Marsh

# Climate liability and insurance — Guidance

# Introduction

Climate change is a significant challenge facing organisations across sectors and geographies. With larger corporations facing greater responsibility and scrutiny in relation to their role in and impact on climate change, there can be an increased risk of climate liability.

No matter the type, sector, or size of your business, the risk of climate liability may affect you in ways you may not be anticipating. Businesses should be taking steps to consider and analyse their exposure to climate change liability as part of their Enterprise Risk Management (ERM) process, including whether their current insurance programmes help, or could help, manage that risk.

This guidance is designed to assist with that analysis by providing an overview of some of the key trends in the current climate liability landscape and points to consider as a risk manager.

There are of course other types of risk that businesses could face in relation to climate change, or the environment more generally — for example climate change mitigation, adaptation, regulatory, or reputational risks — but this guidance focuses on the current trends being seen that relate to climate liability risk.

# Climate liability landscape and business disruption

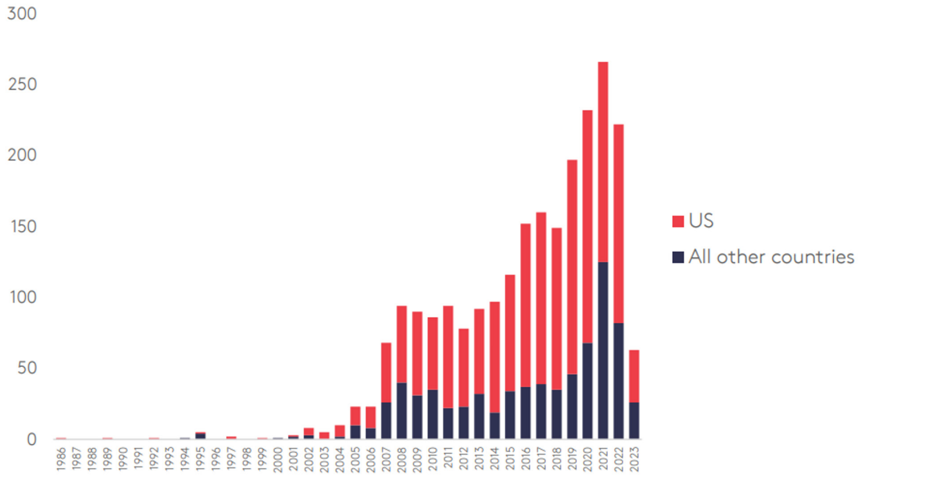
Exposure to climate liability is wider than the risk that you or your business may be on the receiving end of claims from third parties. Climate litigation is shaping the business landscape by, for example, pushing governments and regulators to change regulatory and/or disclosure requirements. In addition, it can cause business disruption requiring changes to business plans, policies, or necessitating investigations. Alternatively, a business may need to bring its own claim to protect its business interests and/or assets. All of these can involve cost and disruption.

The legal basis of claims varies, and often depends on national laws, but it is clear that, globally, the number of climate litigation cases has grown recently at a rapid rate, and the nature of the claims being brought is expanding.

Here are some key points to note about trends in climate cases[1].[2]

- There have been **2341 cases globally** involving a material issue of climate change science, policy, or law. This does not include cases that might otherwise refer to climate change or which have settled before getting to court or private claims, such as arbitration.
- Around **two-thirds of those cases have been filed since 2015** — 190 between June 2022 and May 2023 alone.
- **Climate cases have been filed in every region of the world.** The highest number is in the US, followed by Australia, the UK, and the EU respectively. Other jurisdictions with high numbers of documented climate cases are Germany, Brazil, and Canada.[3]

Figure 1.1. Total climate change cases over time, US and non-US (1986 to 31 May 2023)




*Note: Data collection for 2023 is still underway, and there may be a small delay between cases being filed and being identified and processed for inclusion in the databases, therefore the 2023 data are incomplete.*

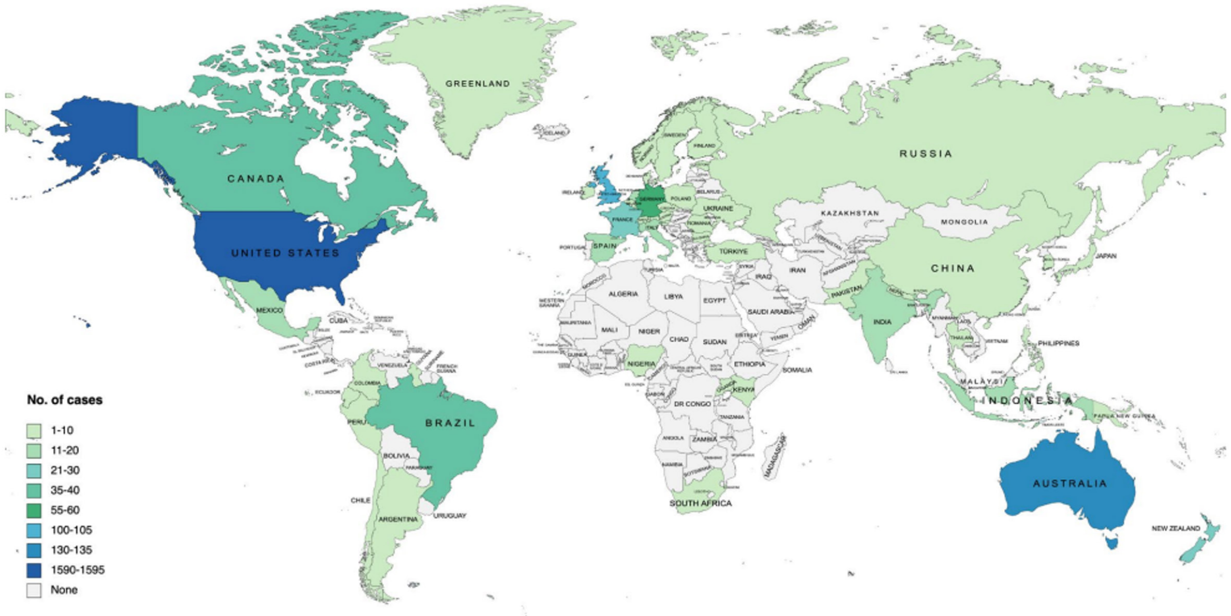
*Source: Authors based on Sabin Center databases*

1| Many key points taken from: Setzer J and Higham C (2023) *Global Trends in Climate Change Litigation: 2023 Snapshot.* London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot/

2| Figure 1.1 taken from Setzer and Higham (2023) *Global Trends in Climate Change Litigation: 2023 Snapshot.*

3| Figure 1.2 taken from Setzer and Higham (2023) *Global Trends in Climate Change Litigation: 2023 Snapshot.*

**Figure 1.2. Number of climate litigation cases around the world, per jurisdiction (up to 31 May 2023)**




*Note: Cumulative figures to 31 May 2023. This figure only includes cases filed before national courts or quasi-judicial bodies specific to a given country. The 118 cases filed before international or regional bodies, including the courts of the European Union, are not included.*

*Source: Authors based on Sabin Center databases. Created with mapchart.net.*

- Between June 2022 and May 2023, seven new jurisdictions recorded climate cases: Bulgaria, China, Finland, Romania, Russia, Thailand, and Turkey.
- Climate litigation includes not only cases that are favourable to climate action, but also claims by those that are against climate action.
- 70% of climate cases historically were against governments. In the 12 months to 31 May 2023, this made up only 54% of cases. This shows there has been an **increase in climate claims against corporates**.
- Recently, there have been **cases against corporates across a wider range of sectors**. Sectors facing climate cases in 2021-22 include: travel, personal & leisure; food & tobacco manufacturing; banking insurance & financial services; transport manufacturing; retail; and construction. This is largely to do with a significant increase in “climate-washing” cases — see below.

This demonstrates that **whatever your businesses’ size, geography, or sector — the risk of climate liability is relevant**.

Climate liability could arise from a number of different sources. It is a very complex and fast-moving area. In the following pages we outline some of the key categories of climate liability being seen, but it is not an exhaustive list.

## Climate-washing cases

The Grantham Institute 2023 snapshot referred to *"an explosion of 'climate-washing' cases"* in recent years. Climate-washing (similar to the perhaps better known "greenwashing", but specifically in relation to climate change) is where people or businesses make statements or claims regarding their actions, practices or performance in relation to climate change (often greenhouse gas emissions) which are false, misleading or unsubstantiated. Claims could be brought by customers, shareholders, or other stakeholders, or contractual counterparties. Of note is that the Grantham Institute identifies that cases *"challenging the truthfulness of corporate climate commitments, particularly where these are not backed up by adequate plans and policies"* has been one of the most significant growth areas with regard to this category of litigation.[4]

In many jurisdictions, there is now or will soon be specific regulation or legislation seeking to control climate-washing (or greenwashing more generally) and to put systems in place to hold businesses responsible when there is evidence of climate-washing. This may lead to a further increase in the number of climate-washing cases, using such regulation as a platform.

The risk of climate-washing is not limited to litigation. Complaints to national bodies can also be made in relation to advertising or marketing. This may not always bring legal liability but could bring the risk of penalties (including fines) and/or damage to reputation.

## Public and administrative law cases

The majority of climate cases so far (although this is changing) has been brought against governments (national or local) and international trade or public bodies. These cases include even the smallest of cases where a claimant is challenging a local authority's decision to grant a licence in respect of a high-emitting project.

While these claims are not directly against businesses, such cases do shape the business and regulatory landscape. This results in an indirect effect on businesses by heightening climate liability risk. For example, such cases can encourage governments to change or tighten regulation, increase regulatory interest or scrutiny, or reduce capacity for planning or licensing approvals.

There is also a contagion effect whereby successful legal arguments against public bodies, can be used by strategic claimants against private businesses. For example, in May 2021 the Hague District Court found in favour of a group of Dutch NGOs and more than 17,000 individual claimants and ruled that Royal Dutch Shell had to reduce its overall $CO2$ emissions by net 45% by the end of 2030, relative to 2019 levels.[5] While specific to Dutch legal principles, it is a decision that will be of interest to private companies as this case builds upon a prior case brought against the Dutch government in 2019 where the Dutch Supreme Court held that the Dutch government had to do more to protect its citizens from climate change and reduce the nation's greenhouse gas emissions on human rights grounds.[6]

## Environmental torts

This category of climate litigation comprises cases where claimants are seeking compensation for the effects of climate change that the defendants have allegedly caused or contributed to. Claimants may be claiming for, for example:

- Damage to property or nature caused by climate change necessitating cost to remedy it.
- Impacts on business or lifestyle as a result of climate change e.g. reduced agricultural yields.
- The increased cost of adapting to climate change.

Some of these cases have been brought by local authorities or cities against businesses, including in some cases where proceedings have been brought in a country in the global north where the parent company is domiciled, even though the event giving rise to the damage took place in a different country or as a result of actions by a subsidiary overseas.

4| Setzer and Higham (2023) *Global Trends in Climate Change Litigation: 2023 Snapshot*, p.39

5| *Milieudefensie et al. v. Royal Dutch Shell plc*

6| *Urgenda Foundation v State of the Netherlands*

## Claims against corporates in relation to carbon emissions

These could be claims against carbon emitters themselves, or cases that seek to influence businesses to reduce high-emitting activities in relation to specific projects or in the general course of doing business. Such claims often target businesses' policies, business practices, or stated climate ambitions (or lack thereof).

Legal arguments vary and are being developed all the time, but they may include arguing that businesses (or governments) have failed to adapt to a low carbon transition.

Similar claims target the financing or "enabling" of high-emitting activities (including specific projects) by financial institutions in order to encourage the consideration of climate change in decision-making.

## Investigations including in relation to Directors

Recently, as stated above, there has been closer scrutiny on and pressure for businesses to factor climate change into their decision-making. This includes in relation to boards of directors. For example, an environmental charity brought a derivative action (where a shareholder brings a claim against a company's directors on behalf of the company) against the directors of a leading energy company[7] on the basis that their business strategy did not comply with their directors' duties under the UK Companies Act 2006 as it did not adequately take climate change into account. While this case was not successful (and the Court of Appeal has refused permission to appeal), it may inspire further cases in the future or in other jurisdictions.

7| *ClientEarth v Shell Board of Directors*

# Points to consider as a risk manager

In light of this rapidly evolving landscape, below are some key points for risk managers to bear in mind when considering the businesses' potential exposure to climate liability risks and how to assess, mitigate, and transfer those risks. When undertaking any climate impact analysis it is important to consider your own business' potential liabilities in respect of its own direct actions or inactions, as well as those of your business' supply chains.

While this note focusses on climate liability, there are many other environmental issues and potential liabilities which may also be relevant to your business — such as in relation to nature, biodiversity, deforestation, waste, energy efficiency and land, water, and resource usage. Many of the points set out below are also likely to apply to these additional potential liabilities.

| Insurance stage | Key points to consider |
|---|---|
| **Placement — placing information** | Insurers may ask for more information about your climate credentials or status at placement stage so make sure you have the information available. Ensure you have an early conversation with your broker and underwriters to understand what information is required.<br>Gathering the relevant information may involve you seeking further information from relevant people/teams in your business — including climate emissions data, climate or sustainability policy, any statements in relation to climate. You may also need to consider obtaining this information from or asking questions of other stakeholders, including directors, employees, and members of your value chain, including any customers, suppliers, partners or contractual counterparties. Remember certain jurisdictions have a pre-inception duty of disclosure, for example the UK duty to make a fair presentation of the risk. |
| **Placement — market capacity** | Insurers' risk appetite may be changing in relation to certain risks (for example fossil fuels projects). So you should discuss with your broker as early as possible whether there are any limits on capacity for the type of risk you are looking to insure, or signals from insurers on either their investment strategies or underwriting guidelines that maybe alter their future ability to support the risk. |
| **Policy coverage — wordings** | Once you have an understanding of your business' exposure to climate liability risk you should carry out a risk assessment and policy review with your broker. This will help you identify which of your insurance policies may be able to mitigate some of the business exposure, and whether the terms and conditions of the relevant policies are suitable.<br>As part of that risk assessment you should consider hypothetical claims scenarios to understand your greatest exposures and how your existing insurance programme would respond. For example:<br>**Policy Limits**<br>• Are your current policy limits adequate?<br>• Even if climate actions against corporates are unsuccessful, the costs of defending them may be very high. Therefore, where you have existing cover for defence costs, is the level of cover available adequate? This applies equally to the costs of regulatory investigations in relation to climate.<br>• Does your policy have a sub-limit for defence costs cover?<br>**Policy Exclusions**<br>• Does your policy contain any exclusions which could be relied upon by insurers to decline cover in respect of climate liability? Whilst there are only a small number of 'climate change' exclusions in the market, they are broadly drafted.<br>• You should discuss with your broker whether your policies contain such an exclusion, whether they could apply to your business' risk, and, where such an exclusion is present challenge the underwriter as to why such an exclusion is necessary.<br>**Coverage Gaps**<br>Undertaking the risk assessment and policy analysis will also assist in identifying where your business faces potential gaps in cover.<br>• Speak to your broker about whether any policy extensions are required to cover specific risks.<br>• Consider with your broker to what extent your current insurance policies/products cover new or potential exposures for climate liability risk and how might they need to be developed, either with existing insurance products or new products. |
| **Claims — notifications** | As always, notifications of a circumstance (if relevant) or a claim should be made promptly. You may need to consider making precautionary notifications. The decision on whether or not to notify a circumstance in relation to climate liability can sometimes be challenging, particularly if it is unclear from the outset whether there is any potential (for example) for a general complaint to develop into climate litigation.<br>Please discuss with your broker if you are not sure whether a notification should be made. Your broker can also help you make that notification. |

The growing number and expanding nature of climate litigation cases highlights the need for businesses to review their exposure to climate change liability as part of their ERM process. Exposure to climate liability can be much wider than the risk of claims from third parties. Businesses also need to consider how governments and regulators are responding to climate change, for example the growing focus on controlling "climate-washing". As the exposure to climate litigation increases so will insurers' interest in how policyholders are assessing and mitigating their climate liability risk exposure. It would be prudent for customers to undertake a climate risk analysis to understand your potential exposure and, working with your broker, whether your insurance arrangements may mitigate some of that exposure.

Marsh

## About Marsh

Marsh is the world's leading insurance broker and risk advisor. With more than 45,000 colleagues advising clients in over 130 countries, Marsh serves commercial and individual clients with data-driven risk solutions and advisory services. Marsh is a business of Marsh McLennan (NYSE: MMC), the world's leading professional services firm in the areas of risk, strategy and people. With annual revenue of $23 billion, Marsh McLennan helps clients navigate an increasingly dynamic and complex environment through four market-leading businesses: Marsh, Guy Carpenter, Mercer and Oliver Wyman. For more information, visit marsh.com, and follow us on LinkedIn and X.