December 20, 2023

FEATURE

Environmental Litigation Trends: What Is Heating Up besides the Climate?

Cheryl P. Vollweiler

> Both traditional and nontraditional environmental lawsuits will continue to proliferate, impacting more industries and corporate conduct.

Getty Images/Bloomberg Creative/Bloomberg Creative Photos

Environmental litigation has a different face than it used to. For sure, "traditional" environmental litigation still exists, and the plaintiffs' bar is continuing to challenge

corporations for creating exposure risks that may cause latent injuries. However, concern for the environment has expanded into a new social consciousness that is challenging corporations worldwide to be more mindful of the environment, from environmental and social governance (ESG) initiatives by activist investors (along with shareholder lawsuits for perceived failures to honor those initiatives) to new and novel causes of action by unexpected plaintiffs seeking to monitor how corporations carry out "green" initiatives (or fail to do so). "Green" claims arguably began with the initial climate change lawsuits, the ill-fated Southeast Louisiana Flood Protection Authority (SLFPA) suit (and the ongoing efforts in Louisiana parishes to hold the petrochemical industry responsible for decades of damage to wetlands caused by drilling, mining, and other activities), and the like. Recently, environmentalists and activist investors have expanded the scope of claims in new and novel ways aimed at making corporations more responsible for their actions, both in word and in deed. This article explores some of the trends in traditional and less traditional environmental litigation in light of the new level of social and environmental consciousness.

Developments in "Traditional" Environmental Litigation

Pollution suits. Traditional environmental litigation is still going strong for sure. Superfund sites always need remediation, and everyone has seen the TV ads looking

for plaintiffs who allege they were exposed to contaminated water in and around the Camp Lejeune area. For example, Georgia-Pacific sought U.S. Supreme Court review of a Sixth Circuit Court of Appeals ruling finding that International Paper Co. and Weyerhaeuser Co. are not liable for any part of a $49 million Superfund site cleanup in Michigan, addressing polychlorinated biphenyl (PCB) contamination from decades of use by the paper industry. (1) Specifically, Georgia-Pacific appealed an April 2022 decision that reversed a Michigan trial court's ruling apportioning liability to all three defendants, as well as a fourth defendant, NCR Corp. The Sixth Circuit ruled that the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA's) statute of limitations prevented Georgia-Pacific from collecting costs related to cleaning up the Kalamazoo River Superfund site from International Paper and Weyerhaeuser. In October 2023, the Supreme Court denied certiorari.

Another example of traditional environmental litigation is a ruling in *United States v. Brace*. (2) The Third Circuit Court of Appeals in that case ruled that a Pennsylvania farmer accused of violating the Clean Water Act three decades ago must comply with a subsequent consent decree to restore 18 acres of wetlands on his property that were damaged by planting corn and excavation work in violation of a 1996 EPA consent decree precluding the discharge of pollutants from the farm into the neighboring wetlands. The consent decree required Brace to "disable and remove a drainage tile system located in the wetlands, fill in two surface ditches, and construct a check dam in a specific location," the appellate opinion said, but the lower court found (and the Third Circuit agreed) that drainage tiles were actually installed instead of removed and that the check dam was in the wrong location. (3) Although Brace argued on appeal that the consent decree's maps were hand-drawn and imprecise (with which the court also agreed), the court nevertheless found the violation to be clear and unequivocal.

In *Admiral Insurance Co. v. Niagara Transformer Corp.*, the Second Circuit Court of Appeals addressed the duty to defend in the context of pollution costs. (4) It ruled that a federal trial court was incorrect in declining to determine whether an insurer

may have to defend a transformer manufacturer in a possible dispute with an agrochemical company over pollution cleanup costs, even though the underlying conflict had not yet resulted in litigation. The court remanded the case to the trial court for a determination as to the probability of whether underlying litigation is likely to occur, and only after that conclusion is reached, for a decision on whether the court may decline jurisdiction, at which point the appeal may proceed. The Second Circuit did, however, affirm the trial court's dismissal of Admiral on duty to indemnify, holding that the trial court correctly found it lacked jurisdiction to make that ruling.

Endangered species suits. The U.S. District Court for the District of Montana transferred to the U.S. District Court for the District of Columbia a lawsuit challenging the Trump administration's reissuance in early 2021 of Nationwide Permit (NWP) 12, which applies to certain oil and gas pipeline-related activities. The issue in that case is whether the defendants had corrected a prior failure to comply with the Endangered Species Act (ESA). In the earlier case, the plaintiffs challenged the 2017 issuance of NWP 12, which would have permitted the Keystone XL pipeline, which the court determined "posed a potential impact to ESA species in the State of Montana." (5) In the present suit, the court ruled that plaintiff Center for Biological Diversity identified only one project that purported to use NWP 12 and allegedly harmed their interests, but identified no ESA-protected species or critical habitat in the area of that project. The court therefore found that no substantial parts of the events or omissions giving rise to the ESA claim had occurred in the District of Montana, and only plaintiffs that resided in Montana lacked standing to bring an ESA claim.

Climate change suits. Courts are also addressing claims related to climate change. For example, the Third Circuit affirmed remand orders in the City of Hoboken and State of Delaware climate change suits brought against petroleum/fossil fuel industry defendants. (6) The Third Circuit found "no federal hook" to allow removal of the state tort law suits to federal court. (7) In doing so, the court rejected the defendants' arguments that the state law claims were inherently federal or necessarily raised a

federal question, or that the Outer Continental Shelf Lands Act or federal officer removal statutes formed a basis for federal jurisdiction. The Third Circuit found that "[c]limate change is an important problem with national and global implications" but that "federal courts cannot hear cases just because they are important." [8]

A fossil fuel company defendant in Honolulu's and Maui's climate change lawsuits filed an action for breach of contract and declaratory relief against its insurer for failing to provide coverage in the Honolulu and Maui actions. [9] The fossil fuel company claimed that the insurer breached its contractual obligations by erroneously asserting that the qualified pollution exclusion of a 1985 commercial general liability insurance policy precluded defense and indemnity coverage in the underlying actions. The defendant alleged that it had incurred more than $880,000 in defense costs in connection with the underlying lawsuits and that it expected to continue to incur significant defense costs. The matter has been stayed pending the disposition of questions certified to the Hawaii Supreme Court. [10]

The U.S. District Court for the Central District of California stayed a case (and ordered the parties to comply with a prior stipulated agreement) brought by the Center for Biological Diversity challenging a 2017 order finding that offshore oil and gas activities on the Pacific Outer Continental Shelf off the coast of California were unlikely to adversely affect species listed under the ESA and claiming the failure to reinitiate consultation under the ESA given new information about impacts not previously considered, such as new studies regarding the impact of oil and gas drilling on climate change. [11] About three months after the suit was filed, the Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement requested that consultation be reinitiated based on representations that they would be updating their oil spill risk analysis in February 2023, considering a newly designated critical habitat for two species of whale, and revisiting proposed actions for potential impacts to ESA-listed marine species. [12]

Developments in PFAS Lawsuits

In what some observers believe may be the next "asbestos" litigation, per- and polyfluoroalkyl substance (PFAS) lawsuits are continuing to grow in number and change in nature to allege new exposure sources and pathways.

Old PFAS suits. Municipal water districts and individual plaintiffs continue to file suits alleging bodily injury and property damage from PFAS. In January 2023, the Alameda County Water District suit, initially filed in California federal court, was transferred to the aqueous film-forming foam multidistrict litigation (AFFF MDL) in South Carolina against 3M, DuPont, and other companies, alleging that decades of exposure to AFFF and other toxic chemicals contaminated its drinking water system. [13] The water district, which serves a population of about 345,000 in and around Fremont, Newark, and Union City on the East Bay, asserted the same allegations as the MDL plaintiffs, specifically that since the 1960s about two dozen companies produced and sold PFAS, which they knew to be toxic and leached into the drinking water system. The water districts seek compensation for past and future water treatment and other system cleanup and remediation for alleged contamination from perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), and other chemicals. [14]

In September 2022, the AFFF MDL court denied summary judgment motions by defendant AFFF manufacturers, rejecting their claim that the suits are barred by the government contractor immunity statute. [15] In doing so, the court held that a triable question of fact exists as to whether 3M and other manufacturers knowingly withheld information about the risks associated with PFAS from the government, such that the government could then make an informed decision as to whether it wished to include PFAS in its product specifications for firefighting foam products despite knowledge of the risks (which the court found is necessary to confer immunity to the manufacturers). This decision paved the way for the court to move forward in the first bellwether trial involving the City of Stuart, Florida. [16] Waiting in the wings of the AFFF MDL are

suits by thousands of firefighters who allege that their exposure to firefighting foam and other products caused serious injuries and/or fear of serious illness, which are stayed pending resolution of the water district bellwether cases.

In March 2022, an Ohio federal trial court judge certified a class of plaintiffs who claim that 3M and other national chemical manufacturers knowingly put their health at risk (including causing various cancers and birth defects) for decades by selling and distributing PFAS, although the ruling certifying the class is on appeal at the Sixth Circuit. [17]

New PFAS suits. Litigation over the impacts of PFAS continues to evolve, with McDonald's and Burger King having recently been sued over PFAS in food packaging. The *McDonald's* case, pending in Illinois, is a proposed class action suit alleging that every time a consumer buys a Big Mac, they are exposed to PFAS that increase risks of cancer and other illnesses, while the fast-food giant assures the public that its products are safe. [18] The complaint alleges that PFAS have been found to cause various health effects, including cancer, liver damage, fertility issues, and other diseases, and these compounds found in food product packaging are likely to make their way into the food itself. The *Burger King* case, another proposed class action suit filed in California, contains virtually identical allegations, including that Burger King fails to disclose to customers the dangers its Whoppers present to their health and, in fact, markets its products as "safe" and "sustainable." [19]

Recent "Greenwashing" Litigation

Activist litigators are trying to keep corporate feet to the fire in how they advertise their "green" initiatives to be sure they are not misleading the public about their efforts. In this regard, Client Earth and two other organizations filed a lawsuit under the District of Columbia Consumer Protection Procedures Act (CPPA) alleging that Washington Gas Light Company falsely and deceptively marketed its natural gas products and services

as "clean" and sustainable. [20] The complaint alleged that the utility's campaign inappropriately capitalized on consumer demands to reduce reliance on fossil fuels by using deceptive claims like use of natural gas was a "key driver" of greenhouse gas reductions in D.C., and natural gas provides "low carbon" energy that would help D.C. become carbon-neutral. [21] The plaintiffs alleged that natural gas is harmful to the environment and its use "is not what reasonable consumers would consider 'clean,' . . . especially because it releases far more emissions than alternatives like renewable energy sources would." [22] They further alleged that Washington Gas's natural gas products were "decidedly not 'low carbon,'" and that Washington Gas's disclosures that its low-carbon gas supply was 0% in 2018 and was planned to increase to 2% by 2025 "demonstrate[] just how misleading their 'sustainability' statements to consumers are." [23] The complaint sought a declaration that Washington Gas's conduct violated the CPPA, an injunction preventing the conduct that violates the CPPA, costs, disbursements, and attorney fees. In August 2023, the court granted Washington Gas's motion to dismiss, ruling that the CPPA explicitly exempts gas companies regulated by the Public Service Commission from the court's subject matter jurisdiction. [24]

In November 2022, two courts dismissed greenwashing claims against Coca-Cola. [25] In both cases, the plaintiffs asserted that Coca-Cola made false and misleading statements regarding the sustainability and environmental friendliness of Coca-Cola products. The suits took issue with Coca-Cola's statements, such as a tweet saying: "Business and sustainability are not separate stories for The Coca-Cola Company—but different facets of the same story." [26] Both courts rejected those allegations and dismissed the suits, with one judge finding that Coca-Cola's statements were goals, not a specific promise to consumers, and "[c]ourts cannot be expected to determine whether a company is actually committed to creating a 'world without waste' or 'to doing business the right way,'" referring to some of the company's green slogans. [27]

Environmental and Social Governance Lawsuits

True ESG lawsuits are finding new avenues in claims asserted by governments as well as private litigants. In April 2022, the SEC commenced a securities fraud suit against Vale S.A. (a publicly traded mining company based in Brazil) in the U.S. District Court for the Eastern District of New York. [28] The suit arose out of the January 2015 collapse of a dam operated by Vale in Brazil that killed 270 people and released approximately 12 million cubic tons of toxic mining waste into a river, polluting the local water supply. The event resulted in a $4 billion loss in market capitalization for Vale. The SEC alleged that Vale knew of the dam's compromised integrity and the risks associated therewith but knowingly manipulated data and concealed information from dam safety auditors. The SEC charged Vale with making false and misleading statements to its investors concerning the dam's safety and stability. Vale moved to dismiss the suit on the grounds that the dam's collapse was not reasonably foreseeable; contrary to the SEC's claims, it made all necessary disclosures to the proper external parties; and the alleged misstatements and omissions were not material to investors. [29] In March 2023, the parties settled, with Vale agreeing to pay a $25 million civil penalty and $30.9 million in disgorgement and prejudgment interest, in addition to general injunctive relief. [30]

In 2021, investors filed a class action suit against Danimer Scientific, Inc., a bioplastics company that went public via a business combination with a special purpose acquisition company (SPAC). [31] Danimer's primary proprietary product was a plastic substitute, Nodax, which the company alleged was 100% biodegradable. However, a *Wall Street Journal* article and subsequent news reports cast doubt on the accuracy of Danimer's claims about its product, citing sources who alleged that Danimer greatly exaggerated claims about the product's ability to completely biodegrade in oceans and landfills, which in turn caused Danimer's stock price to drop. [32] Investors alleged that Danimer made materially false and misleading statements regarding the environmentally friendly attributes and sustainability of its product. In May 2022, Danimer moved to dismiss, arguing that its claims of biodegradability applied specifically to its Nodax material but not to end products made with Nodax,

such as plastic straws, bottles, or utensils, and thus the plaintiffs' allegations did not "contradict[] the certifications and scientific research supporting Danimer's claims." [33] In September 2023, the court found that the plaintiffs had adequately alleged that Danimer made some statements that were materially misleading, but it granted the motion to dismiss for failure to adequately allege scienter. [34]

Other ESG Litigation Trends and Risks

Activist plaintiffs are also targeting new industries with "green" claims, as well as asserting novel allegations about conduct for which they believe corporations should be held accountable. So far, these cases are not gaining much traction, but the number of plaintiffs asserting new claims continues to grow.

Fair trade/labor inequities. Class action plaintiffs commenced a lawsuit in 2021 alleging that Greek yogurt manufacturer Chobani markets itself as the "first Fair Trade USA dairy company" but citing a 2017 report describing Chobani's use of immigrant dairy farmworkers in New York State with "dangerous conditions," "low pay," and "lack of common workplace protections." [35] The complaint asserted claims for violation of New York's consumer protection statute and breach of warranty, among others. Chobani reached a confidential settlement before discovery commenced. Similar suits have been commenced against Nestlé USA, [36] Mars, Inc., [37] and others, alleging claims relating to forced and child labor. For example, in *Hughes v. Big Heart Pet Brands*, the plaintiffs alleged that the defendants should have disclosed the existence of forced labor in their supply chain. [38] The defendants successfully moved to dismiss the suit on the ground that they had no duty to disclose because the existence of forced labor in the supply chain did not affect the product's "central function." [39]

Animal welfare (and environmental). Class action plaintiffs challenged various claims made by shoe manufacturer Allbirds in ads for its wool shoes, alleging Allbirds engaged in "misleading animal welfare claims" when promoting that its sheep "Live The Good

Life" and are treated "humanely," are "happy," and live in "pastoral settings"; and misleading claims about its environmental impact, including "Sustainability Meets Style," "Low Carbon Footprint," "Environmentally Friendly," "Made with Sustainable Wool," "Reversing Climate Change," and "Our Sustainable Practices," based on allegations that investigations showed "workers beat, stomped on, cut open the skin of, and slit the throats of conscious, struggling sheep." [40] The trial court dismissed the suit, finding that the plaintiffs' allegations, which largely consisted of criticisms of the wool industry in general, did not plausibly allege that Allbirds' descriptions of its own practices were false or misleading. [41]

Diversity. Some activist investors have tried to hold corporate directors and officers accountable for failing to carry out diversity initiatives at all levels of the company by asserting shareholder derivative suits against directors and officers of companies that have touted vigorous diversity initiatives on a company-wide basis but allegedly failed to diversify senior management teams or boards of directors. Although several such suits have been brought, to date, they generally have not survived motions to dismiss. [42]

Conclusion

Clearly, environmental litigation is not going away. Traditional environmental suits continue to be filed alleging violations of federal, state, and local environmental protection statutes. New lawsuits continue to be filed asserting novel allegations to seek redress from the fossil fuel industry for the effects of pollution and greenhouse gas emissions on climate change. PFAS manufacturers, distributors, and sellers continue to be a target of municipalities and individuals seeking damages for a long list of problems allegedly related to PFAS exposure. Activist shareholders, public watchdog groups, and governmental agencies are using litigation to persuade corporations to meaningfully address environmental and social issues through more mindful governance and truthful advertising. Many of the newer and more novel claims have not yet taken hold,

and courts generally are being vigilant in weeding out "junk" cases and requiring activists and activist shareholders to plead with specificity or risk dismissal. Plaintiffs, however, appear to be using each suit as a learning experience and are likely to keep refining their claims to try to gain traction in the courts. Overall, it is foreseeable that both traditional and nontraditional environmental lawsuits will continue to proliferate, impacting more industries and more kinds of corporate conduct that activists and activist investors deem questionable or unacceptable.

Endnotes

ENTITY:

TORT TRIAL AND INSURANCE PRACTICE SECTION

TOPIC:

ENVIRONMENT, LITIGATION & TRIALS, TORTS

Authors

Cheryl P. Vollweiler
Skarzynski, Marick & Black, LLP

Cheryl P. Vollweiler is a partner with Skarzynski, Marick & Black, LLP in New York, where she handles all manner of insurance coverage issues and disputes involving an extensive range of insurance policies and programs.