

**Climate Litigation and Finance: Materials for Class on Thursday April 18**

There is a massive amount of US and international litigation involving issues relating to climate change,<sup>2</sup> and there is a limit to how much of this litigation we could possibly learn about in one class session. But, as we have looked at divestment campaigning and anti-ESG efforts as part of thinking about climate finance, I think that focusing on how litigation plays out in this context makes some sense. So I am assigning an article which argues that some environmental litigation interferes with our ability to respond to climate change.<sup>3</sup>

So far we have noticed the idea of challenges to agency rules, for example to the SEC's Climate Disclosure Rules. In terms of litigation relating to financial matters we have also noted greenwashing, claims of bank responsibility for climate change, and potential issues relating to pension fund fiduciaries' decision-making.

Some climate-related litigation is initiated by states (for example challenges to the DOL pensions rule), and some by business groups like the US Chamber of Commerce.

But just as non-profit groups are involved in advocating for shareholder proposals to address climate change, non-profits are also involved in climate-related litigation. We have noticed, for example, that the Sierra Club is challenging the SEC's climate disclosure rules for not going far enough.

Lawsuits relating to climate change involve many different types of claim. The Sabin Center for Climate Change Law at Columbia Law School maintains a database of climate change litigation and categorizes claims as federal statutory claims, constitutional claims and state law claims.<sup>4</sup> In addition they have categories for cases involving common law claims, public trust claims, securities and financial regulation, trade agreements, adaptation, and climate change protesters and scientists.

The cases involving securities and financial regulation include challenges to regulations, but also claims relating to greenwashing. For example, *Fagen v Enviva* involves claims that a company involved in the development of wood pellet production plants misrepresented the

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<sup>2</sup> Cf. Karen C. Sokol, *Bringing Courts into Global Governance in a Climate-Disrupted World Order*, 108 MINN. L. REV. 163 (2023)

<sup>3</sup> Anna Mance, *How Private Enforcement Exacerbates Climate Change*, 44 CARDOZO LAW REVIEW 1493 (2023). The author is an alumna of UM Law and a Professor at SMU Dedman School of Law.

<sup>4</sup> See <https://climatecasechart.com/us-climate-change-litigation/>.

environmental sustainability of wood pellet production.<sup>5</sup> Enviva’s website states: “We are the world’s largest producer of sustainable wood pellets, a renewable alternative to coal. Wood-based bioenergy is part of an all-in renewables strategy to reduce carbon emissions and limit dependence on fossil fuels. The world’s leading authority on climate science, the Intergovernmental Panel on Climate Change, explicitly recognizes bioenergy as a renewable energy source that is critical to our low-carbon future. The IPCC also concludes that sustainable forest management is critical to prevent forest conversion to non-forest uses. We need bioenergy both to replace fossil fuels and to keep forests as forests.”<sup>6</sup> Enviva filed for bankruptcy in March 2024, stating it expected to be able to come out of Chapter 11, although some commentators were doubtful.<sup>7</sup> The complaint in the litigation stated: “On October 12, 2022, during pre-market hours, Blue Orca Capital... published a report on Enviva...Among other allegations, the Blue Orca Report stated that “new discovered data suggests . . . the company is flagrantly greenwashing its wood procurement” and characterized Enviva’s claim to be a “pure play ESG Company with a healthy, self-funded dividend and cash flows to provide a platform for future growth” as “nonsense on all counts.” Moreover, the Blue Orca Report alleged that “Enviva is a dangerously levered serial capital raiser whose deteriorating cash conversion and unprofitability will drain it of cash next year” and is “a product of deranged European climate subsidies which incentivize the destruction of American forests so that European power companies can check a bureaucratic box.”... On this news, Enviva’s stock price fell \$7.74 per share, or 13.13%, to close at \$51.23 per share on October 12, 2022.... As a result of Defendants’ wrongful acts and omissions, and the precipitous decline in the market value of the Company’s securities, Plaintiff and other Class members have suffered significant losses and damages.”<sup>8</sup>

One relatively recent development in this area is that firms involved in litigation finance have begun to fund climate litigation. For example, Aristata Capital combines impact investing and litigation funding.<sup>9</sup> The website states:

“Aristata’s Impact Mission: Create a safer and more equitable world by financing legal cases that empower historically marginalised voices, equalise unjust power dynamics and catalyse systemic

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<sup>5</sup> See <https://climatecasechart.com/case/fagen-v-enviva-inc/> . There is also a derivative suit arising out of the same alleged facts, *Browning v. Alexander*.

<sup>6</sup> <https://www.envivabiomass.com/> .

<sup>7</sup> See, e.g., [https://www.sec.gov/ix?doc=/Archives/edgar/data/1592057/000110465924034944/tm248930d1\\_8k.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1592057/000110465924034944/tm248930d1_8k.htm) ;Justin Catanoso, *Enviva bankruptcy fallout ripples through biomass industry, U.S. and EU* (Apr. 2, 2024) at <https://news.mongabay.com/2024/04/enviva-bankruptcy-fallout-ripples-through-biomass-industry-u-s-and-eu/> ; Elly Pepper, *Enviva Is a Cautionary Tale for Countries Embracing Biomass Energy* (Nov. 16, 2023) at <https://www.nrdc.org/bio/elly-pepper/enviva-cautionary-tale-countries-embracing-biomass-energy> .

<sup>8</sup> Complaint in *Fagen v Enviva*, at 3.

<sup>9</sup> <https://www.aristata.co.uk/>.

change that protects the environment and communities.

Why is Aristata necessary?

Globally there are numerous instances of environmental damage, human rights abuses, gender and racial inequality, minority shareholder issues, housing inequality and other unaddressed wrongs. Litigation offers the individuals and communities affected the possibility of justice through compensation and provides wider communities and future generations with protection from similar injustices going forwards as strong signals are sent highlighting the true cost of the damage caused.

Historically, litigation has been used to solve a range of issues affecting individuals, communities and wider populations. This includes: civil rights; regulating clean water; curbing the interests of the tobacco industry; product safety; healthcare and pharmaceutical reform; protecting the environment; solving issues surrounding climate change; and many other social and environmental issues.

Today's Landscape:

To date the focus of Non-Governmental Organisations (NGOs), public interest organisations, rights groups and the philanthropic sector has been mainly on public interest, not commercial, litigation. This is due to two significant factors:

First, the objective of these legal claims has been to set judicial precedent and amend the law with a view to engaging governments and regulatory authorities to comply with their legal/regulatory obligations and act in the best interests of individuals and communities as a whole. An example is Client Earth's successful challenge to the UK government over the regulation of air quality in 2016 ;

Secondly, the very high costs of commercial litigation. While NGOs and similar actors in the space are well resourced and funded (\$200m spent annually in support of public interest litigation), their resources are finite and they fund predominantly public interest litigation as it is cost controlled (i.e. there is little or no risk of adverse costs awards) there is rarely any return of capital or on the investment made. Commercial claims and the commercial actors that contribute to many of the challenges we face are often excluded from the otherwise powerful application of law in the public interest due to the costs of commercial litigation and the potential in certain jurisdictions of adverse costs awards.

The cost of litigating against commercial actors means that impacted groups often do not have the financial means to seek justice through the courts. Without the financial means to secure legal representation or deal with the risks of adverse costs, meritorious claimants are often left without adequate redress options – a “justice gap”.

Aristata seeks to offer a solution by unlocking commercially viable cases with the power to catalyse positive social and environmental change by providing funding and sharing risk.”<sup>10</sup>

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<sup>10</sup> <https://www.aristata.co.uk/impact-approach>.

A US hedge fund, Gramercy, has made a secured loan to Pogust Goodhead, an international law firm, headquartered in London to fund environmental litigation against large corporations.<sup>11</sup> The £450m/\$552.5m loan was described as the “largest litigation funding deal in legal history.”<sup>12</sup> The Gramercy press release states:

“Pogust Goodhead, a global law firm, and Gramercy Funds Management LLC (“Gramercy”), today announced that they have entered into a \$552.5 million investment partnership in the form of a secured loan by Gramercy to Pogust Goodhead. This loan is the largest of its kind in a U.K. based law firm.

The loan transaction strengthens the firm’s financial power, ensuring Pogust Goodhead has ample funds to continue its litigation across the world and on behalf of environmental victims of corporate giants such as: BHP Group..., BMW..., Fiat Chrysler..., Ford..., Honda..., Hyundai ..., Jaguar/Land Rover..., Mazda..., Mercedes-Benz..., Peugeot/Citroen..., Renault Nissan..., Toyota..., Vauxhall..., Volkswagen AG..., and Volvo AB...

The loan proceeds will fund the largest action of its kind against two of the biggest mining companies in the world – BHP Group ... and Vale... – for their part in the Mariana dam disaster in Brazil. Pogust Goodhead is representing over 720,000 victims of Brazil’s worst ever environmental disaster, with a trial date set for October 2024 in London. The loan proceeds will also support Pogust Goodhead’s litigation against 14 major automobile manufacturers over the Dieselgate scandal, on behalf of approximately one million U.K. consumers.

Tom Goodhead, Global Managing Partner and CEO of Pogust Goodhead, said:

“We are delighted to secure this major investment that will transform our business and give us the financial power to take on some of the largest companies in the world on behalf of millions of people. This landmark deal shows that global investors have good faith in the outcome of our cases. This investment will not only ensure that we bring our existing cases home, but we are putting global corporate giants on notice that we have the financial muscle to take them on for their wrongdoing.

We are taking on some of the largest companies in the world. These companies have access to infinite resources to litigate against these cases. This deal levels the playing field and gives us the ability to go toe-to-toe with them.

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<sup>11</sup> See, e.g., Brooke Masters, *US Hedge Fund Provides Record Loan for Environmental Lawsuits*, Financial Times (Sep. 30, 2023).

<sup>12</sup> Pogust Goodhead press release, *Pogust Goodhead Receives £450m in Largest Litigation Funding Deal in Legal History* (Oct. 4, 2023); Gramercy press release, *Pogust Goodhead and Gramercy Funds Management LLC Announce \$552.5 Million Investment Partnership* (Oct. 2, 2023).

We are not trying to destroy these companies. We are taking them on for corporate misconduct, anti-competitive behaviour, corporate harm and misuse of the environment. The cases we are taking will set the bar for how serious we are, as a global society, about ensuring that big business is held accountable and upholds its obligations and responsibilities to the communities in which it operates.”

Harris Pogust, Chairman of Pogust Goodhead, said:

“Our mission is to defend the rights of those who have been wronged by some of the world’s largest multinational companies. In just the past two years we have secured historic settlements against British Airways and Volkswagen. We currently represent over one million individuals regarding the Dieseltgate scandal. Additionally, we are handling the largest mass action in English history against the world’s two biggest mining companies. We are just beginning the journey to bring justice to those who most deserve it no matter where they reside and regardless of the size and perceived power of the corporate wrongdoer.

This transaction with Gramercy, a firm with deep expertise in litigation finance and patient capital, gives us the ability to bring the fight to any wrongdoer. They are now on notice that it is in their financial interests and those of their shareholders to settle or face a firm with both the financial resources and litigation skills to obtain the justice our clients rightly deserve. We are extremely excited to have Gramercy as an investor and as a partner as we seek global justice for the millions of clients we currently represent and the millions yet to come.”

Robert Koenigsberger, Managing Partner and CIO of Gramercy Funds Management, said:

“We are pleased to be partnering with Pogust Goodhead. The firm has an exceptional track record and we have been impressed by the team and their approach to complex litigation.

Allocating to this transaction is clearly consistent with Gramercy’s mission to positively impact the well-being of our clients, portfolio companies, and their communities. The investment materially aligns with our ESG and impact investing objectives. We are proud to play a part in helping Pogust Goodhead seek justice for some of the worst environmental actions over the past few decades.”

About Pogust Goodhead

Founded by Harris Pogust and Tom Goodhead in 2018, Pogust Goodhead is an international law firm headquartered in London, England. Its growing global partnership consists of over 100 lawyers and more than 500 staff members, all working to help individuals, groups, and businesses access fair and tangible justice.

The firm has been described as “the first legal unicorn”, following a trajectory more like a Fintech start up than a traditional law firm. Pogust Goodhead represents 1.9 million clients in cases across the world, seeking billions of dollars in damages.

Since its formation, Pogust Goodhead has become a world leader in environmental litigation. In

2022 the firm secured a landmark, unanimous judgment from the Court of Appeal that allows victims of the Mariana dam disaster to seek redress against BHP and now Vale, in the Courts of England and Wales. The firm's cases against corporate giants TÜV SÜD, Norsk Hydro and Braskem are all centered around providing redress for claimants who have suffered through a total disregard for the environment they inhabit.

Pogust Goodhead is also at the cutting edge of international consumer claims, including historic settlements in the Volkswagen NOx Emissions Group Litigation in May 2022 and the victims of the British Airways Data Breach in 2021.

#### About Gramercy Funds Management

Gramercy is a dedicated emerging markets investment manager based in Greenwich, Conn., with offices in London, Buenos Aires and Mexico City. Founded in 1998, Gramercy serves a global institutional client base and seeks to provide investors with superior risk-adjusted returns through a comprehensive approach to emerging markets supported by a transparent and robust institutional platform. Gramercy offers both alternative and long-only strategies across emerging markets asset classes including multi-asset, private credit, public credit, and special situations. Gramercy is a Registered Investment Adviser with the SEC and a Signatory of the Principles for Responsible Investment (PRI), a Signatory to the Net Zero Asset Managers initiative and a Supporter of TCFD. Gramercy Ltd, an affiliate, is registered with the FCA.”