



## Climate litigation risk and the financial sector: A perspective on recent developments

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# Executive summary

This report examines the role of the financial system in the broader economy, with a focus on climate-related issues and litigation. Several landmark climate litigation cases are analysed, covering categories such as access to information, duty of care and due diligence, fiduciary duty, insurance-related claims, and greenwashing.

There are, in general, more cases involving a formal litigation process in jurisdictions with a common law framework, such as Australia or the U.S., than in those with a civil law framework, such as in many continental European countries. But the analysis finds that climate-related cases against financial services industry (FSI) institutions are increasing everywhere, with claims brought before courts by private claimants, NGOs, and other groups, as well as cases brought before regulatory, investigatory, and administrative bodies.

The report also highlights the increase in cases involving investments and disclosures. The financial sector plays a critical indirect role in climate change, and we expect climate-related litigation (as well as wider ESG and nature-related litigation) to keep increasing. The outcomes of the key cases assessed in this report may set influential legal precedents shaping the future of climate litigation. They show the importance of legal threats and reputational risks and concerns (such as those related to greenwashing) in shaping the financial industry's response to sustainability matters. Like other industries, the financial sector must expand its responsibilities, consider the potential legal consequences and reputational risks associated with its impacts on the climate, and take steps to mitigate them.



# I. The financial system and the climate: a key enabling role

The financial services industry (FSI) broadly comprises the banking system (national banks, investment banks, commercial banks), the insurance system (life & health insurance, property & casualty insurance, reinsurance), pension funds and investment managers, and associated service providers, such as brokers and consultants. The financial system constitutes the metaphorical lifeblood of the economy, allocating capital from investors with excess savings to individuals and businesses in need of lending and financing. It also provides key risk transfer and risk management services, such as insurance, that help spread risks across time, geographies and economic actors, allowing projects that would otherwise have been subject to too much risk to go ahead.

FSI institutions thus play a critical enabling role, determining which economic activities are financed. What banks, insurers, pension funds and asset managers decide therefore has tangible impacts on the global climate and the environment. This also means that climate change and its threats to the environment create a new set of risks and opportunities for the financial sector.

The carbon footprint of financial institutions' own operations – for example, their buildings, land and air travel, IT systems, and suppliers – are far less important than the indirect footprint of the activities they finance and facilitate. In a 2021 analysis CDP, a disclosures body, estimated that the emissions funded by FSIs were over 700 times greater than FSIs' own direct emissions.<sup>1</sup> In terms of carbon accounting, these emissions correspond to Scope 3 Category 15 (Investments) in the Greenhouse Gas Protocol.<sup>2</sup> Dedicated carbon accounting standards for financed emissions,<sup>3</sup> facilitated emissions,<sup>4</sup> and insurance-associated emissions have been published since 2022 by the Partnership for Carbon-Accounting Financials, a Dutch-based, industry-led partnership to facilitate transparency and accountability in the financial services industry with regards to the Paris Agreement.<sup>5</sup>

1. April 2021, *Finance sector's funded emissions over 700 times greater than its own*, ([Finance sector's funded emissions over 700 times greater than its own - CDP](#)).

2. 2013, *Technical Guidance for Calculating Scope 3 Emissions version 1.0*, ([https://ghgprotocol.org/sites/default/files/2023-03/Scope3\\_Calculation\\_Guidance\\_0%5B1%5D.pdf](https://ghgprotocol.org/sites/default/files/2023-03/Scope3_Calculation_Guidance_0%5B1%5D.pdf), pp.136-139). Note: At the time of writing only investments are the subject to mandatory requirements and detailed guidance, with other financial services (such as insurance for instance) still listed as optional for carbon accounting purposes.

3. December 2022, *The Global GHG Accounting and Reporting Standard Part A: Financed Emissions second edition*, (<https://carbonaccountingfinancials.com/files/downloads/PCAF-Global-GHG-Standard.pdf>).

4. December 2023, *The Global GHG Accounting and Reporting Standard Part B: Facilitated Emissions first version*, (<https://carbonaccountingfinancials.com/files/PCAF-PartB-Facilitated-Emissions-Standard-Dec2023.pdf>).

5. November 2022, *The Global GHG Accounting and Reporting Standard Part C: Insurance-Associated Emissions first version*, (<https://carbonaccountingfinancials.com/files/Insurance-Associated-Emissions-Standard-Nov2022.pdf>).

The enormous leverage of the financial system and its links with climate change and human rights can be illustrated by numerous cases, such as, for example, the East African Crude Oil Pipeline (EACOP). The EACOP is an oil pipeline in planning since 2013, intended to transport crude oil from Ugandan oil fields to the Port of Tanga, Tanzania on the Indian Ocean. The US NGO, Inclusive Development International, and 10 Ugandan and Tanzanian organisations filed a complaint in February 2023 with the OECD against Marsh McLennan, the global insurance broker involved in the projects.<sup>6</sup> The plaintiffs argued that “the EACOP cannot be constructed without insurance” given that insurance is a legal requirement under Ugandan law and therefore Marsh was enabling the construction of the pipeline and therefore contributing to its “adverse impacts” on human rights and the environment.<sup>7</sup>

The key role that financial institutions play regarding climate change is being increasingly recognised by lawmakers, international standard setters and financial supervisors. Progress across jurisdictions is being tracked by various think tanks and NGOs, such as, for example WWF’s SUSREG tracker of sustainable financial regulations which covers over 40 territories on an annual basis, and to which Deloitte Switzerland is a contributor.<sup>8</sup> Countries and jurisdictions such as France, the Netherlands, the European Union, Singapore or Malaysia, among others, have been at the forefront of incorporating climate-related considerations into laws, regulations and supervisory requirements for the FSI.

Additionally, the European Union has been instrumental in introducing the double materiality concept. This requires companies to identify, manage and disclose not only the potential risks and opportunities that climate change and other sustainability-related topics create for their business (‘outside-in’ financial materiality), but also the external impacts from their business on climate, nature and people (‘inside-out’ impact materiality).<sup>9</sup> While financial materiality closely aligns with considerations of fiduciary duties, impact materiality opens up alternative avenues for climate litigation linked to the duty of care and precautionary principles.

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[com/files/downloads/pcaf-standard-part-c-insurance-associated-emissions-nov-2022.pdf](https://www.ec.europa.eu/finance/files/download/pcaf-standard-part-c-insurance-associated-emissions-nov-2022.pdf)).

6. February 2023, *Complaint: Inclusive Development International et al. vs. Marsh*, (<https://www.oecdwatch.org/complaint/inclusive-development-international-et-al-vs-marsh/>).

7. April 2023, *Financial and reputational risks of EACOP pile up amidst growing opposition to project*, ([https://www.banktrack.org/article/financial\\_and\\_reputational\\_risks\\_of\\_eacop\\_pile\\_up\\_amidst\\_growing\\_opposition\\_to\\_project](https://www.banktrack.org/article/financial_and_reputational_risks_of_eacop_pile_up_amidst_growing_opposition_to_project)); February 2023, *Marsh accused of OECD guidelines violations*, (<https://www.insurancebusinessmag.com/us/news/environmental/marsh-accused-of-oecd-guidelines-violations-435525.aspx>).

8. December 2023, *2023 SUSREG Annual Report: An Assessment of Sustainable Financial Regulations and Central Bank Activities*, (<https://www.wwf.sg/susreg/wp-content/uploads/sites/6/2023/12/2023-Annual-Report.pdf>).

9. July 2022, *Sustainable finance*, ([https://ec.europa.eu/newsroom/fisma/items/754701/en\\_section/Double materiality](https://ec.europa.eu/newsroom/fisma/items/754701/en_section/Double%20materiality)).

# I.a. Net-zero targets and voluntary climate pledges

At the same time as climate laws, regulations and supervisory expectations are proliferating, some financial institutions have also formed sectoral net zero alliances of companies that voluntarily pledge to decarbonise their balance sheet, investments, and insurance portfolios. Among these are the Net-Zero Banking Alliance (NZBA), the Net-Zero Asset Managers initiative (NZAM), the Net-Zero Asset Owner Alliance (NZAOA), or the Net-Zero Insurance Alliance (NZIA).

These alliances are grouped under the umbrella of the Glasgow Financial Alliance for Net Zero (GFANZ), which was formed during the COP26 climate conference in Glasgow in 2021. GFANZ describes itself as “a global coalition of eight independent net-zero financial alliances whose members have committed to support the transition to net zero by 2050 and help achieve the objectives of the Paris Agreement” through broad participation in alliances, interim target setting, and supporting collaboration on substantive challenges.<sup>10</sup>

Despite being based on voluntary membership and commitments from individual member companies, net zero alliances have quickly become embroiled in legal controversies. Soon after launching its inaugural target-setting protocol in January 2023, the Net-Zero Insurance Alliance (NZIA – a group of insurance companies convened by the UN and committed to transitioning their underwriting portfolios to net-zero GHG emissions by 2050) faced legal challenges in the U.S. regarding possible antitrust violations.<sup>11</sup> In May 2023 Attorney Generals from 23 U.S. States sent a letter to the NZIA seeking documents and information over “legal concerns brought about by commitments to collaborate with other insurers in order to advance an activist climate agenda”.<sup>12</sup> Notably, this cited increased insurance costs and inflation.<sup>13</sup> It accelerated an exodus of insurance companies from the NZIA that had already started in March 2023 over related antitrust concerns. More than half of the NZIA’s members (above all those with significant business exposure in the U.S.) left the alliance in the following weeks.<sup>14</sup>

These legal challenges from US Attorney Generals to the NZIA remain untested in court at the time of writing. However, they would reflect novel uses of antitrust laws for purposes unrelated to their original historical context, which notably included the breaking up of the petroleum conglomerate Standard Oil due to abusive and anti-competitive actions.<sup>15</sup> This development also highlights potential inconsistencies between climate goals, such as the Paris Agreement, and existing legal frameworks. Since meeting climate and nature goals requires long-term collective action, some jurisdictions have started adapting their antitrust laws to avoid such inconsistencies. For example, the UK Competition and Market Authority published in October 2023 guidance on the application of the 1998 Competition Act and a more flexible approach to enforcing competition law with regards to climate agreements between competitors.<sup>16</sup> In addition, in June 2023 the EU Commission adopted new guidance – revised Horizontal Block Exemption Regulations on Research and Development and Specialisation agreements, accompanied by revised Horizontal Guidelines regarding Art. 101 (1) Treaty of the Functioning of the European Union – to ease competition law application for sustainability standard agreements.<sup>17</sup>



10. August 2022, *About Us: Glasgow Financial Alliance for Net-Zero*, (<https://www.gfanzero.com/about/>).

11. January 2023, *NZIA Target-Setting Protocol Version 1.0*, (<https://www.unepfi.org/industries/insurance/nzia-target-setting-protocol-version-1-0/>).

12. Insurance is primarily regulated at the local State level in the USA.

13. May 2023, *2023-05-15-NZIA-Letter*, (<https://attorneygeneral.utah.gov/wp-content/uploads/2023/05/2023-05-15-NZIA-Letter.pdf>).

14. March 2023, *Munich Re discontinues NZIA membership*, (<https://www.munichre.com/en/company/media-relations/media-information-and-corporate-news/media-information/2023/media-release-2023-03-31.html>).

15. October, 1910, *Standard Oil Co. v. United States*, 221 U.S. 1, (<https://tile.loc.gov/storage-services/service/ll/usrep/usrep221/usrep221001/usrep221001.pdf>).

16. October 2023, *Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements*, ([https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green\\_agreements\\_guidance\\_.pdf](https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf)).

17. June 2023, *Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines*, ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2990](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2990)).

## Effective risk management against climate litigation demands a balancing act from businesses...

Similarly, six signatories to the Net-Zero Banking Alliance (NZBA – a UN-convened group of global banks that commit to focus their financing on climate action and transitioning to net-zero GHG emissions by 2050) – are being investigated in multiple U.S. states for their participation in the alliance.<sup>18</sup> The investigations are being led by a group of Attorney Generals who allege that the GHG emission reduction targets set by the NZBA “attempt to prevent fossil fuel companies from accessing financial services”, which may violate antitrust laws.<sup>19</sup> At the time of writing, these investigations are still ongoing and we are yet to see the interpretation of antitrust as well as consumer protection laws in the U.S. in relation to net-zero alliances.

Voluntary climate action from financial institutions, whether on an individual or (where legally allowed) collective basis, can help build market momentum in favour of climate action by the financial sector. It is, however, no substitute for broader legal, regulatory or supervisory requirements for the financial sector to decarbonise its investment, insurance and advisory activities. While an increasing number of countries have enshrined national net-zero targets in law, few have already translated them into specific obligations for the financial sector.<sup>20</sup> Switzerland’s Climate and Innovation Act, confirmed by popular vote in June 2023, includes general provisions stating that the “federal government ensures that the Swiss financial centre makes an effective contribution to low-emission development that is resilient to climate change. In particular, measures should be taken to reduce the climate impact of national and international financial flows.”<sup>21</sup> In the absence of explicit legal mandates for financial institutions to pursue net-zero goals – even the Swiss legislation may fall short – there is a gap between voluntary practices from pioneering financial companies and practices that remain legal but run contrary to the pursuit of national and international decarbonisation commitments.

18. United Nations Environment Programme Finance Initiative: Net-Zero Banking Alliance (<https://www.unepfi.org/net-zero-banking/>).

19. November 2023, *Taking the chill out of climate action: A progress report on aligning competition policy with global sustainability goals*, (<https://iccwbo.org/wp-content/uploads/sites/3/2022/11/2023-ICC-Progress-report-on-aligning-competition-policy-with-global-sustainability-goals.pdf>).

20. Net Zero Tracker, (<https://zerotracker.net/>).

21. October 2022, *Bundesgesetz über die Ziele im Klimaschutz, die Innovation und die Stärkung der Energiesicherheit*, ([https://www.fedlex.admin.ch/eli/fga/2022/2403/de,Art.9\\_Ziel\\_zur\\_klimavertr%C3%A4glichen\\_Ausrichtung\\_der\\_Finanzmittelfl%C3%BCsse](https://www.fedlex.admin.ch/eli/fga/2022/2403/de,Art.9_Ziel_zur_klimavertr%C3%A4glichen_Ausrichtung_der_Finanzmittelfl%C3%BCsse)).



## I.b. Reputational risk, greenwashing, and greenhushing

Reputational risk is a close companion to (and sometimes an advance warning of) climate litigation. When corporations depend on maintaining their reputation to obtain funding, sell their products and services, and generally safeguard their “social licence” to operate, reputational concerns may prompt them to anticipate future minimum legal requirements.<sup>22</sup> This may in particular be the case for publicly listed and/or retail banks and insurers but does not necessarily apply to other types of financial institutions, such as private equity firms or hedge funds, for example. Consequently, while some leading banks and insurers may gradually stop financing and underwriting the most polluting forms of fossil fuel extraction and exploitation, other financial companies that are less concerned by reputational considerations or located in less stringent jurisdictions might step in and replace them.

22. July 2006, Gunningham et al.: *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, (<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1747-4469.2004.tb00338.x>). Gunningham et al. state that corporations comply with their social license by operating within societal expectations and avoiding activities considered unacceptable by the surrounding civil society.

23. *Greenwashing*, (<https://en.wikipedia.org/wiki/Greenwashing#Terminology>).

24. September 2022, AAE Discussion Paper: *Sustainability Issues and Reputation Risk for Insurance Companies and Pension Funds*, (<https://actuary.eu/wp-content/uploads/2022/09/Sustainability-Issues.pdf>).

Another key reputation-related risk is greenwashing. Originally coined by an environmentalist, Jay Westerveld, in 1986 about the hotel industry's practice of promoting reuse of towels to “save the environment”,<sup>23</sup> greenwashing refers to the practice of providing misleading information to exaggerate a company's environmental claims for its products and services.<sup>24</sup> Fighting greenwashing is an objective implicitly or explicitly embedded in most corporate-level sustainability disclosure regulations and standards which promote transparency. It also takes the form of additional regulation related to financial products, such as investment funds, marketed as having a positive impact on climate and the environment.



Corporations depend on maintaining their reputation to obtain funding, sell their products and services, and generally safeguard their “social licence” to operate ...





In the European Union, for example, the Sustainable Finance Disclosure Regulation (SFDR) aims to improve transparency for sustainable investment products to prevent greenwashing and support sustainability claims made by providers of financial products.<sup>25</sup> The SFDR sets out how financial market participants must disclose sustainability information in order to help inform investors seeking to put their money into companies and projects that support sustainability objectives. The EU Taxonomy provides additional transparency to the financial market through the provision of a classification system that determines the alignment of various economic activities with the EU 2050 net-zero target.<sup>26</sup> The Taxonomy protects private investors from greenwashing by establishing common definitions of environmentally sustainable activities with set criteria, thus combatting any deviations in classifications where misleading information or greenwashing may occur.

Another notable risk is the opposite to greenwashing: “greenhushing”. It is defined as tactical “hiding” by companies due to backlash they may face for being more vocal surrounding their “pursuit of green initiatives.”<sup>27</sup> In this way, by keeping quiet, they hope to avoid public scrutiny.<sup>28</sup>

In Switzerland guidance published by FINMA, the Swiss Financial Market Supervisory Authority, and further guidelines and regulations by the Swiss Banking Association and Asset Management Association Switzerland establish a national framework addressing greenwashing, in parallel with the Federal Council’s publication stating its official position on “greenwashing in the financial sector.”<sup>29</sup> Unlike in the EU, this does not establish a binding regulatory framework to target greenwashing. Therefore in October 2023 the Federal Department of Finance (FDF) announced plans to prepare a proposal implementing the Federal Council’s position. The FDF will publish a draft for consultation to the Federal Council by the end of August 2024 at the latest. However, if the financial industry proactively proposes adequate self-regulation, the FDF may drop its planned regulation efforts.<sup>30</sup>

25. November 2019, *Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector*, (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R2088>).

26. *EU taxonomy for sustainable activities*, ([https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities\\_en](https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en)).

27. November 2022, *What is ‘greenhushing’ and is it really a cause for concern?*, (<https://www.weforum.org/agenda/2022/11/what-is-greenhushing-and-is-it-really-a-cause-for-concern/>).

28. August 2023, *What is greenhushing? How to spot the sophisticated greenwashing tactics being used in 2023* (<https://www.euronews.com/green/2023/08/14/what-is-greenhushing-how-to-spot-the-sophisticated-greenwashing-tactics-being-used-in-2023>).

29. November 2021, *FINMA publishes guidance on preventing and combating greenwashing*, ([finma.ch/en/news/2021/11/20211103-finma-aufsichtsmittteilung-05-21/](https://finma.ch/en/news/2021/11/20211103-finma-aufsichtsmittteilung-05-21/)); June 2022, *SBA introduces self-regulation in the area of Sustainable Finance*, (<https://www.swissbanking.ch/en/news-and-positions/press-releases/sba-introduces-self-regulation-in-the-area-of-sustainable-finance>); *Sustainable Finance Self-regulation*, (<https://www.am-switzerland.ch/en/regulation/self-regulation/sustainable-finance-self-regulation>); December 2022, *The Federal Council’s position on the prevention of greenwashing in the financial sector*, (<https://www.news.admin.ch/news/message/attachments/74580.pdf>).

30. October 2023, *Further efforts to prevent greenwashing*, (<https://www.efd.admin>).



## I.c. Litigation risk is on the rise

In September 2023 the Network for Greening the Financial System (NGFS, a global group of central banks and financial supervisors who define and share voluntary best practices to enhance the role of the financial system in meeting the goals of the Paris Agreement) released two reports on the topic of climate litigation. The first report outlined recent trends in the area, highlighting the rise in climate litigation.<sup>31</sup> The second report focused on micro-prudential supervision of the risks for financial institutions associated with the increase in climate-related litigation.<sup>32</sup> Thus both reports underline the increasing relevance and risk of climate litigation for the financial sector. They also draw attention to another, less-known litigation-related risk specific to insurance companies: their indirect exposure to litigation penalties through the liability insurance policies they sell – notably, Directors & Officers' (D&O) or Errors & Omissions (E&O) policies. Depending on the jurisdiction and exact contractual conditions, insurers may have to cover damages awarded as well as the cost of environmental litigation for their clients.<sup>33</sup> Additionally, in Switzerland, the Swiss Financial Market Supervisory Authority (FINMA) published for consultation

in February 2024 their new circular on nature-related financial risks for banks and insurers, building on the supervisory principles already set out by the Bank for International Settlements (BIS) and the International Association of Insurance Supervisors (IAIS). This proposed circular highlights the need to identify and manage reputation and litigation risks linked to the climate and nature.<sup>34</sup>

Due diligence obligations on the FSI were reduced in the EU following a deal reached during negotiations in December 2023 to temporarily exclude financial services from the scope of the Corporate Sustainability Due Diligence Directive (CSDDD).<sup>35</sup> The exclusion refers to considerations of their downstream value chain, whereas their own operations and upstream supply chain – typically far less relevant than their downstream activities – are still included in the scope of their due diligence obligations. But financial institutions should remain updated on this directive, as a review clause will be included, which could allow for the inclusion of downstream activities (such as financing, lending and insurance) following a future impact assessment.

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[ch/efd/en/home/the-fdf/nsb-news\\_list.msg-id-98351.html#:~:text=2023%20%2D%20The%20Federal%20Department%20of,meeting%20on%2025%20October%202023](https://www.efd/en/home/the-fdf/nsb-news_list.msg-id-98351.html#:~:text=2023%20%2D%20The%20Federal%20Department%20of,meeting%20on%2025%20October%202023).

31. September 2023, *Climate-related litigation: recent trends and developments*, ([https://www.ngfs.net/sites/default/files/medias/documents/ngfs\\_report-on-climate-related-litigation-recent-trends-and-developments.pdf](https://www.ngfs.net/sites/default/files/medias/documents/ngfs_report-on-climate-related-litigation-recent-trends-and-developments.pdf)).
32. September 2023, *Report on micro-prudential supervision of climate-related litigation risks*, ([https://www.ngfs.net/sites/default/files/medias/documents/ngfs\\_report-on-microprudential-supervision-of-climate-related-litigation-risks.pdf](https://www.ngfs.net/sites/default/files/medias/documents/ngfs_report-on-microprudential-supervision-of-climate-related-litigation-risks.pdf)).
33. However, there is no certainty that insurance companies will keep covering these risks in the future. For instance, Lloyd's of London, a global insurance market, has proposed in November 2021 to its member firms a new model climate change exclusion clause (LMA5570) for use on liability policies. Other proposed climate model exclusion clauses, from insurance coverage for climate harms, such as the Chancery Lane Project's Connor Clause, could facilitate the adoption of such exclusions.
34. February 2024, (<https://www.finma.ch/en/news/2024/02/20240201-mm-rs-naturbezogene-risken/>).
35. December 2023, *Corporate sustainability due diligence: Council and Parliament strike deal to protect environment and human rights*, (<https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/>).



## II. Overview and scope of cases

This report focuses primarily on formal climate litigation: legal action brought before a court of law. Our main source of litigation research is the Sabin Center for Climate Change Law at Columbia Law School, which developed the Climate Change Litigation Database.<sup>36</sup> In addition we used the climate rights database maintained by researchers at the University of Zurich.<sup>37</sup>

Besides formal litigation cases we also included some relevant examples of proceedings before supervisory or regulatory authorities that may stop short of actual lawsuits but are conceptually litigation-adjacent in nature. Climate-related proceedings generally take various forms. Many are legal proceedings or actions before regulatory authorities, as cases are also presented before international, administrative, investigatory bodies, and more. We decided, however, to exclude from the scope of this report some cases that may be only superficially linked to the financial sector, such as those involving development banks or state insurers, as these are ultimately linked issues of government policy and public spending.

Jurisdictions with a common law framework, such as Australia or the U.S., present more cases moving through a formal litigation process compared to jurisdictions with a civil law framework, such as many continental European countries. This is primarily due to the fact that common law has fewer codified sources of law; therefore legal questions are raised in a court in order to obtain a binding judicial decision. In civil law systems, by contrast, the higher amount of codified rules allow for more legal questions to be posed to regulatory or administrative bodies.

There is steady growth in climate-related cases like those assessed and presented in the UN Environment Programme (UNEP) Global Climate Litigation Report. By their methodology this includes “cases before judicial and quasi-judicial bodies” such as those brought before regulatory, investigatory and administrative bodies.<sup>38</sup> The UNEP report also identifies growth in cases against FSI institutions, particularly in relation to their investments and disclosures. Our own analysis, more narrowly focused on financial institutions, supports this assessment. We find an increase in claims brought before courts, both by private claimants and NGOs and other claimant groups.

36. Sabin Center for Climate Change Law: *Climate Change Litigation Databases*, (<https://climatecasechart.com/>).

37. *Climate and Human Rights Litigation Database*, (<https://climaterightsdatabase.com/>).

38. July 2023, *Global Climate Litigation Report: 2023 Status Review*, ([https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global\\_climate\\_litigation\\_report\\_2023.pdf?sequence=3, p10](https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3, p10)).

## III. Case and trend commentary

The categories used below for the analysis of cases are partly inspired by The Geneva Association Climate Change Litigation report (2021).<sup>39</sup>

### III.a. Access to information

Many instances of climate litigation concern claimants pursuing their right to access information and requesting publication of information by the respondent. Depending on the nature of the request, the information sought may be kept private and only held internally and these legal challenges may force entities (state institutions, corporations and FSI) to divulge information on their climate-related risks and impacts, investments, strategies and more. A key driver in such cases is a push for transparency in climate and sustainability-related information and accountability.

One notable case is **Abrahams v Commonwealth Bank of Australia (Australia, 2021)**.<sup>40</sup> In November 2021 the Federal Court of Australia found on behalf of the Abrahams Family Trust (a shareholder of the respondent) in their pursuit of internal documents relating to the bank's involvement in gas and oil projects that allegedly did not comply with the bank's environmental, social and economic policies. The Federal Court found in favour of the plaintiffs and subsequently ordered Commonwealth Bank to produce the requested documents.<sup>41</sup> Following the precedent set in this case, to avoid litigation risk, financial institutions seeking to reduce their litigation risk would be advised to ensure transparency of climate-related internal information and documents, particularly where they concern internal alignment and compliance with the Paris Agreement goals and national climate objectives.

Another notable case concerning access to information litigation is **Catherine Rossiter v ANZ Group Holdings Limited (Australia, 2023)**.<sup>42</sup> Banks in Australia are obliged under the APRA Prudential Standard to maintain a risk management framework to address and manage material risks.<sup>43</sup> The claimant, a shareholder of ANZ (Australia and New Zealand Banking Group Limited) alleged that the bank was not properly managing its material risks, given the

lack of disclosures on climate change and biodiversity loss risks in their Annual Report.<sup>44</sup> Furthermore the claimant requested access to ANZ's internal documents relating to their risk management system in order to determine whether there are systems in place to deal with the aforementioned sustainability-related material risks. The Federal Court of Australia accepted the application and is proceeding with a first hearing. The case is still pending.



39. April 2021, *Climate Change Litigation: Insights into the evolving global landscape*, ([https://www.genevaassociation.org/sites/default/files/climate\\_litigation\\_04-07-2021.pdf](https://www.genevaassociation.org/sites/default/files/climate_litigation_04-07-2021.pdf)).

40. August 2021, *Abrahams v. Commonwealth Bank of Australia*, (<https://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-of-australia-2021/>).

41. *Equity Generation Lawyers: Abrahams v. Commonwealth Bank of Australia (2021)*, (<https://equitygenerationlawyers.com/abrahams-v-commonwealth-bank-of-australia-2021/>).

42. *Equity Generation Lawyers: Catherine Rossiter v. ANZ Group Holdings Limited*, (<https://equitygenerationlawyers.com/cases/catherine-rossiter-v-anz-group-holdings-limited/>).

43. July 2017, *Prudential Standard CPS 220: Risk Management*, (<https://www.apra.gov.au/sites/default/files/Prudential-Standard-CPS-220-Risk-Management-%28July-2017%29.pdf>).

44. *Rossiter v ANZ Group Holdings Limited* (n42).

## III.b. Duty of care and due diligence

Climate-related litigation may also follow claims on the basis that financial institutions have an obligation to respect the goals and targets of the Paris Agreement, national climate goals, related targets set by financial industry regulations and/or their own targets and commitments. Litigation claims may generally follow arguments that the respective FSI institution violated a duty of care, which may be further enshrined in national law (as in the French 'loi sur le devoir de vigilance'). These claims often rely on the 'inside-out' materiality focus on the external impacts from an FSI institution's business on climate, nature and people. The remedy may involve reviews of business policies or divestments of climate-impacting investments.

Transparency can also be involved. Claimants may seek production of internal documents in order to have a clearer understanding of the financial institution's risk management system, financing and more. Fiduciary duty, discussed further below, may also be invoked.

In **January 2024**, the **Dutch** NGO **Milieudefensie** announced that they are suing **ING Group and ING Bank** due to their inadequate climate policy.<sup>45</sup> Milieudefensie are basing their claim on ING's duty of care in relation to the legal societal standard of care in the Netherlands (Dutch Civil Code, Art. 6:126(2)). Milieudefensie demands that ING halves its total emissions and stops financing polluting companies, including those without a good climate plan, and oil and gas companies that continue to expand their fossil fuel projects. Companies in the Netherlands have the legal responsibility to respect human rights and to comply with the duty of care. Milieudefensie considers that contributing to climate change is a breach of this duty of care. The same legal basis was successfully used in a climate lawsuit that the NGO previously brought against the oil and gas company, Royal Dutch Shell, in 2021, and in the successful case brought by another NGO, Urgenda, against the state of the Netherlands in 2019. Milieudefensie and other NGOs brought a similar complaint against ING in the Dutch National Contact Point (NCP) in 2017, alleging violation of OECD Guidelines by failing to set targets to meet the 2015 Paris Agreement. The NCP found for the NGOs and an agreement was reached between the parties regarding the calculation and target-setting methodology to utilise.

Another case is **McVeigh v Retail Employees Superannuation**

**Trust (REST) (2018, Australia)**, where the claimant, a beneficiary of the REST pension fund, initially filed to request information regarding REST's climate-related risks, risk management actions, and compliance with the Australian Corporations Act.<sup>46</sup> The claimant later filed an additional claim that REST had violated its duty of care and due diligence under the Superannuation Industry Supervision Act. The Act requires institutions to provide the aforementioned requested information as well as ensure that its investment management processes and climate-related disclosures comply with the Task Force on Climate-Related Financial Disclosures (TCFD).<sup>47</sup> REST and McVeigh reached a settlement before the beginning of the trial, setting out REST's acknowledgement of climate change as a material risk to the trust, provision of the documents raised in the initial claim, and an agreement for REST to "implement a net-zero carbon footprint by the 2050 goal for the fund [...] in line with the [TCFD]."<sup>48</sup>

Other notable cases that set out a claim regarding a violation of a duty of care or vigilance as well as a lack of due diligence concerning an FSI institution's association with climate-harming activities are **Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v BNP Paribas (2023, France)** and **Comissão Pastoral de Terra and Notre Affaire à Tous v BNP Paribas (2023, France)**.<sup>49</sup> Both cases against the French bank, BNP Paribas, concern notices of intent to sue due to BNP's alleged violation of the French duty of care law regarding their obligation to establish a human rights and climate prevention and mitigation plan, as well as their financing of projects connected to deforestation in the Amazon and further violations of human rights. In the first case three NGOs sought the termination of BNP's investments and financing of companies associated with fossil fuel projects. In the second case two NGOs further alleged violations of the duty of care given that BNP's financing of businesses "responsible for the deforestation of [the] Amazon" demonstrated the inadequacy of the bank's prevention and mitigation plan.<sup>50</sup> Both cases are pending before the Judicial Court of Paris.

45. *Our Climate Case Against ING*, (<https://en.milieudefensie.nl/climate-case-ing/our-climate-case-against-ing>).

46. 2018, *McVeigh v. Retail Employees Superannuation Trust*, (<https://climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/>).

47. *Equity Generation Lawyers*, (<https://equitygenerationlawyers.com/cases/mcveigh-v-rest/#:~:text=About%20the%20case,plans%20to%20address%20those%20risks>).

48. 2018, *McVeigh* (n46).

49. 2023, *Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v. BNP Paribas*, (<https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>); 2023, *Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas*, (<https://climatecasechart.com/non-us-case/comiss%C3%A3o-pastoral-da-terra-and-notre-affaire-a-tous-v-bnp-paribas/>).

50. *Comissão* (n49).

## III.c. Fiduciary duty

Since the financial system provides key risk transfer, management services and capital allocation to a range of economic activities and projects, the financing of projects with a link to activities that damage the climate, like fossil fuel, gas and oil projects or activities related to deforestation, can in turn create financial risks for financial institutions themselves. This is essentially the second, 'outside-in' leg of the double materiality concept, in which companies must identify, manage and disclose sustainability-related potential risks and opportunities created for their business. Therefore, FSI institutions should be aware of potential financial risks related to their activities as any resulting losses may constitute proof of a breach of fiduciary duties and a lack of consideration for the interests of their investors, their clients, beneficiaries and other affected parties.

The case of **McGaughey & Davies v Universities Superannuation Scheme Limited (USS) case (2021, UK)** raises a claim contending that the pension fund breached its directors' duties under the UK Companies Act 2006, due to their continued investment in fossil fuels.<sup>51</sup> The claimants are members of the pension scheme who argued that USS Limited (the company/corporate trustee that administers the scheme) did not have an adequate divestment plan to support its "stated ambition to be carbon neutral by 2050". Furthermore, the claim stated that the company, and thus the scheme, has "suffered loss" as a consequence of the directors allegedly not considering the interests of the scheme's beneficiaries; this supported their derivative claim and request to further proceedings against the company directors. The English High Court of Justice ruled against the claimants finding that their claims did not satisfy the characteristics to be a derivative claim as the company had not suffered any loss as described.<sup>52</sup> Subsequently, the claimants pursued an appeal which was also dismissed by the Court of Appeal in July 2023, supporting the judgment of the High Court. This case could only have proceeded if the claimants had been able to prove a more direct connection between the directors' investment in fossil fuels and any losses to the company and scheme.

Another notable case related to fiduciary duty is **Fentress v Exxon Mobil Corp (2016, USA)**. A former employee of Exxon Mobil Corporation and participant in the Exxon retirement savings scheme (i.e. pension plan) filed a class action lawsuit alleging that the company and senior officials had breached their fiduciary duties.<sup>53</sup> The fiduciary duties in question concerned the alleged inflated price of Exxon's stock price due to failing to disclose the impacts of climate change on the company's extraction activities

as well as the use of an inaccurate carbon price to calculate various internal values. The Federal district court of Texas dismissed the lawsuit, asserting that the plaintiffs did not sufficiently argue a breached fiduciary duty due to a lack of proof that the Exxon officials had "insider information" on the materially false stock market price. Additionally, the court held that the plaintiffs did not adequately prove that the stock price did not account for climate change impacts.

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The financing of projects with a link to activities that damage the climate, like fossil fuel, gas and oil projects or activities related to deforestation, can in turn create financial risks for financial institutions themselves.



51. 2021, *McGaughey & Davies v. Universities Superannuation Scheme Limited*, (<https://climatecasechart.com/non-us-case/ewan-mcgaughey-et-al-v-universities-superannuation-scheme-limited/>).

52. May 2022, *Lawrence Ewan McGaughey & Anor v Universities Superannuation Scheme Limited & Ors*, (<https://caselaw.nationalarchives.gov.uk/ewhc/ch/2022/1233>).

53. 2016, *Fentress v. Exxon Mobil Corp.*, (<https://climatecasechart.com/case/fentress-v-exxon-mobil-corp/>).

## III.d. Insurance-related claims

Insurance providers, reinsurers and other insurance intermediaries are uniquely exposed to climate-related litigation risks from multiple perspectives:

01. As corporations, they may be themselves the direct target of climate litigation due to their climate-related activities. A notable case in this area, **Inclusive Development International et al. v Marsh (2023, OECD)**, which was briefly covered earlier, exemplifies the type of litigation that may arise against insurance providers due to their decision to provide insurance for projects that pose climate risks.<sup>54</sup>
02. Insurers may also have to pay claims or legal expenses resulting from climate litigation targeted not directly against them but against the companies to which they provide liability cover. The liability lines of business susceptible to climate litigation risk are mainly Directors' and Officers' (D&O), Errors and Omissions (E&O) and Professional Indemnity (PI) insurance.<sup>55</sup>
03. Finally, insurers can also be involved in the disputed settlement of climate-related damage claims where they provide liability or property insurance to their clients. Questions may be raised concerning their policies and potential related obligations to indemnify or defend insured companies. This can involve, for instance, disputes regarding which sort of flood damage (pluvial / riverine / coastal) to property are covered, or whether general pollution liability policies also cover climate-related claims. Such cases can significantly influence the future climate risk coverage landscape regarding the obligations of insurance providers.

A notable case of disputed insurance settlements is **Aloha Petroleum Ltd v National Union Fire Insurance Co of Pittsburg (2022, USA)**.<sup>56</sup> Aloha Petroleum, a fossil fuel company, filed a lawsuit against its insurers, National Union Fire Insurance Co. of Pittsburgh, and American Home Assurance Company for breaching their contractual duty to protect the firm in an action filed by local governments in Hawaii. The governments sought to hold Aloha Petroleum liable for climate change impacts as a result of their involvement with fossil fuels. The insurers claim they are not obliged to cover climate-related litigation as pollutant damages are excluded from their coverage policies.<sup>57</sup> The District Court passed on the question regarding insurance coverage obligations for climate litigation regarding pollution damages to the Hawaii Supreme Court.<sup>58</sup>

Another significant case, **Everest Premier Insurance Co. v Gulf Oil LP**, questioned policies set in Massachusetts that would require insurers to indemnify Gulf Oil in their climate change litigation due to their alleged improper storage of bulk petroleum.



Insurance providers, reinsurers and other insurance intermediaries are uniquely exposed to climate-related litigation risks from multiple perspectives.



54. February 2023, *Inclusive Development International et al. vs. Marsh*, (<https://www.oecdwatch.org/complaint/inclusive-development-international-et-al-vs-marsh/>).

55. March 2023, *Deloitte: Assessing climate litigation risk for insurers*, (<https://www2.deloitte.com/uk/en/blog/emea-centre-for-regulatory-strategy/2023/assessing-climate-litigation-risk-for-insurers.html>).

56. 2022, *Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh*, (<https://climatecasechart.com/case/aloha-petroleum-ltd-v-national-union-fire-insurance-co-of-pittsburgh/>).

57. September 2023, *Aloha Petroleum, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, (<https://casetext.com/case/aloha-petroleum-ltd-v-natl-union-fire-ins-co-of-pittsburgh-pa>, para 2(2)).

58. *Aloha Petroleum Ltd.* (n56).

## III.e. Greenwashing claims

Greenwashing litigation involves claims that a company published misleading information to exaggerate the environmental benefits of its products and services. It fits into a larger category of sustainability-related litigation. However, the cases we analyse below have a climate focus.

The **Australian Securities & Investments Commission (ASIC)** has filed numerous greenwashing suits against FSI institutions, including three civil penalty proceedings against separate entities in **2023: Mercer Superannuation (Australia) Limited, Vanguard Investments Australia, and LGSS Pty Limited (Active Super)**.<sup>59</sup>

- In the first action against Mercer, ASIC alleged that misleading statements were made that investments in carbon-intensive fossil fuels were excluded.<sup>60</sup> The Australian Federal Court approved a settlement decision for Mercer to pay a penalty.<sup>61</sup>
- In the second case ASIC alleged Vanguard Investments made false and misleading statements that the securities held by one of its Global Index Funds were screened against certain ESG criteria, as ESG research was “not conducted over a significant proportion of issuers of bonds.”<sup>62</sup> The case concluded (the hearing on liability) in early March and the judgment is “reserved” for later delivery.
- In the third case ASIC alleged that Active Super falsely described its pension fund as “ethical and responsible” despite its holdings of coal and oil entities.<sup>63</sup> These claims contradicted Active Super’s claims that they had eliminated investments in entities that posed environmental risks. The liability hearing for this case concluded in late March and the judgment is also “reserved.”

59. February 2023, *ASIC launches first Court proceedings alleging greenwashing*, (<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-043mr-asic-launches-first-court-proceedings-alleging-greenwashing/>); July 2023, *ASIC commences greenwashing case against Vanguard Investments Australia*, (<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-196mr-asic-commences-greenwashing-case-against-vanguard-investments-australia/>); August 2023, *ASIC commences greenwashing case against Active Super*, (<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-215mr-asic-commences-greenwashing-case-against-active-super/>).

60. ASIC Feb 2023 (n 59).

61. December 2023, *Merger to pay \$11.3 penalty in ASIC’s first greenwashing case*, (<https://www.afr.com/companies/financial-services/mercer-to-pay-11-3m-fine-in-asic-s-first-greenwashing-case-20231207-p5eps7#:~:text=ASIC%20alleged%20Mercer%20Superannuation%2C%20which,BHP%2C%20Glencore%20and%20Whitehaven%20Coal.>).

62. ASIC Vanguard (n 59).

63. ASIC Active Super (n 59).





In **Germany** the Baden-Württemberg consumer association filed a couple of landmark greenwashing claims, **Verbraucherzentrale Baden-Württemberg e.V. v Commerz Real Fund Management S.à.r.l. (2020)** and **Verbraucherzentrale Baden-Württemberg v DWS Greenwashing (2022)**:

- In the first case the consumer association filed a claim against Commerz Real Fund alleging that advertisement of their “KlimaVest” financial product, stating that investors would be supporting “the avoidance of future emissions” as well as have the ability to calculate their associated CO2 footprint, was misleading.<sup>64</sup> The Verbraucherzentrale argued that the values and advertising were misleading as Commerz Real Fund contended that the emissions values were targets rather than guaranteed offsets. The Regional Court supported the claimant and concluded that the advertised claims were misleading as per the German Act against Unfair Competition.
- In the second case the Verbraucherzentrale also filed a lawsuit against DWS, an investment fund company and subsidiary of Deutsche Bank, for misleading advertising concerning some of its investments that would allegedly “counteract climate change”, though no details as to how were provided.<sup>65</sup> Prior to the hearing before the Regional Court of Frankfurt, DWS issued a declaration stating that it would cease the contested advertising practice.

It is important to note that greenwashing claims can also take the form of regulatory proceedings rather than formal lawsuits, as seen in the following examples (**USA, 2022**) concerning charges by the **Securities and Exchange Commission (SEC)**:

- In March 2022 the Securities and Exchange Commission charged **BNY Mellon Investment Adviser, Inc.** for misstatements and omissions about Environmental, Social, and Governance (ESG) considerations in making investment decisions for certain mutual funds that it managed.<sup>66</sup> The SEC asserted that from 2018 to 2021 BNY Mellon Investment Adviser misleadingly implied in various statements that all investments in the funds had undergone an ESG quality review. To settle the charges BNY Mellon Investment Adviser agreed to pay a \$1.5 million penalty.
- In November 2022, the SEC charged **Goldman Sachs Asset Management** for their failure to implement written policies and procedures to establish and explain the ESG factors used during the evaluation part “of the investment process” (under Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-7).<sup>67</sup> Goldman Sachs agreed to a penalty of \$4 million for their violation of the regulation as well as a cease-and-desist order.

64. December 2022, *Verbraucherzentrale Baden-Württemberg e.V. v. Commerz Real Fund Management S.à.r.l.* (<https://climatecasechart.com/non-us-case/verbraucherzentrale-baden-wuerttemberg-ev-v-commerz-real-fund-management-sarl/>).

65. 2022, *DWS Greenwashing*, (<https://climatecasechart.com/non-us-case/dws-greenwashing/>).

66. May 2022, *SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations*, (<https://www.sec.gov/news/press-release/2022-86>).

67. November 2022, *SEC Charges Goldman Sachs Asset Management for Failing to Follow its Policies and Procedures Involving ESG Investment*, (<https://www.sec.gov/news/press-release/2022-209>).



## Direct protest actions

A different category of climate litigation for FSI institutions to be aware of relates to acts committed as a result of public disapproval or protesting activities. For many FSI institutions, this may not be a key climate litigation risk, but rather another business risk to note. These cases often enter criminal proceedings and may further contribute to potential reputational risk, particularly due to their intentionally public nature. The additional reputation risk that results from such cases stems from the potential damage to the institution's "social licence", as individuals beyond directly affected stakeholders demonstrate their lack of acceptance of an entity's actions through other mediums.<sup>68</sup> In some cases, public disapproval of the financing or investment in climate-damaging projects may even result in property damage, as in the case of **Extinction Rebellion v HSBC (2023, UK)**.<sup>69</sup> The nine climate protesters on trial were acquitted of criminal damage to the HSBC London headquarters after a jury found that the property damage did not constitute criminal conduct as it occurred during a protest which was lawfully justified. This case shows that public disapproval, evident in the jury's decision, can surpass concerns about any physical impacts on the climate-offending party. Thus, litigation concerning direct actions may also be an influential lever to force changes in financing and investment decisions.

Other noteworthy cases linked to direct action taken against an FSI institution are the **Credit Suisse climate activists' trials (2021, Switzerland)**. These two cases concern a group of activists in Lausanne and a single protestor in Geneva, members of the BreakFree Suisse collective which staged protests at Credit Suisse office buildings in the respective cities. In Lausanne the protestors occupied the lobby of the building and the lower court found in favour of the protesters, arguing that climate change is an "imminent threat" and that the protest was "necessary and proportionate" to their goal.<sup>70</sup> This decision was overturned by the Cantonal Tribunal finding that while climate change is indeed an "imminent threat", the protest might have utilised alternative and more proportionate means. This was upheld by the Swiss Federal Supreme Court which found that the protest was unlawful. In the Geneva case the activist was initially found guilty by the Tribunal de Police, acquitted on revision by the Court de Justice and later found guilty by the same court following the overturned previous adjudication by the Swiss Federal Supreme Court.<sup>71</sup> In this case the Supreme Court instead did not find climate change to be an "imminent danger to individual legal interests."

## III.f. Ongoing legal battles over ESG regulation

Many legal actions or suits challenging existing and proposed ESG regulations, or trying to gain clarity on laws or rules, are currently filed in various jurisdictions. The outcome of these legal battles has potentially far-reaching implications for future climate and ESG regulation.

Two such cases were notably filed against the EU Commission, challenging their inclusion of fossil gas and other nuclear and gas energy activities in the sustainable activity list under the EU Taxonomy Delegated Regulation 2022/1214: **ClientEarth and Others v Commission & Greenpeace and Others v Commission (2023, EU)**.<sup>72</sup> In both cases the plaintiffs argued that the classifications of gas and nuclear activities were unlawful and not in line with the EU Taxonomy Regulations. Both cases are still pending before the EU General Court.

While the EU cases mentioned above are pursuing stricter climate regulation, a flurry of 'anti-ESG' lawsuits have been filed in the U.S. by conservative interest groups with a view to challenging proposed climate disclosures and government rules that would favour and push for consideration of ESG factors in investment decisions. Notable examples of such legal activism include:

- **The Heritage Foundation** filed a lawsuit against the **US Securities and Exchange Commission (2023)** under the Freedom of Information Act, requesting access to information regarding the SEC's proposed climate disclosure rule, including emails, analyses and reports on the rules impact on external costs.<sup>73</sup> The lawsuit is also understood to challenge various aspects of the proposed disclosure rules generally as well as the SEC's power regarding environment- and climate-related issues.

68. Gunningham et al. (n22).

69. November 2023, *Jury clears climate protesters of causing damage to HSBC London HQ*, (<https://www.theguardian.com/environment/2023/nov/16/climate-protesters-cleared-of-causing-criminal-damage-to-hsbc-london-hq>).

70. May 2021, *Credit Suisse Climate Activists Trial (Lausanne)*, (<https://climaterightsdatabase.com/2021/05/26/credit-suisse-climate-activists-trial-lausanne/>).

71. September 2021, *Credit Suisse Climate Activists Trial (Geneva)*, (<https://climaterightsdatabase.com/2021/09/28/credit-suisse-climate-activists-trial-geneva/>).

72. 2023, *ClientEarth and Others v. Commissions*, (<https://climatecasechart.com/non-us-case/clientearth-and-others-v-commission/>); 2023, *Greenpeace and Others v. Commissions*, (<https://climatecasechart.com/non-us-case/greenpeace-and-others-v-commission/>).

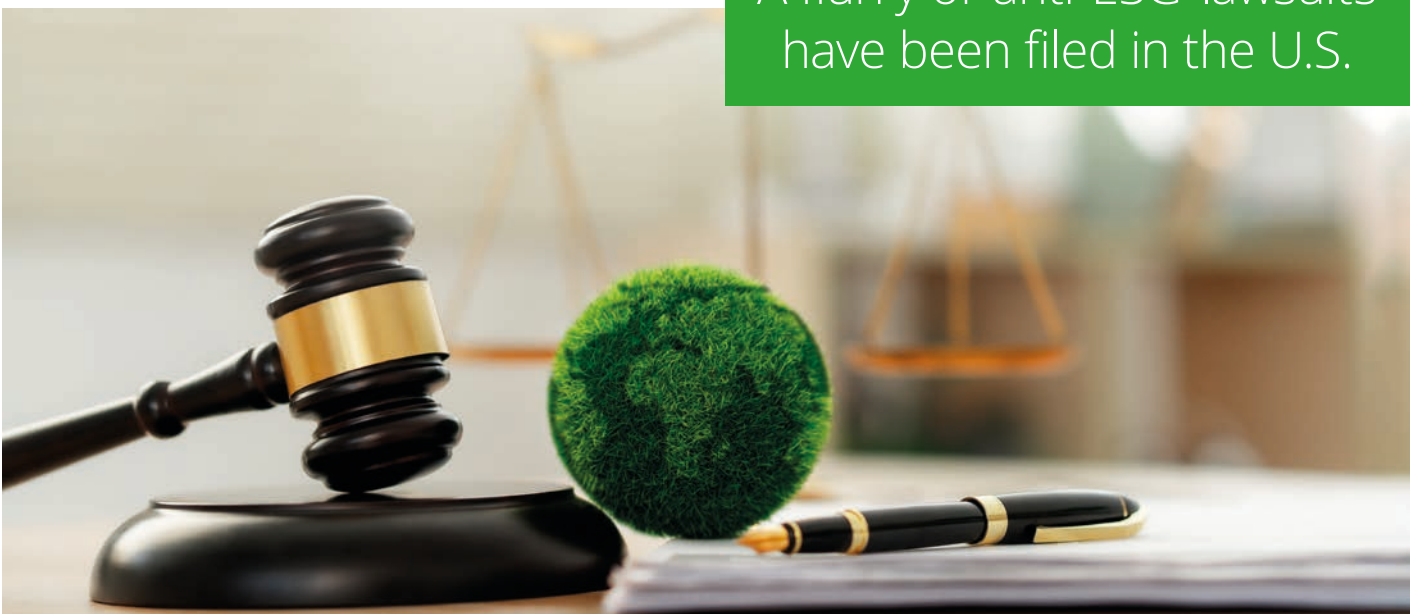
73. 2023, *Heritage Foundation v. U.S. Securities & Exchange Commission*, (<https://climatecasechart.com/case/heritage-foundation-v-us-securities-exchange-commission/>).

- **Texas v SEC (2023)** challenges the SEC proxy vote reporting requirements for investment companies due to the alleged expansion of “voting categories that address left-wing priorities” that would favour ESG or climate topics.<sup>74</sup>
- **Braun v Walsh (2023)**<sup>75</sup> and **Utah v Walsh (US) 2023** challenge the Department of Labor’s regulations that would encourage pension plan administrators to consider ESG factors in their investment decisions.<sup>76</sup>
- In **Louisiana v Mayorkas (2023)**, ten states challenge the Federal Emergency Management Agency’s new methodology for calculating flood insurance rates which considers alleged “inappropriate factors” such as future climate change.<sup>77</sup>
- In **Hope of Kentucky LLC v Cameron (2023)**, the Kentucky Federal Court permitted the Kentucky Attorney General’s investigation into six banks holding membership in the UN NZBA. The Attorney General alleged that their involvement discriminated against businesses seeking lending that are not aligned with the 2050 net-zero greenhouse gases (GHG) emissions target. They held that the trade association “did not demonstrate standing for [a] First Amendment claim” (freedom of speech and assembly).<sup>78</sup>

Following the long-awaited adoption of the SEC’s rules to enhance and standardize climate-related disclosures by public companies and in public offerings in March 2024, 10 U.S. States announced that they planned to challenge the new rules.<sup>79</sup> These States argue that the rules are unrelated to investors’ financial returns, that the S.E.C. lacks authority to set the new rules and that the requirements may violate companies’ First Amendment rights. At the same time and for opposite reasons, environmental organizations are gearing up to sue, saying the rules fall short.<sup>80</sup> Similarly, the U.S. Chamber of Commerce and co-claimants sued the state of California on the new corporate climate disclosure laws alleging that it violates the First Amendment in “unconstitutionally compel[ling] speech.”<sup>81</sup> Following consistent political pressures, the SEC stayed the rules pending judicial review, and released a statement defending the regulation, but noting “procedural complexities.”<sup>82</sup>



A flurry of ‘anti-ESG’ lawsuits  
have been filed in the U.S.



74. 2023, *Texas v. Securities & Exchange Commission*, (<https://climatecasechart.com/case/texas-v-securities-exchange-commission/>).

75. 2023, *Braun v Walsh*, (<https://climatecasechart.com/case/braun-v-walsh/>).

76. 2023, *Utah v. Walsh*, (<https://climatecasechart.com/case/braun-v-walsh/>).

77. 2023, *Louisiana v Mayorkas*, (<https://climatecasechart.com/case/louisiana-v-mayorkas/>).

78. 2022, *HOPE of Kentucky, LLC v. Cameron*, (<https://climatecasechart.com/case/hope-of-kentucky-llc-v-cameron/>).

79. 2024, *Securities and Exchange Commission: The Enhancement and Standardization of Climate-Related Disclosures for Investors*, (<https://www.sec.gov/files/rules/final/2024/33-11275.pdf>).

80. March 2024, *S.E.C. Approves New Climate Rules Far Weaker Than Originally Proposed*, (<https://www.nytimes.com/2024/03/06/climate/sec-climate-disclosure-regulations.html>).

81. January 2024, *U.S. Chamber Sues California Over Climate Disclosure Law*, ([https://www.uschamber.com/climate-change/u-s-chamber-sues-california-over-climate-disclosure-laws?x-craft-preview=K8kZDCIUoz&token=cDEICrcFRET38uq\\_0xte00KTbd6UIfDC](https://www.uschamber.com/climate-change/u-s-chamber-sues-california-over-climate-disclosure-laws?x-craft-preview=K8kZDCIUoz&token=cDEICrcFRET38uq_0xte00KTbd6UIfDC)); February 2024, *Amended Complaint for Declaratory and Injunctive Relief*, (<https://www.uschamber.com/assets/documents/Amended-Complaint.pdf>).

82. April 2024, *US SEC stays climate disclosure rule amid legal challenges*, (<https://www.reuters.com/legal/us-sec-stays-climate-disclosure-rule-amid-legal-challenges-2024-04-04/>).

## Risk management insights and challenges

Effective risk management against climate litigation demands a balancing act from businesses, complying with reporting requirements while avoiding the risk of greenwashing and potential litigation relating to disclosures.

There is an additional challenge when entities operate across jurisdictions with different characteristics. For example, U.S. firms are generally more cautious when disclosing, as their jurisdiction sees high levels of climate litigation; European firms may be more likely to disclose.

There are also challenges within businesses when business lines or functions are not aligned on the central climate-related narrative and do not coordinate on this topic. This could expose the business to litigation caused by isolated and uncoordinated climate narratives.

Finally, potential methodologies for the quantification of climate litigation risks for the FSI are still in their early stages, although there have been first proposals from the United Nations Environment Programme and the Sabin Center for Climate Change Law.



## IV. Conclusion and outlook

There is no denying that the financial sector plays a critical indirect role in climate change. Climate-related litigation against financial institutions is expected to continue to grow. It is also likely that ESG- and nature-related litigation will increase.

The outcomes of key cases against companies and regulators, such as those against ING, BNP Paribas, the EU Commission, and the US SEC, are likely to set influential legal precedents shaping the future of climate regulation. In addition to formal litigation, legal threats and reputational issues, such as accusations of greenwashing, will also play a material role. In the absence of significant legal and regulatory progress, as perceived by individuals or groups, direct actions in the form of protests, civil disobedience, boycotts, or even violent acts may also grow and become more radical. It is therefore essential that the financial sector enhances its corporate responsibility, takes steps to mitigate the sector's impact on the climate, and avoids potential legal consequences and reputational damage.

### Deloitte's Climate and Sustainability Experience

At Deloitte we feel we must do our part to contribute to the discussion on climate change, sustainability and the environment, and advance efforts to address these challenges. We also want to support our clients on their sustainability journey. We hope this article contributes to our clients' efforts to position themselves as market leaders in the sustainability transformation. Climate litigation considerations should play an important role, factoring into risk and opportunity assessments, including (but not limited to) compliance risk.

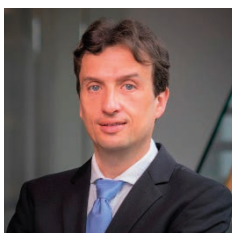
Our Sustainability Team in Switzerland has been at the forefront of cutting-edge transparency efforts. We have, for example, been supporting the WWF's [Sustainable Financial Regulations \(SUSREG\) project](#) since 2021. Some of our collaborative activities in this capacity included contributions to the development of the [2023 SUSREG Annual Report](#) and the [SUSREG global tracker for sustainable financial regulations](#) (covering banking and insurance activities in 47 jurisdictions).

We are a diverse team of regulatory, financial, audit, industry, and technical (science and engineering) experts. Our offerings reflect our capabilities and expertise, and cover sustainability reporting, assurance, consultancy, tax and risk advisory.

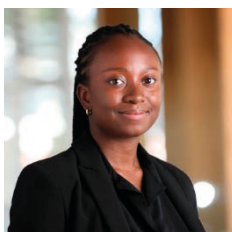
To help our clients steer their journey, we have developed innovative enablers, such as our ESG Regulatory Tool which tracks ESG regulations and facilitates companies' regulatory impact assessments. More information on our services can be found [here](#).

# Authors

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