoalwater Bay Indian Tribe v. Exxon Mobil Corp. (23-2-25215-2)* and *Makah*

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[7] *Id,* at 1186.

[8] The Court also found that the CAA displaced federal common law so federal law could not preempt the state law claims.

[9] *Id.* at 1207.

[10] *Id.* at 1208.

[11] *Id.* at 1185.

Indian Tribe v. Exxon Mobil Corp. (23-2-25216-1), the first of their kind. These suits similarly allege that fossil fuel companies misled the public about the dangers of their products and their role in increased greenhouse gas emissions and climate change harms to the Tribes and their reservations, and seek compensatory damages and adaptation costs.

Continuing momentum in 2024

2024 has started with a couple of significant judgments in the US.

On 8 January 2024, the US Supreme Court issued its decision in another deception case, *Minnesota v. American Petroleum Institute*[12], an action brought by the State of Minnesota against members of the fossil fuel industry for causing climate change harms by misleading the public about the threat of climate change and the role their products played in causing it. Following the Supreme Court's decision in April 2023 concerning other similar cases, defendants had filed a petition for a writ of certiorari seeking review of the Eighth Circuit's affirmance of the remand of the case to state court. They had argued that the Supreme Court's review was fundamental because *"similar cases will continue to proliferate, and similar claims could be brought against members of any number of industries that plaintiffs believe have contributed to climate change."*[13] However, the US Supreme Court denied defendants' petition and thereby declined to consider the question of jurisdiction.[14]

The following day, on 9 January 2024, the Delaware Superior Court granted in part and denied in part defendants' fourteen motions to dismiss in the case *State of Delaware ex rel. Jennings v. BP America Inc.*. Filed in 2020, Delaware's suit alleges that fossil fuel industry defendants concealed the climate change risks of their products, causing the state to suffer climate change harms. Specifically, the state alleges: negligent failure to warn, trespass, common law nuisance, and violations of the Delaware Consumer Fraud Act. The Court dismissed some of Delaware's claims, including those brought under the Delaware Consumer Fraud Act, which were found to be time-barred under the statute's five-year limitation period. This finding was made on the basis of defendants' evidence – unrefuted by the state - that the public had had knowledge of or access to information about defendants' alleged deception for decades. The Court also held that the CAA preempted the state's claims for damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution, but did not preempt those resulting from air pollution sources in Delaware. While the Court dismissed greenwashing and other misrepresentation claims against certain defendants, it granted Delaware leave to amend with particularity. Notably, the Court allowed the state's claim for failure to warn to proceed. The question of whether there was any duty to warn because the dangers of fossil fuel use were open and obvious is to be resolved at a later stage.

These two decisions illustrate the different outcomes that state court decisions can create. However, the overall picture follows the trend that these claims are being allowed to proceed, albeit with various limitations.

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[12] *State of Minnesota v. American Petroleum Institute,* --- S.Ct. ----2024 WL 72389 (U.S. Jan. 8, 2023).

[13] Petition for Writ of Certiorari at *4-5, *American Petroleum Institute et al. v State of Minnesota*, No. 23-168 (Aug. 18, 2023), 2023 WL 5431546.

[14] *State of Minnesota v. American Petroleum Institute*, --- S.Ct. ----2024 WL 72389 (U.S. Jan. 8, 2023).

Predictions for 2024

2024 is likely to be another busy year for climate litigation. In the US Big Oil lawsuits, we can expect to see decisions on the substantive issues or, at least, procedural decisions that hint at the court's approach to them. The nuances of different state laws mean that there will likely be different outcomes and further uncertainty for the oil and gas sector. We expect to see more cases filed using strategies that have proved successful, for example, deception.

This year will also see a milestone for one of the few cases in Europe that seek damages from a corporate actor for climate change harms. A court hearing in Germany on the evidence in *Lliuya v RWE*[15] (the expert opinion on the flood risk) is expected in the first half of 2024. Likewise, the appeal in the landmark case *Milieudefensie v Shell*[16] is scheduled for April 2024 in the Netherlands. Although this case is brought on different grounds than the US Big Oil lawsuits and does not seek monetary damages from Shell, Shell employs some of the same arguments in its defence, namely that it is being unfairly targeted: *"The court's ruling, effectively holds Shell accountable for a wider global issue, reducing consumer demand for carbon-based fuels."*[17] It will be instructive to see how The Hague Court of Appeal addresses this issue and what effect this might have on similar actions.

Predictions for insurers

Liability insurers' attention is mainly focused on the US Big Oil lawsuits given the number of policyholders implicated as defendants and the potential sums at stake in indemnity and defence costs. Should an adverse judgment issue in one of these suits, it will be an industry defining moment for the oil and gas sector and, by extension, its liability insurance market. Many commentators predict that the stakes are too high for the economy to leave this matter to local courts and discordant rulings, and that eventually a federal ruling or legislation will come. It seems unlikely that the US Congress will provide any constructive leadership in the near future. Where there is no effective policy or leadership, we will see the quagmire of lawsuits continue apace and, subject to policy wording, insurers will be called on to cover defence costs.

Indeed, the duty to defend is the first issue for liability insurers considering this issue. Given the duration of this litigation and law firms involved in defending fossil fuel policyholders, defence costs are likely to be immense. One can look to the tobacco and opioid litigation to see how high these costs can go. With the amounts at stake, it is likely that defendant companies will seek to confirm coverage, and we can expect to see more cases like *Aloha Petroleum*.[18] Insurers should continue to monitor liability risk in their portfolios, horizon scan for emerging risks, and use the tools at their disposal – wordings, exclusions, sublimits and endorsements - to pro-actively mitigate that risk.

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[15] *Luciano Lliuya v RWE AG*, Higher Regional Court of Essen, Case No.2 O 285/15

[16] *Milieudefensie at al. v Royal Dutch Shell Plc*, The Hague District Court, case number C/09/571932

[17] dutch-district-legal-case-faq

[18] *Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh,* Civ. 22-00372 JAO-WRP; see also: https://www.theguardian.com/environment/2022/aug/30/us-fossil-fuel-firm-aloha-petroleum-sues-insurer-aig-for-refusing-to-cover-climate-lawsuit

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