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CLIMATE

Connecting Climate Change and the Law

June 4, 2024

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In this week's edition, we look at the climate-linked criminal lawsuit filed against a French oil major. We also review a survey conducted by Bloomberg Law that shows a majority of attorneys believe they will see only a partially intact SEC climate disclosure rule in the face of legal challenges. And, asset managers and other investment firms may find some comfort in a legal memo which notes that consideration of climate factors in investment decisions is not likely to be in violation of fiduciary duty.

TotalEnergies Faces Potential Criminal Suit From Victims of Extreme Weather Events

On May 21, 2024, a group of individual claimants, and three civil society organizations, filed a criminal suit accusing French oil major, TotalEnergies, of manslaughter, endangering others, failing to combat a disaster and harming biodiversity as a result of activities that contributed toward extreme weather events caused by climate change. The complaint was filed with a court in Paris and features the accounts of eight individual claimants from France, Pakistan, Belgium, the Philippines, Australia and Zimbabwe, who all experienced loss and associated consequences during extreme weather events such as floods, heatwaves, wildfires and typhoons. The criminal complaint against TotalEnergies has been filed against the company's directors, and several large shareholders including BlackRock and Norges Bank. The public prosecutor will decide whether the case may proceed within three months. In the event that the public prosecutor does not take a decision or dismisses the case, the claimants may take their case directly to an investigating judge. The three non-profits behind the case, BLOOM, Alliance Santé Planétaire and Mexican non-profit Nuestro Futuro, claim that the board of TotalEnergies is liable because it is responsible for the company's strategy to continue expanding its fossil fuel extraction business. Institutional shareholders are being targeted on the basis that their past voting decisions supported strategies inconsistent with limiting global warming to 2oC pursuant to commitments under the Paris Agreement.

The case is notable given that it is criminal in nature; climate-related litigation is often based on civil claims with claimants **seeking a range of outcomes** including building pressure to force policy changes. There have been recent examples in the UK, where activists successfully challenged the country's climate policy for not being aligned with its international and domestic commitments, **and in Switzerland**, where a group of Swiss citizens successfully claimed that their human rights had been violated by their government's failure to take sufficient measures to minimize the effects of climate change.

As we have observed frequently in Cadwalader Climate, climate-related litigation is steadily increasing and has recently seen notable successes for claimants. The aforementioned Swiss case brought by KlimaSeniorinnen Schweiz (Swiss Senior Women for Climate Protection) was heard before the European Court of Human Rights (ECtHR), after the group had exhausted all available legal remedies in Switzerland (the Swiss Supreme Court had rejected the group's appeal in May 2020). The verdict delivered by the ECtHR in April 2024 sets out that the Swiss citizens group's right to respect for private and family life (Article 8 of the European Convention on Human Rights (ECHR)) was violated. The ECtHR held that Article 8 encompasses a right to effective protection by State authorities from the serious adverse effect of climate change on life, health, well-being and quality to life. Further, the judges noted in the majority opinion that

Switzerland failed to comply with its positive obligations concerning climate change and also failed to meet its greenhouse gas emissions reduction targets in the past. The case is considered to be particularly significant because it effectively creates a new legal duty on governments that are parties to the ECHR, to take action against climate change. The case has received mixed reactions, in particular in light of the dissenting judge's opinion who noted that (a) it is not within the ECtHR's remit to create an entirely new right; and (b) that the violations asserted by the group could have fallen comfortably within existing rights conferred by the ECHR. Despite the controversy, the decision is objectively significant and will serve as a precedent to lower courts, and cannot be appealed. Parties to the ECHR will have to carefully consider whether their climate policies breach the convention and the litigation risk that potential violation presents. Its success will likely serve as encouragement and provide confidence to those looking to bring similar cases forward.

The French courts are proving to be a popular forum for claimants in climate-related suits. Several climate advocacy groups have filed lawsuits against companies for breaching their duty of vigilance. The law requires companies to establish a "Vigilance Plan" to "identify and prevent risks of severe violations of human rights and fundamental freedoms, health and safety of people and to the environment in their entire sphere of influence." In March 2023, Friends of the Earth France, Notre Affaire à Tous and Oxfam France, **filed a suit** alleging a breach of its duty of vigilance against BNP Paribas. ClientEarth also filed on the same basis **against food products company Danone**. Prior to filing its claim against Danone for breaching the duty of vigilance law, ClientEarth served "legal warnings" on Danone and certain other French companies, including Auchan, Carrefour, Casino, Lactalis, McDonald's France, Les Mousquetaires, Picard and Nestlé France. **As we reported in our March 5 edition**, three separate cases were heard before the Paris Court of Appeal in which it is alleged that energy companies Suez, EDF and TotalEnergies breached France's Duty of Vigilance Act. Once the decisions in these cases are handed down (expected in June 2024), the direction that pending cases may follow will become clearer. Similarly in the Netherlands, Environmental activist group Milieudefensie (Friends of the Earth Netherlands) **announced its intention** to file a lawsuit against Dutch banking group ING for breaching its Dutch law duty of care to not create dangers that can cause avoidable damage to people or property, by providing financial support to high carbon-emitting companies.

Legal Memo States That Companies' Climate-Focused Investment Choices Is Not Violation of Fiduciary Duty

According to a **legal memo** published by the U.S. Sustainable investment Forum, companies that make climate-related commitments or join initiatives such as Climate Action 100+ and the Net Zero Asset Managers (NZAM) initiative, while making independent investment choices, are not violating their fiduciary duty, and are at negligible risk from antitrust claims. The memo was produced by Jenner & Block, and Sphere, a provider of climate-friendly products. Commenting on the memo, Sphere's chief executive noted: "This memo should quell investor uneasiness stoked by the uptick in politically charged threats focused on investor action to reduce climate risk." The debate concerning whether climate-related decision making and investment is in conflict with a firm's fiduciary duty is a topic we discuss frequently, **including in an article we published in March 2023** on a letter written by 21 Republican Attorneys General (AGs) citing concerns around asset managers' consideration of climate factors inconsistent with fiduciary duty, which is directly addressed by U.S. SIF's legal memo.

In its analysis, the paper suggests that the legal theories put forward in the AGs letter would be unlikely to succeed in litigation. In particular:

- The commitments made by members of Climate Action 100+ would constitute an agreement, but that even if such an argument could be made, it would be unlikely to produce anticompetitive effects.
- NZAM's commitments are more strenuous but each member made an independent commitment to apply climate-related criteria in investment decisions and it would therefore be challenging to demonstrate a critical element of allegations of antitrust violations.
- Shareholders have a legal right to engage with companies on issues of concern and to vote on proposals. That act of voting does not constitute an agreement between competitors, falling short of meeting one of the most basic elements of an antitrust case.

Assessing climate-change risk and the opportunities presented by the climate transition helps asset managers manage overall financial risks and opportunities and therefore complies with the core of their fiduciary duty, according to the memo. Given active litigation in this area, these arguments will doubtless be utilized by firms accused of failing to properly discharge their fiduciary duty in making climate-related decisions.

Majority of Attorneys Expect SEC Climate Disclosure Rules to Succumb to Legal Challenges

In March 2024, **we discussed** the U.S. Securities and Exchange Commissions' (SEC) decision to adopt a scaled-back version of its GHG emissions disclosure requirements for public companies, and the slew of lawsuits which then followed, **accusing the SEC** of going beyond its statutory authority. Now, a survey conducted by Bloomberg Law has shown that just over half of the law firms surveyed, and approximately 60% of inhouse counsel believe that the requirements will likely survive but only partially intact. Approximately 30% of law firm respondents thought the rule would be overturned in its entirety, and 25% of inhouse counterparts agreed.

Under the previous iteration of the rules, public companies would have been mandated to make a swath of additional climate-related disclosures, including Scopes 1 and 2 GHG emissions metrics, both broken out by constituent greenhouse gases (eight different greenhouse gasses are specified in the proposal) and also presented in the aggregate; and Scope 3 greenhouse gas emissions metrics, if material, or if the registrant has set a greenhouse gas emissions reduction target or goal that includes its Scope 3 emissions.

The requirements relating to Scope 1 and 2 emissions have been scaled back such that disclosures would only be mandatory if companies deem them material. The disclosure of the Scope 3 emissions was contentious, with lobbying groups claiming the requirements were excessively burdensome; the SEC has eliminated this requirement and significantly scaled back the Scope 1 and 2 reporting which will now apply only to large filers, and only when material. More time will also be granted so that reporting can be included in the second quarter report, rather than annual reports. Another contentious element of the proposed rules was that, where a company's financial results were affected by more than 1% and the cause was climate "impacts," this would need to be disclosed in their financial impacts. But, without accurate, quantitative methods to calculate this, stakeholders who submitted comments to the SEC on the proposals criticized the rule. This requirement has now been replaced with less burdensome reporting.

In the wake of the SEC's decision to scale the rule back, several states filed lawsuits across the U.S. asking the courts to vacate the rule. **As we observed previously**, the rule was challenged across the political spectrum; the Sierra Club and the Natural Resources Defense Council, argued that the climate rule was scaled back too far.

Prior to the rule being amended, many firms had already begun to prepare for compliance. Although ongoing political and legal wrangling increases uncertainty for many, it is likely that preparatory work will need to continue regardless, given similar developments elsewhere such as in California **(through Senate Bills 253 and 261)** or the **European Sustainability Reporting Standards**.