STEVENS&BOLTON

Welcome to

CLIMATE CHANGE LITIGATION

Valerie Fogleman

The lecture will start soon !

STEVENS&BOLTON

CLIMATE CHANGE LITIGATION

Valerie Fogleman, Consultant, Stevens & Bolton LLP
Professor of Law, Cardiff University School of Law and Politics

TOPICS

- Climate change; the science
- Climate change litigation
  - Claims against governments
  - Claims against corporations
    - Claims against ‘carbon majors’
    - Securities and financial regulation claims
  - Insurance claims
  - Trends

CLIMATE CHANGE; THE SCIENCE

- Six main greenhouse gases (GHGs)
  - Carbon dioxide (CO2)
  - Methane (CH4)
  - Nitrous oxide (N2O)
  - F-gases
    - Hydrofluorocarbons (HFCs)
    - Perfluorocarbons (PFCs)
    - Sulphur hexafluoride (SF6)
- Approximately 80% of GHG emissions are CO2

CLIMATE CHANGE; THE SCIENCE

- Carbon dioxide
  - Remains in the atmosphere for about 100 years
- Methane
  - 21 times as effective as CO2 in trapping heat
  - Remains in the atmosphere for 11-12 years
- Nitrous oxide
  - 200 to 300 times as effective as CO2 in trapping heat
  - Remains in the atmosphere for up to 150 years
- F-gases
  - 3,000 to 13,000 as effective as CO2 in trapping heat
  - Remain in the atmosphere for up to 400 years

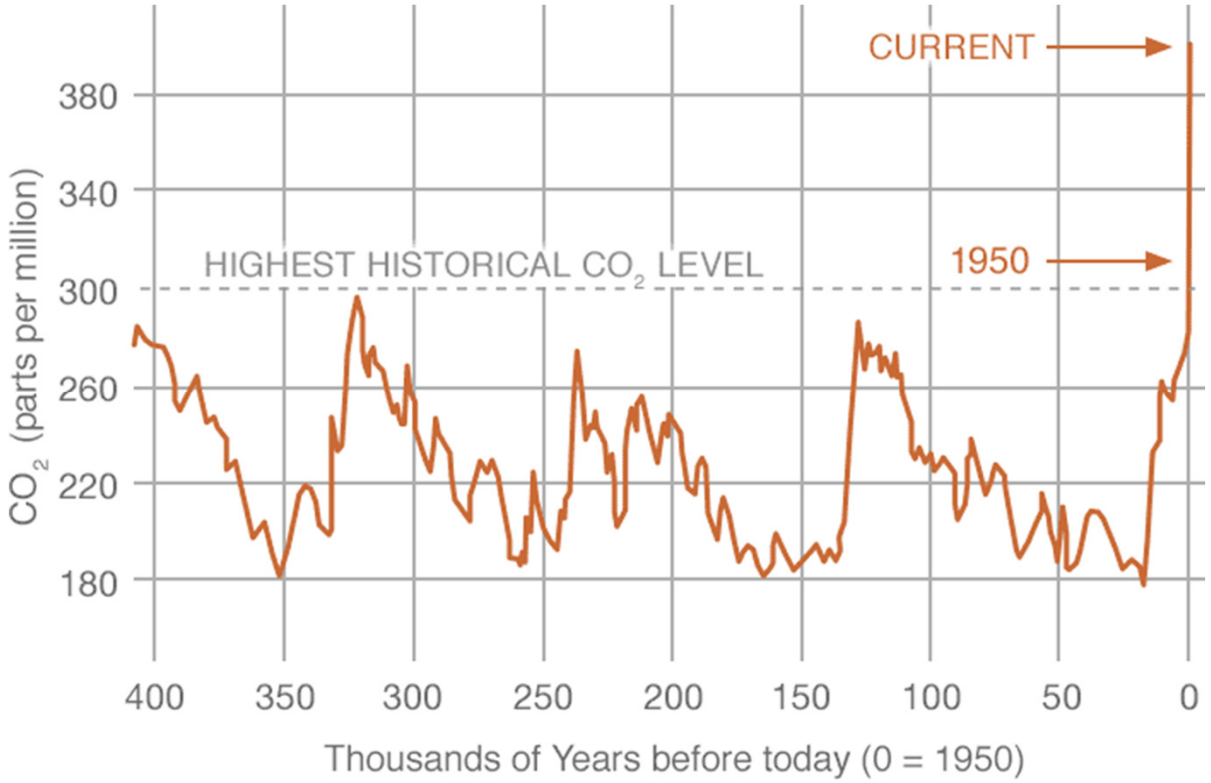
CLIMATE CHANGE; THE SCIENCE

- According to 136 year records by NASA
  - 2019 was the second hottest year globally since 1880
    - Second only to 2016
  - 2014 to 2019 were the hottest years ever recorded

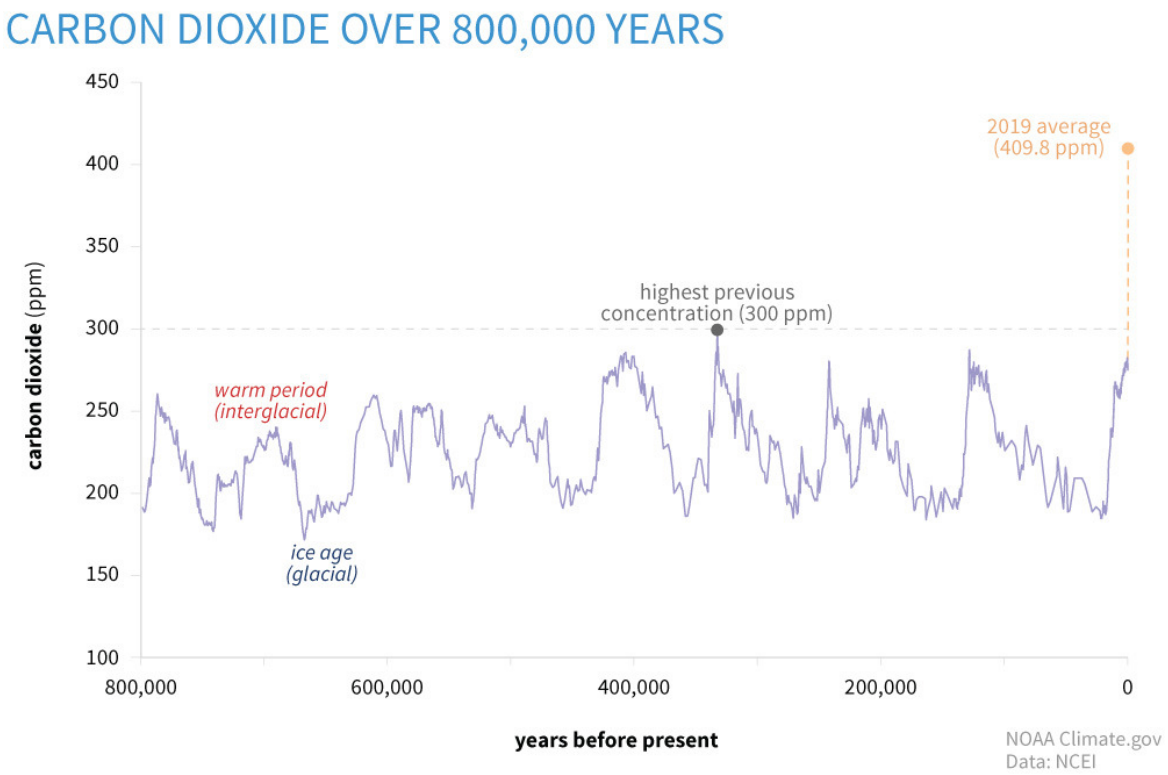
CLIMATE CHANGE; THE SCIENCE

- CO2 levels in the atmosphere have increased by over 35% since the industrial revolution (18th and 19th centuries)
  - Over 1/3 of the increase has occurred since 1980
- Levels recorded at Mauna Loa Observatory, Hawaii
  - January 2015: 400.10 parts per million (ppm)
  - May 2019: 414.7 ppm
  - May 2020: 417 ppm

CLIMATE CHANGE; THE SCIENCE



CLIMATE CHANGE; THE SCIENCE



CLIMATE CHANGE; THE SCIENCE

- If global average temperature reaches 3ºC above pre-industrial levels (which could occur by 2300), sea level is expected to rise by 2.7 to 5.1 metres, of which between 2 and 4 metres would be due to the melting of the Arctic and Antarctic ice sheets
- Difference in global average temperature of earth from coldest in last ice age (11,000 years ago) to today was about 8 to 10ºC
- Total temperature increase from 1850-1899 to 2001-2005 was 1.4ºC
- Temperature rise at the poles is faster than other parts of the world

CLIMATE CHANGE LITIGATION

- Key categories of cases
  - Claims against governments
  - Claims against corporations
    - Claims against carbon majors
    - Securities and financial regulation claims
  - Insurance claims (three US cases; no non-US cases)
  - ABI has commented that the major impacts of climate change on insurers are
    - Weather-related events such as hurricanes, extreme freezes (claims for burst pipes in UK in early 2018 cost insurers £194 million in a three-month period), extreme heatwaves (claims for damage from subsidence by over 10,000 households in UK in 2018 cost insurers over £64 million), and flooding
    - Fall in value of assets in which insurers invest

CLIMATE CHANGE LITIGATION

- Other types of cases
  - 2017-2018: 159 cases in the US concerned federal climate change policy including litigation concerning the Obama Administration's climate change policies and decisions
  - Freedom of information/public record cases
  - Cases against protestors
  - Cases by people seeking refuge or asylum due to threat of climate change

CLIMATE CHANGE LITIGATION

STEVENS&BOLTON

- Best source of climate change litigation
  - Sabin Center for Climate Change Law, Columbia Law School / Columbia University Earth Institute https://climate.law.columbia.edu/content/climate-change-litigation and http://climatecasechart.com/
- Also Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science
  - https://www.lse.ac.uk/granthaminstitute/
- Centre for Climate Change Economics and Policy, hosted by University of Leeds and London School of Economics and Political Science
  - https://www.cccep.ac.uk/

CLIMATE CHANGE LITIGATION

- Number of climate change cases between 1986 and 30 May 2020
  - US: 1,213 cases
  - Non-US: 374 cases
    - Australia: 98 cases
    - UK: 62 cases
    - EU bodies and courts: 57

    Asia: 16

    Latin America: 14

    Africa: 7

  - 41%: climate change was the central legal argument
  - 59%: climate change was a peripheral issue

Source: Joana Setzer and Rebecca Byrnes, Global trends in climate change litigation: 2020 snapshot (July 2020)

CLAIMS AGAINST GOVERNMENTS

STEVENS&BOLTON

- *Commonwealth of Massachusetts v EPA,* 549 U.S. 497 (2007)
  - 1999: 19 organisations filed a petition requesting the US Environmental Protection Agency (EPA) to regulate GHG emissions from new motor vehicles under the Clean Air Act (CAA)
  - September 2003: EPA denied the petition
  - EPA considered that the CAA did not authorise it to issue regulations to address global climate change
    - Essentially considered that CO2 is not a pollutant because it does not 'pollute' the air
  - Even if the EPA had such authority, it considered that it would be unwise to issue such regulations

CLAIMS AGAINST GOVERNMENTS

- *Massachusetts v EPA* (continued)
  - Standing
    - Test for constitutional standing requires claimants to demonstrate that they have
      - A concrete and particularised injury that is either actual or imminent
      - The injury is fairly traceable to the defendant
      - A favourable decision is likely to redress that injury
  - US Supreme Court ruled that Massachusetts had standing because it had a particularised injury in its capacity as landowner of a substantial portion of coastal property
  - Injury was fairly traceable to the EPA because domestic automobiles emitted over 6% of global CO2
  - Rulemaking would slow or reduce loss of the Massachusetts coastline

CLAIMS AGAINST GOVERNMENTS

- *Massachusetts v EPA* (continued)
  - CAA is unambiguous that CO2 is a pollutant
  - EPA is therefore authorised to regulate CO2
  - EPA had stated that it had such authority in 1998 and had never disavowed it
  - EPA had not offered a reasonable explanation for its refusal to decide whether GHGs cause or contribute to climate change
  - Court did not reach issue of whether the EPA must make an 'endangerment finding' but held only that the EPA must ground its reasons for action or inaction in the CAA
    - Endangerment finding
      - a finding by the EPA that current and projected concentrations of GHGs in the atmosphere threaten the public health and welfare of current and future generations
      - provides the basis for the EPA to issue regulations on GHGs under the CAA

CLAIMS AGAINST GOVERNMENTS

- Atmospheric Trust litigation
  - Environmental NGOs and others have brought about 50 cases against the federal Government and States seeking to compel them to regulate climate change on behalf of present and future generations
  - Public trust doctrine
  - US Constitution
    - Substantive due process clause of the Fifth Amendment ('No person shall … be deprived of life, liberty, or property, without due process of law …') (applies only to the federal Government)
    - Equal protection clause (Fourteenth Amendment) ('… No State shall … deprive any person of life, liberty, or property, without due process of law …')
    - Ninth Amendment ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people')

CLAIMS AGAINST GOVERNMENTS

- *Juliana v United States* (US District Court for the District of Oregon)
  - August 2015: 21 people aged 8 to 19, Earth Guardians and James Hansen of Columbia University (as guardian for future generations) alleged that the US Government had breached the equal protection provisions of the Fourteen Amendment and the substantive due process provision of the Fifth Amendment by endangering them and future generations with policies that contributed to climate change
    - Some of the children lived on farms affected by drought; others had lost their homes because of floods; others faced health issues because of forest fires
  - Requested US Government to create a 'national remedial plan' to stabilise the climate and 'restore the Earth's energy balance'
  - Main argument: 'government has known for more than 50 years that carbon dioxide produced by burning fossil fuels was destabilizing the climate system in a way that would significantly endanger plaintiffs, with the damage persisting for millennia'

CLAIMS AGAINST GOVERNMENTS

STEVENS&BOLTON

CLAIMS AGAINST GOVERNMENTS

STEVENS&BOLTON

- November 2016: District Court denied defendants' motion to dismiss for failure to state a claim and lack of jurisdiction
- 30 July 2018: US Supreme Court denied the US Government's application for a stay in the start date for trial of 29 October 2018, and its 'premature' request to review the case before the District Court could hear that facts supporting the claims
- 17 January 2020: Ninth Circuit ruled 2-1 to dismiss the action on the basis that the plaintiffs lacked standing to sue because climate policies must come from the legislative, not the judicial, branch of government (justiciability issue)
- 2 March 2020: plaintiffs filed a petition for a rehearing *en banc*

CLAIMS AGAINST GOVERNMENTS

- *Urgenda Foundation v State of the Netherlands (Ministry of Infrastructure and the Environment)*
  - Action by an environmental NGO
  - Based on Dutch law that requires the State to have 'due care' for its citizens; also that the Netherlands had recognised, by signing international climate change conventions, that a failure adequately to reduce emissions would harm its citizens
  - Dutch target had been 17% lower than 1990 levels
    - (1990 levels are used as baseline levels under the UN Framework Convention on Climate Change, the Paris Agreement, and various legislation for calculating targets for reducing CO2 emissions)

CLAIMS AGAINST GOVERNMENTS

- *Urgenda* (continued)
  - 24 June 2015: Hague District Court
    - Applied principles of the Council of Europe Convention on Human Rights to interpret the Government's duty of care
    - Ruled that the State had a 'serious duty of care to take measures to prevent climate change' and to 'mitigate as quickly and as much as possible'
    - Ordered the Dutch Government to take more measures to reduce GHG emissions to ensure that Dutch emissions in 2020 will be at least 25% lower than those in 1990
  - 2015: Dutch Government appealed, raising 29 grounds of appeal

CLAIMS AGAINST GOVERNMENTS

- *Urgenda* (continued)
  - 9 October 2018: Hague Court of Appeal ordered the Dutch Government to carry out measures to reduce GHG emissions by 25% by 2020
    - Ruled that climate change was sufficiently serious that the Dutch Government's failure to carry out more ambitious measures was a breach of article 2 (right to life) and article 8 (right to respect for private and family life) of the Convention on Human Rights
    - Concluded that Urgenda had the right to invoke articles 2 and 8 directly on behalf of individuals

CLAIMS AGAINST GOVERNMENTS

- *Urgenda* (continued)
  - 20 December 2019: Dutch Supreme Court ruled
    - Dutch Government had breached its obligations under articles 2 and 8 of the Convention on Human Rights due to the risk of dangerous climate change that could seriously affect the rights to life and well-being of residents of the Netherlands
    - Dutch Government must reduce its emissions by a minimum of 25% by the end of 2020 compared to 1990 levels

CLAIMS AGAINST GOVERNMENTS

- *Friends of the Irish Environment CLG v Ireland*
  - Action by an environmental NGO
    - FIE argued that the Irish Government's 2017 National Mitigation Plan did not meet requirements of the Climate Action and Low Carbon Development Act 2015
      - Plan set out measures to reduce emissions of CO2 and to transition Ireland to a low carbon, climate resilient and environmentally sustainable economy by 2050
    - Government had breached the Irish Constitution and articles 2 and 8 of the Convention on Human Rights
    - September 2019: High Court dismissed action
      - FIE, a corporate entity, had standing to bring constitutional and human rights claims but
      - 2015 Act does not require the plan to achieve specific intermediate targets; plan was only a 'piece of the jigsaw'

CLAIMS AGAINST GOVERNMENTS

- *Friends of the Irish Environment* (continued)
  - 31 July 2020: Irish Supreme Court ruled for FIE
    - Quashed the plan because it concluded that it was *ultra vires* (that is, it exceeded the Government's powers) because it fell 'well short of the level of specificity required … to comply with the provisions of the 2015 Act'
      - A reasonable and interested member of the public could not know how the Government intended to meet the transition objective, and some policies in the plan were 'excessively vague or aspirational'
    - Court did not address human rights issues
    - Concluded that FIE did not have standing to bring them because it does not enjoy the right to life or the right to bodily integrity
  - Irish Government must now create a new, more ambitious National Mitigation Plan that complies with Ireland's national and international climate obligations

CLAIMS AGAINST GOVERNMENTS

- *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 (27 February 2020)
  - Application for judicial review by five London boroughs, Mayor of London, Friends of the Earth, Plan B Earth, Greenpeace and a member of the public
  - Challenged issuance by Secretary of State for Transportation of 'Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England', dated 26 June 2018 (ANPS) that favoured the development of a third runway at Heathrow Airport
  - Section 5(8) of the Planning Act 2008 provides that the reasons for the policy set out in the ANPS 'must (in particular) include an explanation of how the policy … takes account of Government policy relating to the mitigation of, and adaptation to, climate change …'
  - 1 May 2019: Divisional Court dismissed two claims for judicial review of the ANPS

CLAIMS AGAINST GOVERNMENTS

- *Plan B Earth* (continued)
  - Other grounds included breach of the Climate Change Act 2008, its relationship to the Paris Agreement, environmental issues, and human rights
    - Climate Change Act set a 'carbon target' for the UK to reduce its GHG emissions by 80% from their 1990 level by 2050
    - 29 June 2019: amended to 100% reduction target
  - Court of Appeal rejected most grounds but ruled that the Secretary of State failed to take into account the UK Government's commitment to the Paris Agreement when it issued the ANPS

CLAIMS AGAINST GOVERNMENTS

- *Plan B Earth* (continued)
  - UK Government decided not to appeal
  - 6 May 2020: UK Supreme Court granted right to appeal to Heathrow Airport Ltd (airport operator) and Arora Holdings Ltd (represents a group of companies that own land within the boundaries of Heathrow and intends to build and operate a new terminal at Heathrow)
  - 7-8 October 2020: hearing scheduled

CLAIMS AGAINST GOVERNMENTS

STEVENS&BOLTON

- *R (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004
  - 2019: UK Government commissioned a review to consider whether and if so how to continue with HS2
  - 11 February 2020: Government decided to proceed with HS2
  - 3 April 2020: High Court denied an application for judicial review by Chris Packham on the basis, among other things, that the UK Government had failed to take account of the project's GHG emissions in light of the Paris Agreement and the Climate Change Act 2008
  - 29 June 2020: Court of Appeal agreed to hear the appeal

CLAIMS AGAINST GOVERNMENTS

- *Packham* (continued)
  - 31 July 2020: Court of Appeal denied the application for judicial review
    - Stated that it could be taken that the UK Government was aware of its commitments under the Paris Agreement and its responsibilities under the Climate Change Act and that it took them both into account in its decision
      - There was no evidence to the contrary
    - Distinguished *Plan B Earth* by stating that the Paris Agreement is an unincorporated international obligation not having the status of government policy on climate change
    - Also, whereas section 5(8) of the Planning Act 2008 sets out clear duties for decision making in respect of the ANPS, the UK Government was not constrained by the Climate Change Act in deciding to proceed with HS2

CLAIMS AGAINST CARBON MAJORS

- *American Electric Power Company v Connecticut*
  - 2004: 8 States, City of New York and 3 land trusts brought a federal common law of nuisance action against 6 electric utilities that operated fossil fuel plants in 20 States
  - Alleged that GHG emissions from the defendants' operations were causing harm to human health and the environment by contributing to global warming
  - Sought an injunction for the utilities to reduce GHG emissions

CLAIMS AGAINST CARBON MAJORS

- *American Electric Power Company* (continued)
  - 2005: District Court dismissed the actions on the basis of a non-justiciable political question
  - 2006: Second Circuit Court of Appeals held oral arguments
  - 2009: Second Circuit vacated the case
    - Case did not raise non-justiciable political question
    - Claimants had standing to sue
    - Federal common law of nuisance applied to claims
    - Not been displaced by the CAA or EPA's rulemaking under the CAA
    - Did not reach state law issues

CLAIMS AGAINST CARBON MAJORS

- *American Electric Power Company* (continued)
  - 19 April 2011: US Supreme Court held oral arguments
  - 20 June 2011: reversed the Second Circuit
    - Federal common law of nuisance claims were displaced by EPA's authority to regulate CO2 under the CAA and the EPA's exercise of that authority
    - 4 justices concluded that at least some plaintiffs had standing; 4 concluded that no plaintiffs had standing
    - Justice Sotomeyer recused herself because she was involved in the 2nd Circuit decision
    - Did not decide whether state nuisance law applied
      - Left question for consideration on remand

CLAIMS AGAINST CARBON MAJORS

- *Comer v Murphy Oil USA, Inc.*
  - 20 September 2005: persons whose property was damaged by Hurricane Katrina brought an action seeking compensatory and punitive damages from 147 oil, chemical, coal and other companies
    - Alleged that the defendants contributed to global warming adding to the strength of Katrina
  - 28 May 2010: Fifth Circuit Court of Appeals eventually dismissed the case
  - 10 January 2011: US Supreme Court denied mandamus petition

CLAIMS AGAINST CARBON MAJORS

STEVENS&BOLTON

- *Native Village of Kivalina v ExxonMobil Corporation*
  - 2008: Inupiat village in Alaska filed an action against 24 oil, utilities and coal companies in the US District Court for the Northern District of California
  - Alleged public and private nuisance, civil conspiracy and concert of action
  - Alleged that GHG emissions had caused sea ice to melt and erode the shoreline around their village
  - Sought the cost of relocating the village ($95 - $400 million (£73 - £306 million))

CLAIMS AGAINST CARBON MAJORS

CLAIMS AGAINST CARBON MAJORS

- *Kivalina* (continued)
  - September 2009: District Court dismissed the action
    - Village did not have standing
      - Non-justiciable political question
  - 21 September 2012: Ninth Circuit Court of Appeals affirmed the District Court's ruling
  - 20 May 2013: US Supreme Court denied certiorari

CLAIMS AGAINST CARBON MAJORS

- *People of the State of California v BP P.L.C., Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation and Royal Dutch Shell PLC* (San Francisco Superior Court)
- *People of the State of California v BP P.L.C., Chevron Corporation, ConocoPhillips, Exxon Mobile Corporation and Royal Dutch Shell PLC* (Alameda County Superior Court)
  - 20 September 2017: both actions filed
  - Actions in public nuisance by San Francisco and Oakland alleging that the defendants marketed and produced fossil fuels knowing that the fuels would and did create a public nuisance including sea level rise and flooding
  - Sought funding to finance infrastructure to deal with rising sea levels

CLAIMS AGAINST CARBON MAJORS

- *People of the State of California* (continued)
  - 20 October 2017: defendants removed both actions to the US District Court for the Northern District of California on the basis that they are governed by federal common law and presented substantial federal questions including the actions being displaced by the CAA
  - 27 February 2018: District Court denied motions by San Francisco and Oakland to remand the cases to State court
  - June 2018: District Court dismissed the actions on the basis of the CAA and judicial deference to policymakers
  - 26 May 2020: Ninth Circuit Court of Appeal
    - Denied motions by defendants to hear the cases in federal court
    - Ruled that both cases should be revived and sent back to the District Court to consider whether they should be heard in State courts

CLAIMS AGAINST CARBON MAJORS

- *City of New York v BP P.L.C., Chevron Corporation, ConocoPhillips, ExxonMobil Corporation and Royal Dutch Shell PLC*
  - 9 January 2018: New York City filed an action in US District Court for the Southern District of New York
  - Alleged that the defendants produced 11% of all GHGs through oil and gas products sold by them and that they have known the adverse consequences of burning fossil fuels but engaged in misinformation campaigns to cast doubt on climate change that delayed regulation of the fossil fuel industry thus allowing them to protect their businesses and assets
    - Actions in public nuisance, private nuisance and trespass
      - Mentioned rebuilding costs from Hurricane Sandy
      - Based on internal documents, especially Exxon Mobil (Exxon) documents

CLAIMS AGAINST CARBON MAJORS

- *City of New York v BP* (continued)
  - Sought an order for reimbursement of costs related to climate change and an injunction to abate public nuisance and trespass if the defendants failed to pay damages for past and permanent injuries
  - 19 July 2019: Court dismissed the action on the basis that the claims were based on the transboundary nature of GHGs from the worldwide production of fossil fuels, not production of fossil fuels in New York
  - 22 November 2019: oral argument of plaintiff' appeal to Second Circuit to reinstate the lawsuit

CLAIMS AGAINST CARBON MAJORS

STEVENS&BOLTON

- *Milieudefensie v Royal Dutch Shell plc*
  - 5 April 2019: Milieudefensie, Friends of the Earth Netherlands, other environmental NGOs and over 17,000 members of the public brought an action in the Hague Court of Appeals against Shell alleging that its contributions to climate change breach its duty of care under Dutch law and articles 2 and 8 of the European Convention on Human Rights
  - Plaintiffs seek a ruling that Shell must reduce its CO2 emissions by 45% by 2030 compared to 2010 levels and to zero by 2050, in line with the Paris Agreement
  - Plaintiffs seek to extend the decision in *Urgenda* to private companies, arguing that given the Paris Agreement's goals and the scientific evidence regarding the dangers of climate change, Shell has a duty of care under the Dutch Civil Code and articles 2 and 8 of the European Convention on Human Rights

CLAIMS AGAINST CARBON MAJORS

- *Milieudefensie* (continued)
  - Plaintiffs argued that
    - Shell's long knowledge of climate change, misleading statements on climate change, and inadequate action to reduce climate change help support a finding of Shell's unlawful endangerment of Dutch citizens and actions constituting gross negligence
    - Shell is responsible for 1.8% of all CO2 emitted by humans, a significant proportion of GHGs emitted since the late 1980s can be traced back to 25 companies including Shell, and that Shell's activities and products are responsible for approximately 1% of global GHG emissions each year
  - 1 September and 30 October 2020: parties scheduled to provide evidence on the facts and the law
  - 1, 3, 15 and 17 December 2020: hearings scheduled for judge to clarify which questions the parties should explore in greater depth

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation
  - 2015: Inside Climate News began an investigation of Exxon's role in climate change
    - July 1977: presentation by James F. Black, a senior scientist in the Research & Engineering Division of Exxon, at its headquarters on the dangers of climate change followed by a written version stating, among other things

      'In the first place, there is general scientific agreement that the most likely manner in which mankind is influencing the global climate is through carbon dioxide release from the burning of fossil fuels'

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
  - 1978: Black updated his presentation to more personnel including scientists and managers at Exxon
    - Warned that an estimated doubling of CO2 in the atmosphere would increase average global temperatures by 2 to 3°C, and up to 10°C at the poles; rainfall could increase in some regions and desertification could occur in others
    - He stated that 'Some countries would benefit but others would have their agricultural output reduced or destroyed' and 'Present thinking holds that man has a time window of five to ten years before the need for hard decisions regarding changes in energy strategies might become critical'

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- ExxonMobil litigation (continued)
  - 1978 to late 1980s: Exxon carried out a detailed research programme into CO2 from fossil fuels and its impact
  - 1980s: Exxon ended the research programme and began denying that climate change existed
  - November 2015: New York Attorney General (AG), Eric Schneiderman, issued a subpoena to Exxon demanding documents from 1 January 1977 including
    - Documents on climate change prepared for or by industry groups including the American Petroleum Institute, the U.S. Oil & Gas Association and the International Petroleum Industry Environmental Conservation Association
    - Documents related to Exxon's support or funding of advocacy groups involved in climate change
    - Marketing and advertising documents about climate change, including communications to employees and spokesmen about how to discuss the subject, as well as advertisements and other public-facing documents

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
  - 2016: Maura Healey, Massachusetts AG issued a civil investigative demand to Exxon alleging that it breached State consumer protection rules and misled investors about the impact of fossil fuels on climate change and risks of climate change to its businesses
  - Demanded that Exxon provide internal documents from 1976
  - Exxon responded that
    - Massachusetts had no jurisdiction over it because it only franchised service stations in Massachusetts and did not have an actual business operation in the State
    - Demand breached the due process clause of the 14th amendment to the US Constitution because Exxon is a non-resident; headquartered outside Massachusetts

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
  - June 2016: Exxon filed an action to stop Massachusetts and New York carrying out their investigations on the basis that the investigations sought to retaliate against Exxon for its views of climate change and thus breached its constitutional rights
  - January 2017: Massachusetts Superior Court ruled that Exxon must provide internal documents about impacts of fossil fuel combustion to AGs
  - 13 April 2018: Massachusetts Supreme Judicial Court affirmed an order from the Superior Court denying Exxon's motion to bar the Massachusetts AG pursuing the investigation
  - 7 January 2019: US Supreme Court declined to review Exxon's petition for a writ of certiorari seeking review of the Massachusetts Supreme Judicial Court's ruling

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
  - October 2019: Massachusetts AG filed an action against Exxon alleging consumer and investor fraud
    - Alleged that Exxon hid its early knowledge of climate change and misled investors about the projected financial impact on its business
  - 30 July 2020: Exxon filed a notice indicating that it would seek to dismiss the action

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
  - 24 October 2018: New York AG filed a fraud action against Exxon in New York State Supreme Court
    - Alleged that Exxon had perpetrated a 'longstanding fraudulent scheme – to deceive investors and the investment community … concerning [its] management of the risks posed to its business by climate change'
    - Also alleged that Exxon had made materially false and misleading representations concerning the proxy cost of CO2 that it claimed to use in simulations of the impact of future climate change regulations on its business
    - Sought an injunction, damages, and restitution for investors

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
  - 10 December 2019: court dismissed New York AG's action with prejudice finding that he had failed to establish that Exxon had made any material misstatements or omissions that misled a reasonable investor about its practices or procedures for accounting for climate change risk
  - 10 January 2020: New York AG announces that they will not appear the ruling
  - NB: issues relate only to fraud not responsibility for climate change

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- *In re Exxon Mobil Corporation*
  - 2 May 2019: two Exxon shareholders filed a derivative action in the US District Court for the Northern District of Texas against various directors and officers of Exxon
  - Alleged that Exxon had 'a well-documented history of intentionally misleading the public concerning global climate change and its connection to fossil fuel usage, as well as the impact the changing climate will have on Exxon's reserve values and long-term business prospects'
  - Alleged breaches of federal securities laws and fiduciary duty, waste of corporate assets, and unjust enrichment
  - Also sought contribution from defendant directors and officers in a federal securities class action in the same court
  - 31 May 2019: plaintiff in another shareholder derivative action in the same court sought to consolidate both actions
  - 6 August 2019: court granted motion for consolidation

SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- *O'Donnell v Commonwealth*
  - 22 July 2020: Kathleen O'Donnell (a 23 year old student who owns Australian government bonds that will mature in 2050) filed a class action against the Australian Government on the basis that it failed to disclose material climate change risks relating to its bonds
  - Alleged that
    - Australian Government, as a 'promoter' of the bonds, owes a duty of utmost candour and honesty to investors
    - Government disclosed some risks but not climate change risks, in breach of the Australian Investments and Securities Commission Act 2001
    - Government also breached its duty of disclosure under the Public Governance, Performance and Accountability Act 2013
  - Claim seeks an injunction to restrain the Government from further promoting the bonds until it complies with the duty of disclosure

INSURANCE CLAIMS

- *Steadfast Insurance Company v AES Corporation*
  - 2008: Steadfast (an indirect subsidiary of Zurich Financial Services) filed an action for declaratory judgment that it was not obliged to defend its insured, AES Corporation (an energy company), under commercial general liability policies for any damages for which AES was liable
    - AES was a defendant in the *Kivalina* action
  - Steadfast argued that the claims for property damage did not result from an 'accident', that the damage occurred before September 2003, the inception date for its policies, and GHGs are a pollutant and are barred by pollution exclusions in the policies
    - Policies provided cover for damage 'caused by an occurrence'
    - 'Occurrence' was defined as 'an accident, including continuous or repeated exposure to substantially the same general harmful condition'

INSURANCE CLAIMS

- *Steadfast* (continued)
  - February 2010: Virginia Circuit Court granted Steadfast's motion for summary judgment and held that Steadfast did not have a duty to defend AES because there was no 'occurrence' as defined by the policies
  - September 2011: Virginia Supreme Court affirmed the Circuit Court's decision on the basis that the release of GHGs was not an 'accident' or an 'occurrence'
  - January 2012: Virginia Supreme Court granted a motion for a new hearing to AES
    - AES had argued that the court's decision was overly broad
  - April 2012: Virginia Supreme Court reaffirmed its previous holding on the basis that any alleged damages incurred by AES were due to its intentional acts in emitting GHGs and were not an 'accident' or an 'occurrence'

INSURANCE CLAIMS

- *Pietrangelo v S & E Customize It Auto Corporation*
  - 2013: Small claims action
  - Plaintiff alleged that the defendant, a vehicle repair company, was negligent in failing to have flood insurance, resulting in the plaintiff not being fully compensated for damage to her vehicle caused by Hurricane/Superstorm Sandy whilst the vehicle was in the defendant's repair shop in Staten Island, New York
  - Court ruled that the repair company was not liable for failure to obtain insurance for the bailment of the defendant's vehicle
  - Court also ruled that the claimant had failed to show that the defendant was negligent

INSURANCE CLAIMS

- *Pietrangelo* (continued)
  - Court further ruled that the negligence claim was barred by the 'act of nature' defence
  - Court stated, in what it termed 'merely intellectual speculation', that if it was true that climate change caused Sandy to become a superstorm, 'then the possibility exists that Sandy is not a pure "act of nature" but is the result of human activity'
  - Court did not reach this issue but commented that the act of nature defence would still be available because 'locating a source of the altered weather pattern might be impossible' and 'the proper party or parties could not be identified with any certainty so as to bring them into the court's jurisdiction'

INSURANCE CLAIMS

- *Illinois Farmers Insurance Company v Metropolitan Water Reclamation District of Great Chicago*
  - 2013: Illinois Farmers Insurance Company, Farmers Insurance Exchange and various subsidiaries and related entities brought actions against the water reclamation districts for Greater Chicago, Cook County, City of Chicago and numerous other municipalities in negligent maintenance, failure to remedy known dangerous conditions and takings without just compensation
  - Alleged that the municipalities' failure to implement reasonable measures to manage storm water and increase capacity for managing the water after heavy rains in April 2013 had resulted in sewer water flooding its insureds' properties resulting in insurers making larger payments to their insureds
  - 2014: Insurers voluntarily dismissed the claims

TRENDS

- Massive increase in climate change cases in the past few years inside and outside the US
- Increase in human rights arguments
  - E.g., *Urgenda, Juliana*, *Milieudefensie*
- Different strategies used in actions against carbon majors
  - Including nuisance *(e.g., People of the State of California v BP, State of New York v BP)*
  - Fraud (Exxon Mobil litigation)
  - Disclosure-related actions (Exxon Mobil litigation)