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Novel Legal Strategies, Financial Risk and Preparedness for Uncertainty in Climate Litigation

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Beginning in 2015, the year that the Paris Climate Agreement was ratified, global climate litigation topped 100 cases annually. Over 250 Climate-related cases were filed in 2021 and 2022 before falling back to approximately 230 in 2023. According to the Grantham Research Institute on Climate Change and the Environment, a research institute at the London School of Economics, raw case numbers do not fully capture the risk for organizations. Private citizens, activists and non-governmental organizations (NGOs), at times in partnership with each other, have based their climate claims on novel and sometimes creative legal strategies. Plaintiffs have increasingly targeted corporations in addition to governments with the aim of encouraging companies to modify their behavior vis-a-vis the climate. Given the potential financial stakes, reputational risks and evolving regulations, organizations should closely monitor climate cases to prepare for potential lawsuits and precedent-setting decisions that may impact them. To better understand climate litigation and offer guidance to organizations that could face novel legal strategies, RANE spoke to **Charity Lee** of **Clearly Gottlieb**. Among her areas of expertise, **Lee** is experienced in climate change litigation and has represented multinational corporations in such suits.

Known and Potential Legal Theories

Climate litigation has transformed since 2006: Whereas previously, governments were the primary targets of activist lawsuits for shortcomings in climate policy, the private sector is increasingly a focus of plaintiffs who accuse companies of contributing to climate change. Climate cases are now often based on a range of legal theories that plaintiffs connect to climate change; at their core, novel claims are a legal strategy employed to establish organizational liability. For example, claimants have based their suits on human rights law (climate change infringes on the right to clean air and water –– as seen in the 2023 case against the State of Montana), tort law (current and historic climate damage), consumer protection (misleading claims), money laundering (financing fossil fuel projects) and even on statutes aimed at prosecuting organized crime (where pipelines are considered a criminal "enterprise"). In *BLOOM and Others v. TotalEnergies* (2024), plaintiffs contend that the board and shareholders should be criminally liable for their decisions contributing to climate change; the case is pending. At the same time, there has been an increase in greenwashing claims wherein plaintiffs contend that corporations are misleading a range of shareholders and creating unfair competition, such as in *Deutsche Umwelthilfe v. Danone Deutschland GmBH* (2023). Greenwashing cases have also been based on alleged violations of securities laws that require accurate disclosures of company activities. Activists have also applied these strategies to file claims focusing on 'portfolio emissions.' While **Lee** does not want to presume the specific motivations of any of the plaintiffs or their lawyers in bringing novel cases, **Lee** does say that plaintiffs increasingly view climate litigation as a tool to modify corporate behavior on climate change.

In terms of case counts, the Grantham Institute recorded a slight decrease in cases from 2022 to 2023. Companies might take some comfort in the suggestion of slightly more favorable legal conditions, especially amid an increase in resistance to environmental, social and governance principles. Any optimism, however, should be carefully measured. Case counts in the developing world are incomplete because of poor reporting and difficulties in acquiring case data. For example, cases remain pending across many jurisdictions; the Sabin Center at Columbia University Law School counts, as of April 2024, 19 known cases pending in five jurisdictions in Africa. **Lee** highlights a transitional stage in climate litigation; more cases are making it beyond the initial motion to dismiss. Similarly, Professor Douglas Kysar of Yale Law School notes that a case that proceeds to discovery effectively levels the playing field by allowing the plaintiffs to request documents and construct a narrative about the defendant's record on climate change. Cases based on human rights law could gain more traction in Europe, as opposed to the United States, because transnational laws take precedence over EU law. But regardless of jurisdiction, **Lee** says that she expects plaintiffs to continue to refine and test novel claims in court and that defendants will have to modify their defensive tactics to match.

In addition to the array of climate lawsuits that organizations are now facing across jurisdictions, **Lee** cautions that newly enforceable climate-related laws could become the basis for claims based on public disclosures. For example, Corporate Sustainability Reporting Directive (CSRD) requirements in the European Union will be phased into effect from 2024-29. Large companies operating in the European Union or non-EU companies that generate €150 million ($165 million) will be required to report on sustainability. One goal of the new reporting requirements is to ensure transparency for investors and other stakeholders in terms of the financial risks present by climate change; climate plaintiffs are likely to continue to view themselves as instrumental in that effort. Similarly, the European Union's Corporate Sustainability Due Diligence Directive (CSDDD) includes several provisions that will be phased in through 2029. Companies must disclose, among other provisions, the negative or potentially negative environmental impacts of their activities, along with the measures to prevent, mitigate and remediate those impacts. Lawsuits focusing on any of these individual components are a plausible response from activists and NGOs who perceive a "say-do" gap –– instances of a company making one environmental claim but not following through. It is here that **Lee** says companies can be more diligent in their public statements. As a result of new disclosure requirements, claims of underreporting, unrealistic mitigation strategies, misleading investors or insufficient data collection are likely to continue and may be combined with each other.

One area ostensibly external to the law that could result in novel case developments is climate attribution science. Climate attribution science, determining the extent to which observed weather is caused by climate change, has improved with the innovation of robust modeling. Climatologists are able to say with greater precision that a specific weather event and associated damage was exacerbated by climate change. As modeling and analysis techniques continue to advance, these models will likely become more accurate and more likely to be admissible. According to the Sabin Center for Climate Change Law at Columbia University, some attribution science could be admissible if it aligns with the *Daubert* standard established by the Supreme Court. Judges must determine whether the scientific knowledge passes a four-part test: (data) testability, peer review, error rate and acceptance in the

relevant scientific community. Courts in the European Union could be more receptive to attribution science; they have already accepted probabilistic attribution evidence following European heatwaves since 2000. Since no single entity is fully responsible for all degrees of warming or the resulting severe weather, determining liability and assigning penalties based solely on attribution remains challenging. Despite the current uncertainty around the admissibility of attribution science in climate cases, methods like probabilistic modeling could potentially increase its impact as a legal risk.

Motivations for Litigation

Given the volume of climate cases, the range of novel legal strategies and the multitude of jurisdictions in which those cases are pending, understanding the range of plaintiff objectives could provide some perspective on future cases. Though litigation is not necessarily intended to replace policy advocacy, some climate activists brought their cases based on a perceived failure of public policy to adequately address climate change. **Lee** views policy and the legal systems as two levers that can work together. Nonetheless, due to perceived policy inadequacy, activists turn to litigation to bring climate issues into the public consciousness. The shift towards targeting corporations, alongside governments, in lawsuits highlights the changing priorities of plaintiffs. **Lee's** suggestion that behavior modification, such as in *Friends of the Earth v. Royal Dutch Shell* (2021), instead of an exclusive policy focus, motivates claims against corporations and is supported by the increase of cases against corporations. Furthermore, activists hope to raise awareness and galvanize public support for the aforementioned behavior modification. A well-informed consumer base could, theoretically, alter its purchasing decisions and create commercial pressure for corporations to consider climate action.

An additional factor driving plaintiff behavior is the climate justice movement. Advocates of climate justice, the belief that climate action must address the unequal distribution of climate change impacts, turn to litigation as a method to redistribute finite resources to communities most affected by climate change. For example, in the landmark *KlimaSeniorinnen v. Switzerland*,2000 senior Swiss women claimed in a human rights court that Swiss climate policies were placing them at undo risk. The women proved that they were uniquely vulnerable to dying in heat waves and in April 2024, the court ruled that the Swiss government must uphold its climate commitments. Activists succeeded in suing the Government of South Korea in August 2024; the Court ruled that the absence of legally binding emissions targets violates the constitutional rights of future generations. Cases such as these could establish a blueprint for plaintiffs bringing claims against governments or corporations and a precedent for judges in cases relating to climate justice.

Elevated and Uncertain Financial Risk

The financial risks associated with climate-related litigation are multi-faceted and, therefore, challenging to quantify precisely. It is possible, however, to classify types of financial risk associated with litigation into two broad categories, each with its own implications for risk management: direct costs and indirect costs. Direct costs are similar to those associated with nearly any corporate litigation; they are quantifiable and include court-related expenses such as legal fees. Settlements, if reached, or penalties, if assessed, add to the overall costs of litigation but are among the direct costs. Indirect costs, by

contrast, are less clearly defined because they are dependent on factors external to the organization and the court–they may also be dependent on the direct costs, which further complicates their valuation. Indirect costs include the time that management must spend preparing for court appearances or even the downgrading of a credit rating as the result of a large settlement. To that end, a 2024 study by the Oxford Sustainable Law Programme suggested that one oil company's liabilities could total $8.5 trillion, which would far exceed profits. Cases that compel changes to business practices – what **Lee** calls behavior modification – from reconfiguring supply chains to switching costs could undermine profits. Taken together, the Oxford study that suggests some investors could be "flying blind" to the litigation risk could turn out to be prescient. In addition, being named in a climate-related lawsuit could result in reputational damage to the organization or its leadership; investors (financing), customers (purchasing decisions), and current or future employees (human capital) could alter their behavior in response to the case. Notably, a favorable resolution of the case does not necessarily result in fully containing the damage.

Elevated financial risks are possible for nearly all types of organizations, but certain sectors and their supply chain partners are uniquely vulnerable to climate lawsuits. Among the most frequently targeted industries are fossil fuel companies and financial institutions. Other industries with commercial dependencies on fossil fuels and banks make up a much larger third group. Notably, a 2023 study by the Grantham Institute estimated that the market capitalization of Carbon Majors could be decreased by -0.5% to -1.5%, compared to expected value, in the event of a highly unfavorable or precedent-setting ruling. Decreases on the higher end of the distribution are more closely associated with novel legal arguments, precedent-setting judgments and large enforcement actions. The statistical analysis showed less correlation for other types of companies, but the researchers still found a need for stakeholders to consider climate litigation risk as a material financial risk.

Financial institutions have been accused of enabling climate change as a result of lending to or underwriting carbon-heavy industries. Morningstar's Sustainalytics studied financial risks to banks in 2024 and determined that banks face their own direct and indirect financial risks. Other claims against financial institutions include failures of climate due diligence, such as the 2023 case in France against BNP Paribas for loaning money to fossil fuel developments without robust plans to mitigate climate damage. Similarly, claims of greenwashing and misleading leading statements feature prominently in a 2023 suit against the Royal Bank of Canada (RBC). The cases against BNP and RBC remain pending. Also of note, banks with simultaneous European and US exposure could conceivably face lawsuits for climate action in one jurisdiction and climate inaction in the other.

Preparing for Litigation in the Short and Long Term

One approach that **Lee** endorses for preparing for climate-related lawsuits is to focus on feasible climate plans with quantifiable and defensible results. **Lee** refers to this approach as 'back to basics.' Among the legal strategies being pursued by plaintiffs in a number of cases are claims that company plans for sustainability are unrealistic and difficult to validate. Similarly, lawsuits have challenged the feasibility of a range of net-zero promises, focusing on both the target date and/or the proposed methods. Companies

can, therefore, prepare for, or even preempt, these kinds of lawsuits by ensuring that climate plans are feasible and based on verifiable research. Companies should establish internal structures to collect and maintain the data required to verify that stated targets and goals have been satisfied. Internally and externally verifiable data also helps to establish transparent corporate practices and ensure, as **Lee** advocates, that public statements match actual practice. Considering that some activists have accused companies of obfuscation for the explicit purpose of misleading the public or investors, improved transparency could aid in blunting some of those claims.

Looking Ahead

2030 could become a turning point for climate litigation because of the overlap of intermediate net-zero commitments with enforceable disclosure requirements. Many organizations, companies and governments have set intermediate targets for 2030 for their 2050 net-zero commitments. At the same time, more robust climate disclosure requirements, such as CSDDD, will, by 2030, have been in full force for several years. As a result, organizations should prepare for the possibility that activists, NGOs and other stakeholders could begin examining organizational climate progress in preparation for those 2030 benchmarks. Suits could be filed against organizations whose pledged commitments have not materialized or whose disclosures are inconsistent or unclear. Organizations should, therefore, carefully calibrate their planning for 2030 in order to ensure that pledged targets match public filings and are both attainable and attained. Lawsuits could also come from large shareholders or class action suits from smaller shareholders, all of whom may claim that they have been misled about company activities and performance.

About The Expert

Charity E. Lee's practice at Cleary Gottlieb focuses on civil litigation and arbitration, with an emphasis on cross-border ESG matters. Lee has represented domestic and international clients from a range of sectors in complex civil litigation in state and federal court. She is also experienced in White-Collar Defense and Investigations. Lee joined Cleary Gottlieb in 2014. She holds a Bachelor of Art with distinction from the University of Virginia and earned her J.D. from the New York University School of Law. Lee was an Executive Editor of Academic Articles at *The New York University Journal of Law & Business.*