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Vermont's Fossil Fuel Suit Underscores Climate-Change Pressures Faced by U.S. Companies

Companies in the United States and elsewhere continue to face extreme pressure to respond to climate change, with respect to both business operations and disclosures. In the most recent U.S. development on this front, the State of Vermont yesterday brought civil claims against a series of energy companies under its state consumer protection statute, alleging deceptive acts and unfair practices in connection with their marketing, sales and other operations in and outside of the state. Stopping short of seeking restitution for environmental degradation or a ban on the sale of fossil fuels, the suit seeks disgorgement of funds obtained as a result of the alleged violation of Vermont's consumer protection law as well as substantial civil penalties. These suits are yet another reminder that regulators continue to take aggressive positions on issues related to climate change, making it all the more important that companies carefully consider how best to address those issues.

The core allegation of the suit is that the defendants misled the public about the impact of fossil fuels by advertising that their products are better for the environment than others, while omitting to disclose that their products continue to contribute to greenhouse gas emissions and climate change. With an explicit reference to the language of cigarette marketing, the suit also alleges that the defendants mislead consumers by using "green," "clean" and similar terminology. Vermont alleges that recent "greenwashing" campaigns by these companies falsely portray the companies as responsible stewards of the environment. Notably, the state alleges that at least one of these companies admits in a sustainability report that its publicly disclosed net-zero emissions targets are not reflected in its operating plans and budgets.

Oil and gas companies have faced similar accusations before. The post-trial dismissal by the court of a suit brought by New York State against ExxonMobil demonstrates that it may not be easy for states to establish a legal basis for these kinds of climate-related claims. Litigation has also been brought in a range of overseas jurisdictions concerning climate-related disclosures, including "net zero" commitments by oil and gas companies. However, it is also clear that energy companies will not face these pressures alone. The SEC, FTC, state attorneys general, sustainability-linked organizations and others are likely to press greenwashing and other charges on a number of fronts (whether grounded in securities laws, consumer protection, tort, nuisance, trespass or other theories) over a wide variety of industries and businesses that seek to portray themselves as environmentally friendly or otherwise sustainable. Moreover, increased disclosure on this topic, whether driven by regulatory change or investor pressure, will likely increase the scope of legal and investor inquiries probing the credibility and bases for such disclosures.

This civil suit by Vermont, which is part of a larger pattern of actions brought by cities, states and other organizations, underscores the need for companies to carefully evaluate the disclosures they include in their consumer marketing, as well as their ESG/sustainability reports, and implement appropriate internal controls with respect to such disclosures. As companies consider those questions, they should focus in particular on inconsistencies between

their public statements and their internal reports and studies that may create potential reputational and/or legal exposure. Proposals to make public commitments to, for example, environmental improvements, carbon neutrality, elimination of waste, ethical or humane treatment of animals and similar sustainability claims should be scrutinized with care to ensure that both internal and external stakeholders understand the scope of – and whether the company's actions are consistent with – the proposed commitment.

The Vermont suit also underscores the determination in some quarters to continue to try to fashion a legal theory on which to pin legal liability for climate change on corporate actors. In addition to securities laws theories along the lines advanced unsuccessfully by New York State, other jurisdictions have sought to recover on "public nuisance" or similar grounds. Although the oil and gas companies have had some success against these claims, including the Second Circuit's dismissal of New York City's "public nuisance" claim on the grounds that the federal Clean Air Act displaces state tort law, a significant number of similar cases remain pending in other courts around the country.

Moreover, State attorneys general and other plaintiffs frequently try to adapt their legal theories until they find one that sticks. Indeed, the Vermont lawsuit appears to be an attempt to avoid the Second Circuit decision by seeking disgorgement for allegedly misleading disclosures rather than damages for public nuisance arising from pollution. The development and deployment of these kinds of creative legal claims is unlikely to subside and hence companies would be well-advised to pressure-test their public statements in these areas to safeguard against reputational risk and potential future litigation.

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