

**Climate Litigation against Companies:
An Overview of Legal Arguments
- June 2019 -**

For the past decade, climate litigation has been steadily rising across jurisdictions. Traditionally, these cases have been brought against governments, but there is now a steep rise in climate lawsuits brought directly against companies. This increase is a result of advancements in climate attribution science, lessons learnt from similar litigation efforts, revelations into companies' long-standing climate knowledge and deception efforts, increased public mobilisation, and collaboration between cities, lawyers, scientists and activists across the globe.

By early 2018, we tracked 14 climate lawsuits against fossil fuel companies around the world. Our 2018 Corporate Legal Accountability Annual Briefing [Turning up the heat: Corporate legal accountability for climate change](#) provides an in-depth analysis of these lawsuits and examines the opportunities and challenges for bringing such litigation.¹ This briefing is intended to provide an overview of the specific legal arguments that lawyers have used to hold corporations accountable for climate harms.

Most of the lawsuits highlighted below are based on tort law claims including nuisance, negligence, civil conspiracy, and other legal doctrines, such as unjust enrichment and strict liability. A few cases also make innovative inroads into consumer protection legislation. However, differences in state laws, particularly in U.S. lawsuits, invite caution in making generalisations about the requirements or merits of particular claims. While all of the claims brought against companies are civil claims, ultimately, what they seek to achieve is the protection of rights and accountability for the abuse of those rights. In that sense, advocates are employing a rights-based approach to environmental litigation against companies.

I. Tort Law Based Claims

1. Nuisance Claims

Public Nuisance

Several of the climate lawsuits brought against companies allege a public nuisance, i.e., an act or omission that interferes with the rights of the community, or the public generally. In U.S. lawsuits, a major argument used by plaintiffs is that defendants' mass production and promotion of fossil fuels contributed, and continues to contribute, to global warming-induced impacts, such as rising sea-levels, and that these impacts create a public nuisance interfering with the rights of the communities represented.

In [Kivalina v. ExxonMobil](#), Kivalina residents in Alaska argued that fossil fuel companies' contribution to global warming interfered with their rights to use and enjoy public and private property, and sought to recover monetary damages for the cost of relocating their entire village. Similarly, in [Connecticut v. American Electric Power Co.](#) plaintiffs sought to limit power companies' greenhouse gas (GHG) emissions, which they claimed

¹ The San Francisco-based law firm Sher Sher Edling LLP has provided in-depth data on climate change-related cases, which are available [here](#).

contributed to the public nuisance of climate change. The plaintiffs sought an order “holding each of the Defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming”² and demanded that defendants’ carbon dioxide emissions be capped at judicially-determined levels.

Private Nuisance and Trespass

Plaintiffs have also brought private nuisance claims alleging an act or omission by an individual or a corporation that interferes with an individual’s enjoyment of his property. Plaintiffs have also raised trespass claims, which, contrary to private nuisance, require a physical invasion of property.

In [Luciano v. RWE](#), a Peruvian farmer brought a general nuisance claim in the Essen Court, based on article 1004 German Civil Law code, against an energy company, RWE. Mr. Luciano Lliuya alleges that RWE’s carbon emitting activities have contributed to climate change and that RWE therefore bears responsibility proportionally to its historic CO2 emissions for the melting of mountain glaciers near Huaraz, the plaintiff’s home town in Peru. He claims that his house is at imminent risk of being destroyed or damaged due to an outburst flood, arguing that the flood hazard creates an interference with his property. The plaintiff claims “reparation for the expenditures made toward the removal of the impairment from the disturber.”³

In three separate lawsuits brought by the [City and County of Santa Cruz and the City of Richmond](#) against Shell, among other claims, plaintiffs allege private nuisance and trespass. While filed separately, the cases all make similar claims and use similar language. For instance, in [City of Richmond v. Chevron Corp.](#), plaintiff argues that climate change-related injuries, such as flooding, also create a private nuisance interfering with their property: “Defendants [...] have created conditions on Plaintiff’s property, and permitted those conditions to persist, which constitute a nuisance by increasing sea level, increasing the frequency and severity of drought, increasing the frequency and severity of extreme precipitation events, increasing the frequency and severity of heatwaves, and increasing the magnitude of the consequences associated with those physical and environmental changes.”⁴

Plaintiff also argues that Chevron’s activities contributed to floods, which physically invaded their property and constituted trespass: “Plaintiff Richmond did not give permission for Defendants [...] to cause floodwaters, extreme precipitation, landslides, saltwater, and other materials to enter its property as a result of the use of Defendants’ fossil fuel products.”⁵ The city seeks both compensatory and punitive damages, as well as equitable relief including abatement of the nuisance. The two additional cases brought by the City and County of Santa Cruz contain seek similar remedies.

2. Negligence Claims (Negligent Failure to Warn)

Other lawsuits argue that companies owe a duty of care in relation to climate change, claiming that ‘but for’ the emissions of company X, they would not have suffered a particular, measurable harm. In [Urgenda Foundation v. Kingdom of the Netherlands](#), plaintiffs accused the Dutch government of breaching a duty of care *vis à vis* Dutch society under section 6:162 of the Dutch Civil Law Code. To establish that the state has a legal obligation to limit GHG emissions, plaintiffs argued that the Dutch state did “not pursue an adequate climate policy and therefore acts contrary to its duty of care towards Urgenda and [...] more generally speaking, Dutch society.”⁶ Urgenda also argued that “the State is acting unlawfully because, as a

² USA, Southern New York District Court, *Connecticut v. American Electric Power Co.*, [Opinion and Order](#), 19 September 2005, p. 9.

³ Germany, Essen District Court, *Luciano v. RWE AG*, [Decision](#), 15 December 2016, page number not provided in the English transcription of the decision.

⁴ USA, Superior Court of California, County of Contra Costa, *City of Richmond v. Chevron Corp. et al.*, [Complaint](#), 22 January 2018, p. 103, para. 258.

⁵ See *City of Richmond v. Chevron supra* note 4, p. 110, para. 290.

⁶ Netherlands, The Hague District Court, *Urgenda Foundation v. Kingdom of the Netherlands*, [Decision](#), 24 June 2015, para. 4.1.

consequence of insufficient mitigation, it [...] endangers the living climate (and thereby also the health) of man and the environment, thereby breaching its duty of care.”⁷ The plaintiffs demanded that the Dutch government take more action to reduce the greenhouse emissions in the Netherlands, including by ensuring that the Dutch emissions in the year 2020 will be at least 25% lower than those in 1990. Although not brought against a corporation, experts say that the finding of state liability in the [Urgenda](#) case could also be applied to corporate liability.

The legal arguments made in the *Urgenda* case inspired a recent [Complaint](#) against Shell by Milieudefensie (also known as Friends of the Earth Netherlands), six other NGOs and around 400 co-plaintiffs in April 2019.⁸ The complaint argues that the company’s lack of preventive measures to avoid unnecessary harm constitutes hazardous negligence, which is a tortious act under Dutch law (“onrechtmatige daad” in Dutch). The plaintiffs claim that “the adopted Paris climate target, which aims to prevent dangerous climate change, also has a legal significance for Shell. Under Dutch law (to which Shell is subject), Shell has a duty of care towards the claimants to contribute to preventing this all-encompassing danger and to act in line with the Paris climate target.”⁹ The plaintiffs demand that “Shell immediately starts reducing its CO2 emissions to at least 45% by 2030 (compared to 2010) and to net zero in 2050.”¹⁰

The fossil fuel industry’s knowledge of climate science/ harms forms the basis for negligence claims related to defendants’ alleged breach of their duty of care by not preventing foreseeable harm, and for negligent failure to warn. In [County of San Mateo v. Chevron Corp.](#), plaintiffs alleged negligence and negligent failure to warn: “Defendants took affirmative steps to conceal, from Plaintiffs and the general public, the foreseeable impacts of the use of their fossil fuel products on the Earth’s climate and associated harms to people and communities.”¹¹ The plaintiffs are seeking punitive damages.

3. Strict Liability

Some lawsuits aim to hold distributors of fossil fuels liable for defective products and for failure to warn of the risks associated with their use. Rather than alleging fault (such as negligence or tortious intent by the defendant), these cases claim strict liability for “design defects,” - i.e. flaws or errors in a product’s design that render it inherently dangerous. In these cases, fossil fuels (such as crude oil, coal or natural gas) are the product and the defect is the impact of the emissions and the known safety and injury risks associated with them.

Strict liability was traditionally claimed in similar lawsuits against the tobacco industry, but the causation between action and injury have proven [harder to prove](#) in climate harm cases. Nonetheless, plaintiffs have relied on the strict liability doctrine under which a manufacturer or a distributor is liable for product defects and a failure to provide warnings, whether or not they acted negligently. The legal arguments in these cases therefore revolve around the carbon industry’s knowledge and deception of climate harm (rather than alleging “fault” or negligence).

In [Rhode Island v. Chevron Corp.](#), the State of Rhode Island filed a lawsuit against 21 fossil fuel companies for their alleged climate harms on the State, including sea level rise, flooding, extreme precipitation events, drought, and a warmer and more acidic ocean. Plaintiffs claim that the defendant’s fossil fuel products are defective because of their potential harm to the citizens of Rhode Island, arguing that “Defendants’ roles as promoters and marketers were [...] a necessary factor in bringing fossil fuel products and their derivatives to

⁷ See *Urgenda v. Netherlands supra* note 6, para. 4.35.

⁸ In April 2018, Friends of the Earth Netherlands/Milieudefensie and its partners had gathered more than 13,000 signatures from Dutch citizens backing the forthcoming lawsuit, see <https://www.climateliabilitynews.org/2019/02/12/shell-netherlands-lawsuit-climate-change/>.

⁹ the Netherlands, [Complaint](#) sent by Milieudefensie to Royal Dutch Shell CEO, 5 April 2019, p. 15, para. 38.

¹⁰ the Netherlands, [Summary of the Complaint](#) sent by Milieudefensie to Royal Dutch Shell CEO, 5 April 2019, p. 3.

¹¹ USA, Superior Court of California, County of San Mateo, *County of San Mateo v. Chevron Corp.*, [Complaint](#), 17 July 2017, p. 50, para. 116.

the consumer market, such that Defendant had control over, and a substantial ability to influence, the manufacturing and distribution processes of their affiliates and subsidiaries.”¹²

Plaintiffs also allege that the defendants “breached their duty to warn by failing to adequately warn customers, consumers, regulators, and the general public of the known and foreseeable risks posed by their fossil fuel products, and the consequences that inevitably follow from their use;”¹³ concluding that the “defendants’ production, promotion, and marketing of fossil fuel products, simultaneous concealment of the known hazards of these products, and their championing of anti-science campaigns actually and proximately caused Rhode Island’s injuries.”¹⁴ The states are demanding an award of punitive damages.

4. Civil Conspiracy

In other cases, plaintiffs have accused defendants of civil conspiracy; i.e. plotting with another person to commit an unlawful act or to conspire to deprive a third party of a legal right. For example, in [Kivalina v. ExxonMobil](#), plaintiffs filed a series of tort claims based on civil conspiracy, alleging the “defendants’ participation in conspiratorial and other actions intended to further the defendants’ abilities to contribute to global warming.”¹⁵ The lawsuit alleges conspiracy to suppress the awareness of the link between GHG emissions and global warming. Plaintiffs argue that “there has been a long campaign by power, coal, and oil companies to mislead the public about the science of global warming. Defendants ExxonMobil, AEP, BP America Inc., Chevron Corporation, ConocoPhillips Company, Duke Energy, Peabody, and Southern (“Conspiracy Defendants”) participated in this campaign.”¹⁶ The plaintiffs demanded monetary damages, as well as a “declaratory judgment for such future monetary expenses and damages as may be incurred by Plaintiffs in connection with the nuisance of global warming.”¹⁷

II. Unjust Enrichment

Yet another legal basis used in climate change litigation against companies is unjust enrichment, a doctrine that prohibits the unjust enrichment of one person at another’s expense. For example, Boulder and San Miguel counties in Colorado, along with the City of Boulder, sued Exxon Mobil and Suncor Energy for “causing and exacerbating climate change.” In [Board of County Commissioners of Boulder County v. Suncor Energy](#) plaintiffs claim that the company acquired an unjust benefit from the continued “manufacture, distribution and/or sale of fossil fuels with that knowledge [of climate change impacts] and have benefited from not incurring the costs necessary to reduce the impacts of Defendants’ contributions to climate change.”¹⁸ This enrichment was made “at the expense of Plaintiffs and the Plaintiff communities who have been damaged and must abate the hazards created by Defendants’ fossil fuel products.”¹⁹ The plaintiffs are requesting “monetary relief to compensate Plaintiffs for their past and future damages and costs to mitigate the impact of climate change” as well as compensation damages for “past and reasonably certain future damages, including but not limited to decreased value in water rights; decreased value in agricultural holdings and real property.”²⁰

¹² USA, Superior Court of Rhode Island, *Rhode Island v. Chevron Corp.*, [Complaint](#), 2 July 2018, p. 123, para. 254.

¹³ See *Rhode Island v. Chevron* *supra* note 12, p. 122, para. 246.

¹⁴ See *Rhode Island v. Chevron* *supra* note 12, p. 4, para. 10.

¹⁵ USA, California Northern District Court, San Francisco Division, *Native Village of Kivalina v. ExxonMobil Corp.* (*Kivalina v. ExxonMobil*), [Complaint](#), 26 February 2008, p.1, para. 2.

¹⁶ See *Kivalina v. ExxonMobil* *supra* note 15, p. 47, para. 189.

¹⁷ See *Kivalina v. ExxonMobil* *supra* note 15, p. 67.

¹⁸ USA, Colorado District Court, County of Boulder, *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, [Complaint](#), 17 April 2018, p. 100, para. 452.

¹⁹ See *Boulder County v. Suncor* *supra* note 18, p. 100, para. 454.

²⁰ See *Boulder County v. Suncor* *supra* note 18, pp. 103-104, paras. 468-469.

III. Consumer Protection

In a few cases, plaintiffs have also pleaded consumer protection claims. For instance, in [Mayor & City Council of Baltimore v. BP p.l.c.](#), plaintiffs argued that the defendants “engaged in deceptive marketing and promotion of their products by, *inter alia*, disseminating misleading marketing materials and publications refuting the scientific knowledge generally accepted at that time, advancing pseudo-scientific theories of their own and developing public relations materials that prevented reasonable consumers from recognizing the risk that fossil fuels would cause grave climate changes.”²¹ The alleged behaviour is in breach of Maryland’s Consumer Protection Act, which forbids business from engaging in “any unfair or deceptive trade practice.” Similar allegations based on state consumer protection laws were made in the previously cited [Board of County Commissioners of Boulder County v. Suncor Energy](#) and [City of Richmond v. Chevron Corp.](#) cases.

IV. Shareholder Litigation

Shareholders are becoming increasingly important actors in promoting corporate accountability for climate harms. Institutional and private shareholders are bringing legal action against the companies or private institutions in which they own shares (shareholder litigation). Shareholders have sought diverse remedies, ranging from monetary compensation and restitution, to the enforcement of obligations on climate disclosure, as well as ambitious changes in the business strategy of fossil fuel companies. Plaintiffs typically argue that (1) the lack of knowledge about climate risks undermines their ability to exercise their rights as shareholders and/ or that (2) the company’s misleading use of knowledge has harmed their interests as shareholders.

The world’s first shareholder-led lawsuit over alleged failure to adequately disclose climate risk was [filed against Exxon Mobil Corporation](#) (Exxon) in 2016. This class action was initiated by a group of US investors who sought damages from Exxon after its [stock price fell by 13%](#) that year. Plaintiffs argued that the company had made false and misleading statements relating to the impact of climate change on its business. As a consequence, it had substantially overstated the value of its oil reserves, and artificially inflated the company’s value. While the case was later dismissed, it paved the way for what seems to be a lively trend of federal class action litigation in the U.S.

Since late 2018 at least two new class actions have been initiated in California Federal Courts in the US alleging false and misleading statements relating to climate change impacts in the company’s financial reporting. In [Barnes v. Edison International](#) plaintiffs argue that the company provided misleading information about its mitigation measures related to climate change and the heightened risk of wildfires in California. By doing so, the company “engaged in a plan, scheme, conspiracy and course of conduct, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices and courses of business which operated as a fraud [...]”²² In [York County v. Rambo](#), a coalition of pension funds and investors is suing the utility Pacific Gas and Electric Company and its parent company (PG&E) alleging that “Subsequent to, and due to, defendants’ failure to disclose the true state of PG&E’s business and operations and the risks posed by the Company’s lax wildfire safety practices, the value of these senior notes has substantially declined.”²³ In both cases, the plaintiffs are claiming monetary compensation for the damages sustained.

Litigation is also used to seek the enforcement of other fiduciary duties and procedural rights. In July 2018, [Mark McVeigh, a](#) member of the Australian Retail Employees Superannuation Trust (REST), brought a lawsuit

²¹ USA, Baltimore Circuit Court, *Mayor & City Council of Baltimore v. BP p.l.c.*, [Complaint](#), 20 July 2018, p. 128, para. 292.

²² USA, Central California District Court, *Glen Barnes, et al. v. Edison International, et al.*, [Complaint](#), 16 November 2018, p. 25, para. 59.

²³ USA, Northern California District Court, *York County on Behalf of the County of York Retirement Fund v. Rambo*, [Complaint](#), 22 February 2019, p. 11, para. 60.

arguing that REST had provided him with insufficient information about its climate business risks and mitigating strategies for making an informed choice about the management and financial condition of the fund. The plaintiff demands that REST provides him with the required information. Along similar lines, in October 2018, [ClientEarth](#), a non-profit environmental organization and shareholder in the Polish energy company Enea SA, sued the company in the Regional Court of Poznań in Poland. The lawsuit (not yet publicly available), claims that, due to climate-related financial risks, Enea's approval to construct a coal-fired power plant harms the economic interests of the company and its shareholders.

Along similar lines, in the recently dismissed [Fentress v. Exxon Mobil Corp. plaintiffs](#) claimed that the company breached its fiduciary duty "when they knew or should have known that Exxon's stock had become artificially inflated in value due to fraud and misrepresentation, thus making Exxon stock an imprudent investment under ERISA and damaging the Plan and those Plan participants who bought or held Exxon stock."²⁴ In addition to damages, the plaintiffs requested recognition that the defendants breached their fiduciary duties.

Business & Human Rights Resource Centre Key Resources & Documents on Climate Change

Litigation:

- Blog: [Are shareholders the new champions of climate justice?](#)
- Corporate Legal Accountability Annual Briefing "[Turning up the heat: Corporate legal accountability for climate change](#)"
- [Climate Justice Portal](#)
- [Climate Change Litigation page](#)

²⁴ USA, Southern Texas District Court, *Fentress v. Exxon Mobil Corporation et al.*, [Complaint](#), 23 November 2016, p. 2, para. 3.