



Conférence Contentieux Climatique Climate Change Litigation Conference

5 octobre 2021

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<https://www.zelle.com/climatechange>

Who are we?

Coverage lawyers for insurers

Liability insurers – duty to defend and indemnify policyholders against claims made by third parties

Instructed on many of the active climate change lawsuits in the U.S. and elsewhere

Agenda

Climate Change litigation outside Europe – what, why, trends, future

Insurers' exposure

Solutions, challenges and opportunities

Climate Change Litigation

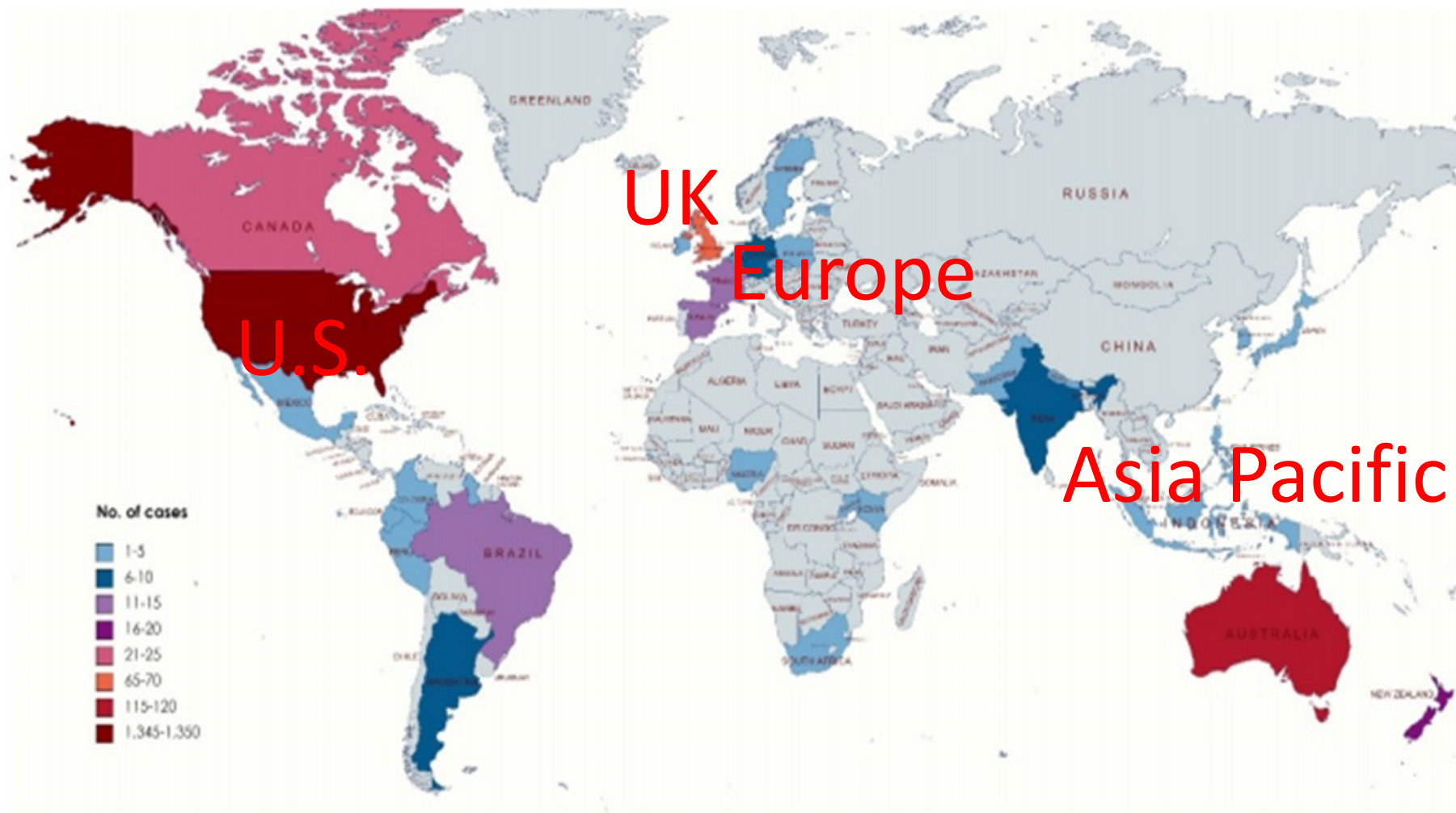
What?

Increasing

Targets

International snapshot

Figure 1.2. Number of cases around the world, per jurisdiction, to May 2021



Notes: Cumulative figures to May 2021. Map created with mapchart.net.

Source: Authors based on CCLW and Sabin Center data

European and Global Claims

Commission on Human Rights of the Philippines (December 2019)

Urgenda vs The Netherlands (December 2019)

Milieudefensie v Royal Dutch Shell (May 2021)

Lliyua v RWE (ongoing)

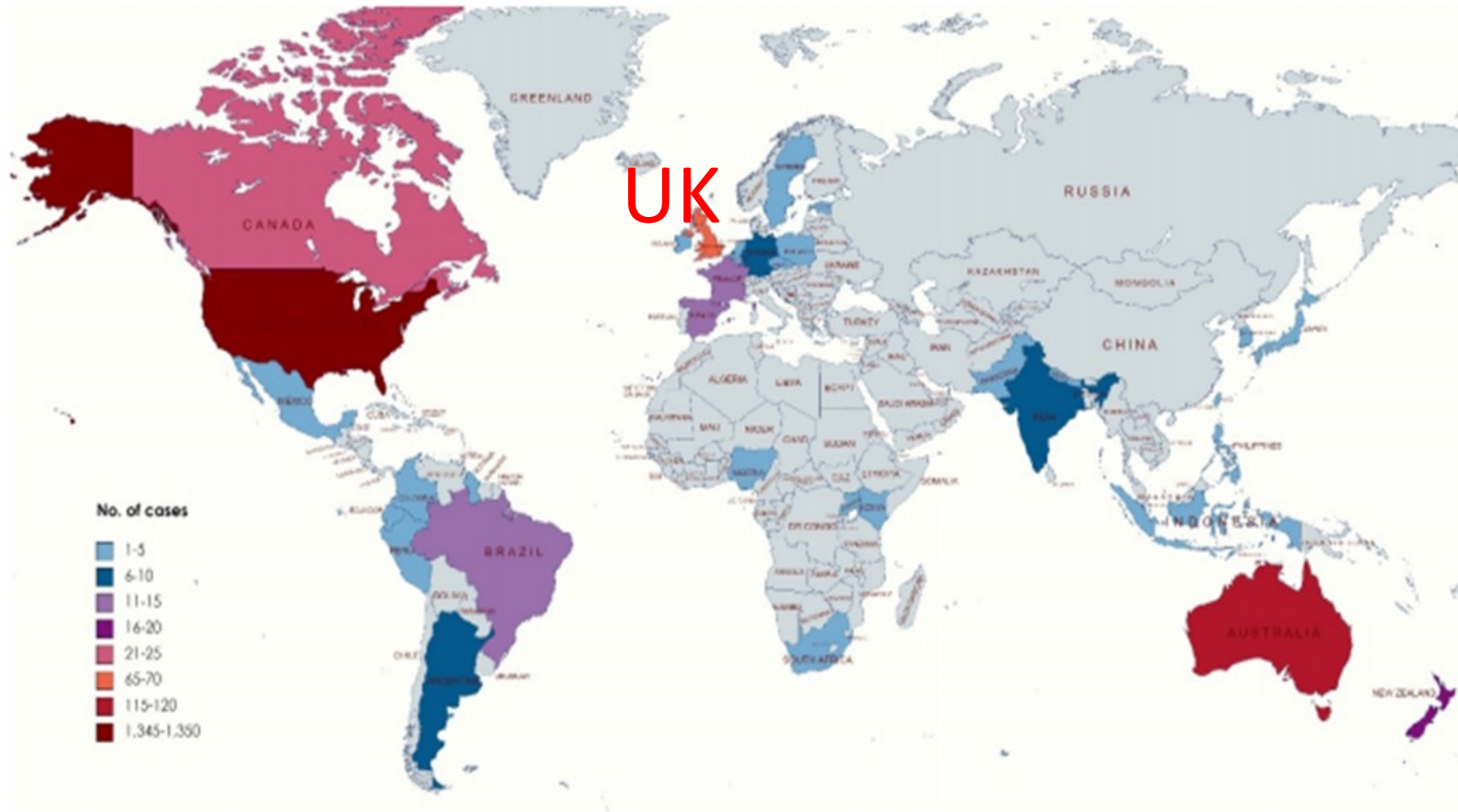
Notre Affaire à Tous and Others v. Total (January 2020)

Children's Climate Change Case at the ECHR (2020)

Notre Affaire à Tous and Others v France (judgment 2021)

UK

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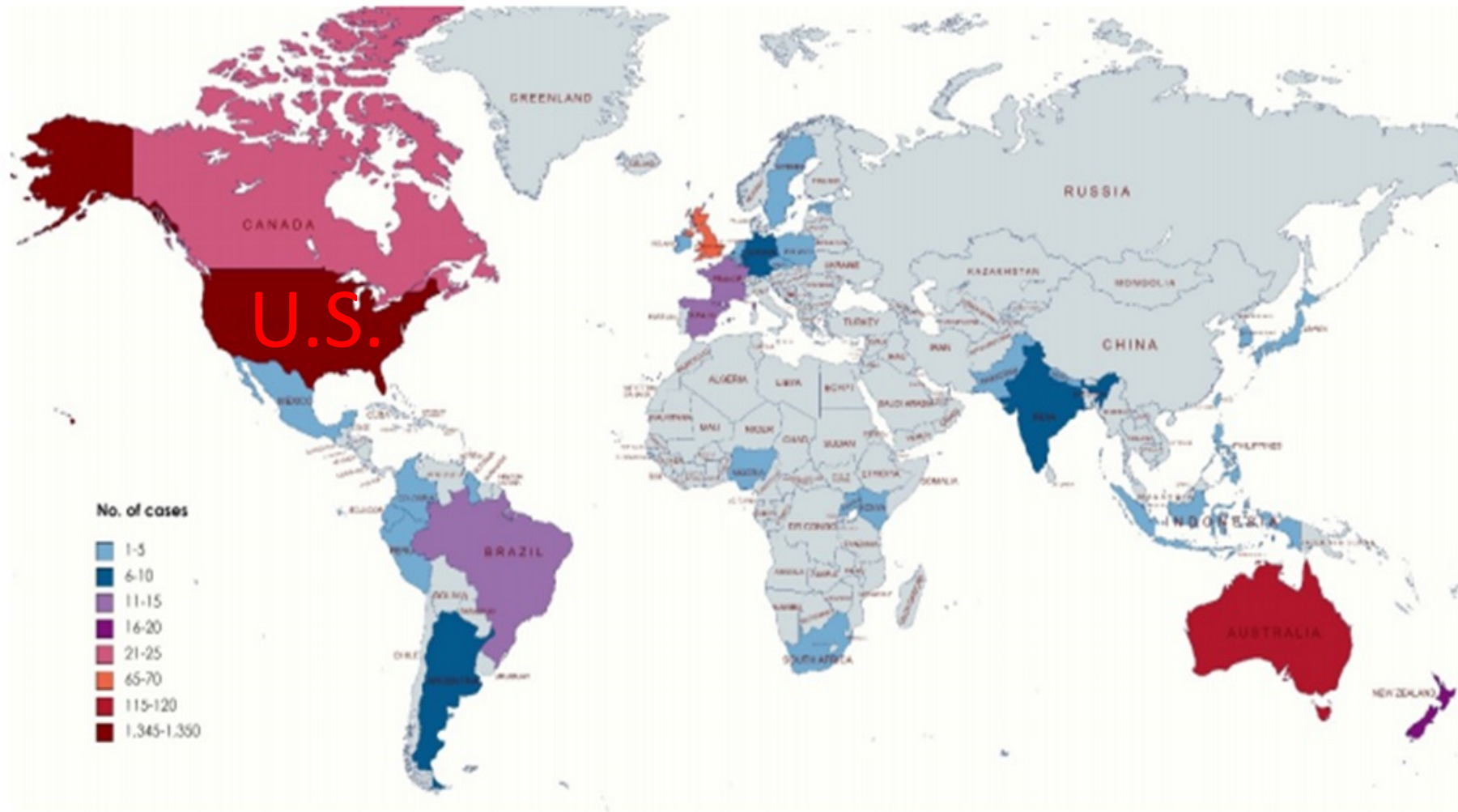


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U.S.

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U.S.

Tort/nuisance

Comer v Murphy (2010)

Kivalina (2013)

California nuisance claims (2018)

Securities & Financial Regulation

2018 New York v Exxon

2019 Massachusetts v Exxon

Consumer Protection / Greenwashing

Minnesota v. American Petroleum Institute et al., case number 0:20-cv-01636

U.S.

Tort / nuisance climate change claims

First wave – 2007-2011 (dismissed for standing)

Second wave – 2018 onwards

Main issue: forum

Comer v Murphy (2010)

Kivalina (2013)

California nuisance claims (2018)

Massachusetts v Exxon (2019)

In the Supreme Court of the United States

BP P.L.C., ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Section 1447(d) of Title 28 of the United States Code generally precludes appellate review of an order remanding a removed case to state court. But Section 1447(d) expressly provides that an “order remanding a case * * * removed pursuant to” the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443, “shall be reviewable by appeal or otherwise.” Some courts of appeals have interpreted Section 1447(d) to permit appellate review of any issue encompassed in a district court’s remand order where the removing defendant premised removal in part on the federal-officer or civil-rights removal statutes. Other courts of appeals, including the Fourth Circuit in this case, have held that appellate review is limited to the federal-officer or civil-rights ground for removal. The question presented is as follows:

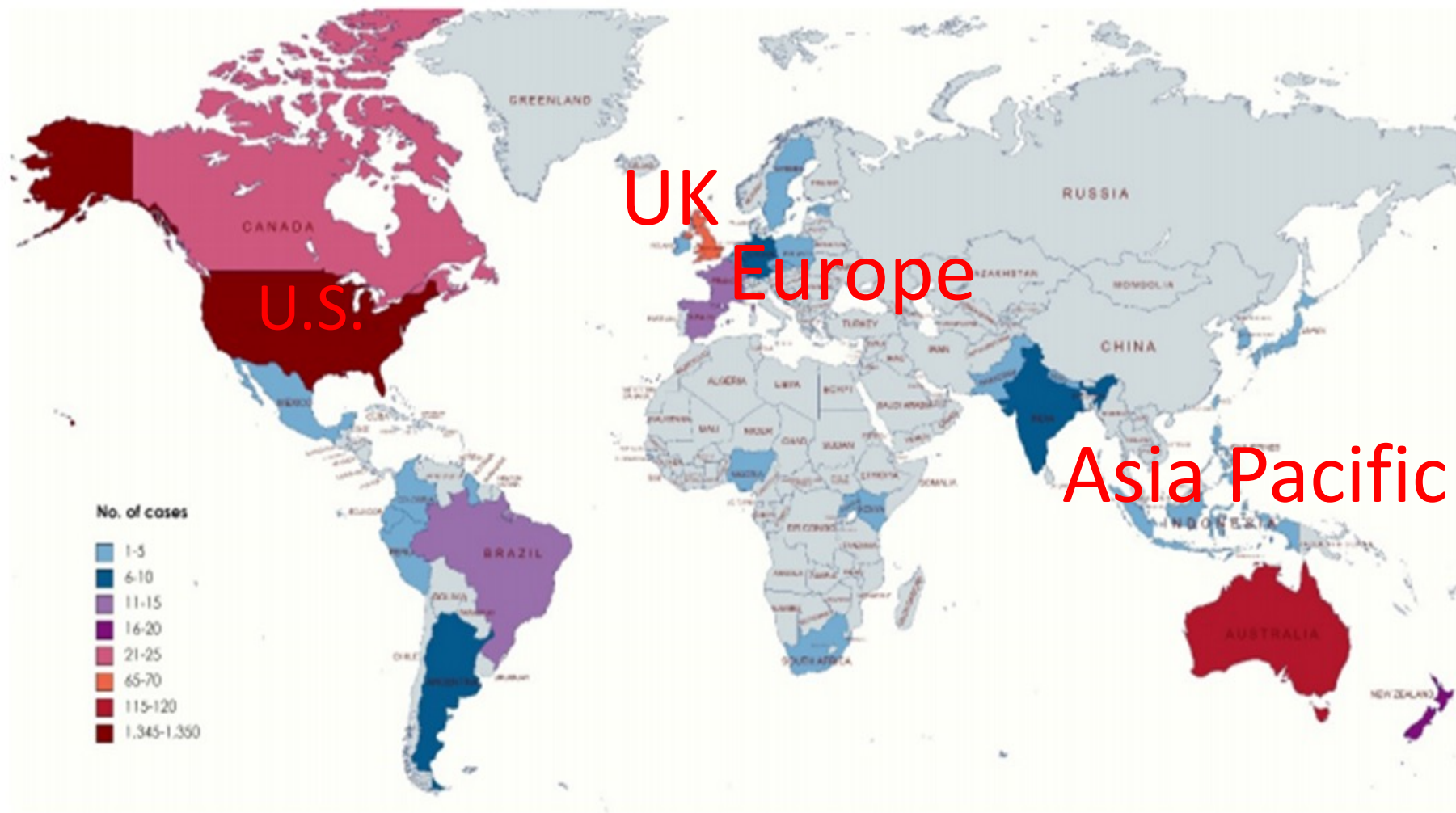
Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court’s order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443.

CLIMATE LITIGATION: CASES AND CLAIMS

CASE	DEFENDANTS					IMPACTS				LEGAL CLAIMS ASSERTED							
	Exxon	Chevron, Shell, BP	Other Fossil Fuel Cos	Koch	American Petroleum Institute	SLR	Hydro Cycle	Health	Other	Public Nuis. (People)	Nuis. (Pub/Priv)	Trespass	Prod. Liab.	Negl	FTW	Consumer Protection	Other
San Mateo, Marin, Imperial Beach (CA)	✓	✓	✓			✓				✓	✓	✓	✓	✓	✓		
Santa Cruzes, Richmond (CA)	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
Baltimore (MD)	✓	✓	✓			✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	
Rhode Island	✓	✓	✓			✓	✓	✓	✓		✓	✓	✓	✓	✓		✓
PCFFA	✓	✓	✓				✓		✓		✓		✓	✓	✓		
San Francisco / Oakland (CA)	✓	✓				✓				✓							
Honolulu (HI)	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓			✓		
Minnesota	✓			✓	✓		✓	✓	✓						✓	✓	✓
District of Columbia	✓	✓							✓							✓	
Charleston (SC)	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	
Delaware	✓	✓	✓		✓	✓	✓	✓	✓	✓		✓			✓	✓	
New York City (NY)	✓	✓	✓			✓					✓	✓					
King County (WA)	✓	✓	✓			✓	✓		✓		✓	✓					
Boulder (CO)	✓		✓				✓		✓		✓	✓				✓	
Massachusetts	✓								✓							✓	✓
Hoboken (NJ)	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓		✓		✓	
Connecticut	✓								✓							✓	

International snapshot

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Trends

New types of litigation

Movement building

Changing defences

Attribution science

One size does not fit all

What does success look like?

Fight to the Death

Developing case law

Shaping public debate

Discovery

Judgment

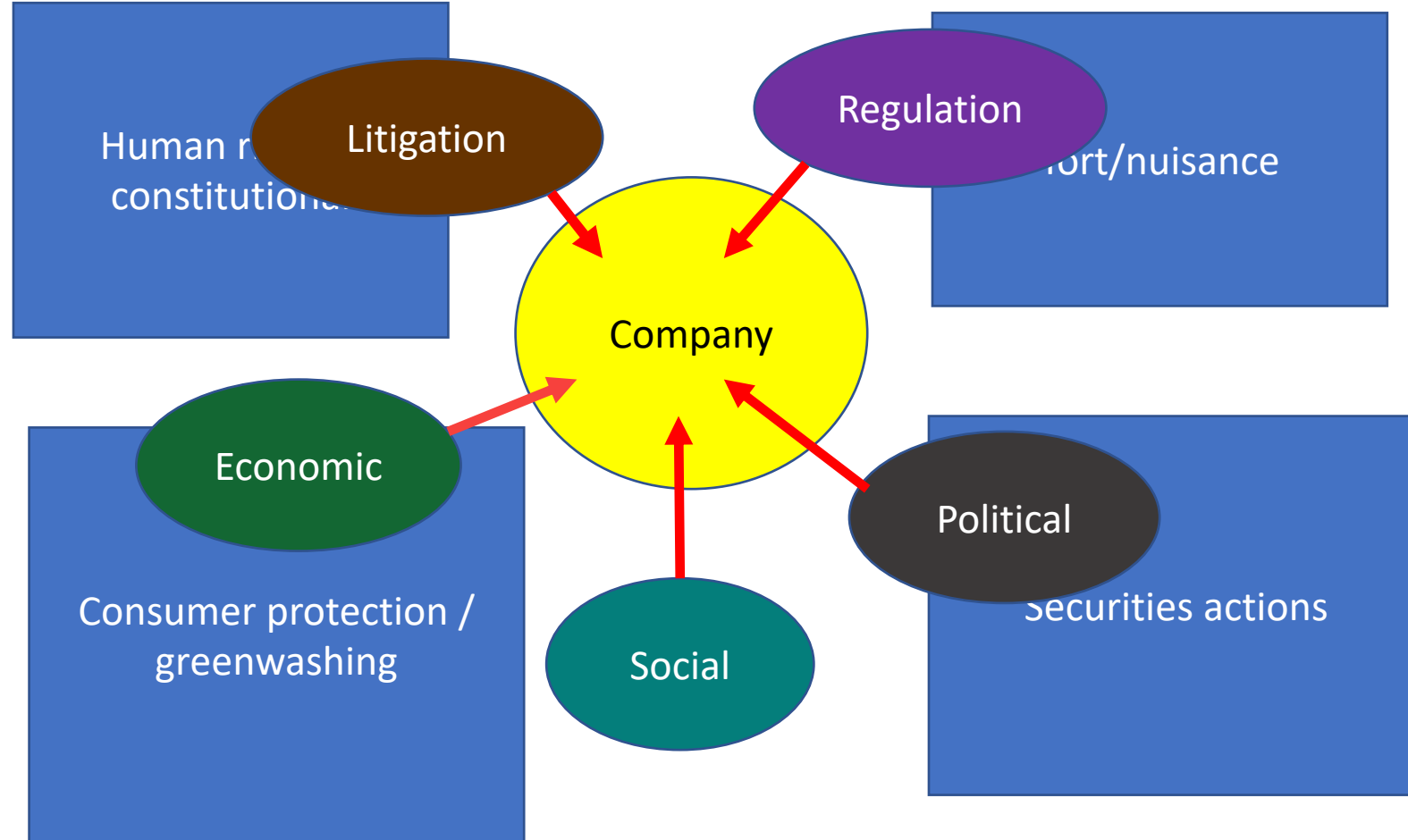
Litigation is working

Public opinion

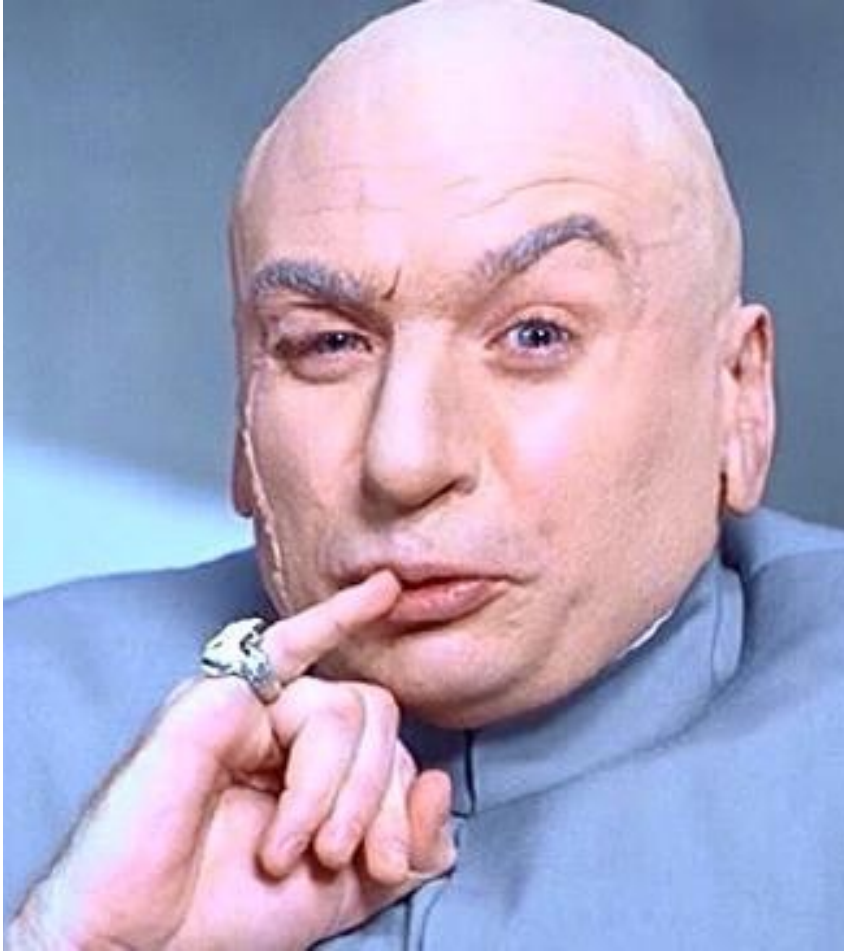
Political action

Where next?

Companies face increasing pressure



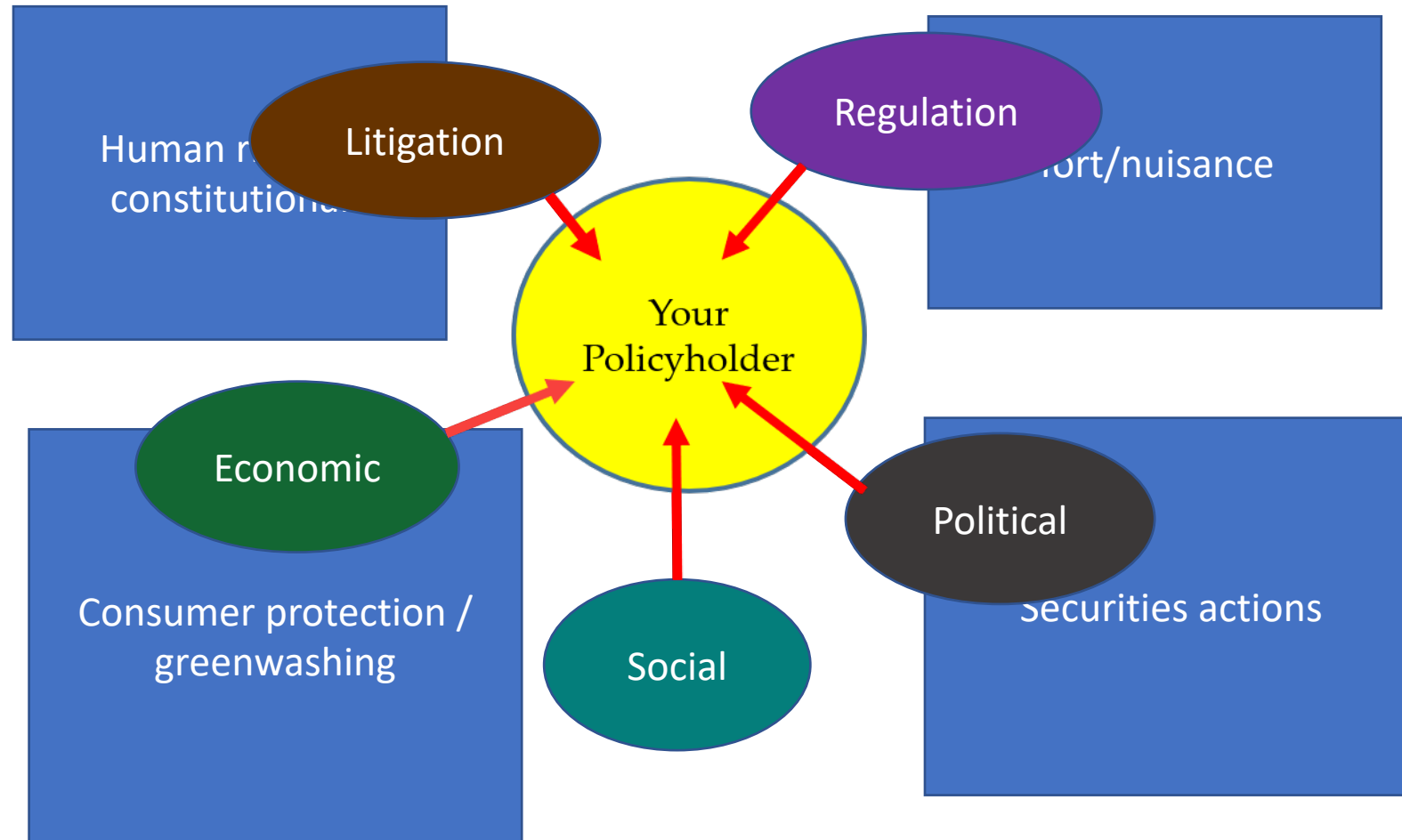
Insurers' exposure



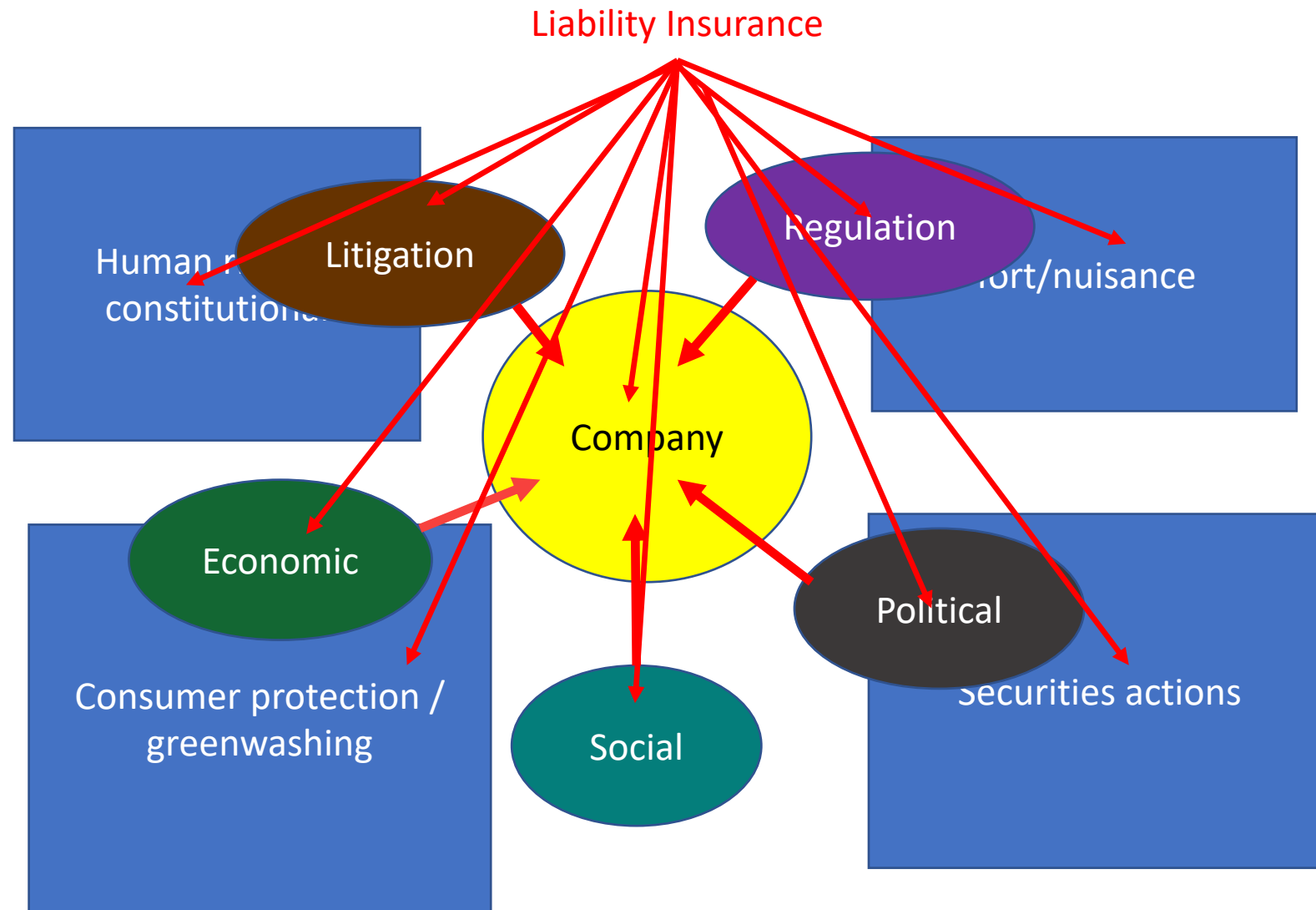
Trillions of Dollars of damages and indemnity will be exchanged in connection with climate change.

Entity	Products Flaring, own fuel, F (fuel, cement) vented CO ₂ n					
	GtCO ₂	GtCO ₂				
1. ChevronTexaco, USA	46.28	1.48	50. Ecopetrol, Colombia	1.66	0.05	0.10
2. ExxonMobil, USA	41.60	1.54	51. Sonangol, Angola	1.69	0.03	0.07
3. Saudi Aramco, Saudi Arabia	42.82	1.03	52. Cyprus Amax, USA *	1.61	0.00	0.14
4. BP, UK	32.51	1.02	53. EnCana, Canada	1.40	0.09	0.20
5. Gazprom, Russian Federation	25.09	2.13	54. Devon Energy, USA	1.41	0.08	0.19
6. Royal Dutch Shell, The Netherlands	27.57	0.99	55. BG Group, UK	1.24	0.09	0.21
7. National Iranian Oil Company	26.71	0.76	56. Sinopec, China	1.41	0.04	0.08
8. Pemex, Mexico	18.14	0.59	57. Westmoreland Mining, USA	1.41	0.00	0.12
9. British Coal Corporation, UK *	17.74	0.00	58. Suncor, Canada	1.24	0.05	0.11
10. ConocoPhillips, USA	14.70	0.67	59. Syrian Petroleum	1.29	0.04	0.08
11. Petroleos de Venezuela	14.77	0.44	60. Kiewit Mining, USA	1.19	0.00	0.10
12. Coal India	14.28	0.00	61. North American Coal, USA	1.09	0.00	0.09
13. Peabody Energy, USA	11.46	0.00	62. RAG, Germany	1.05	0.00	0.09
14. Total, France	10.79	0.35	63. China National Offshore Oil Co.	1.03	0.03	0.06
15. PetroChina, China	9.67	0.28	64. Luminant, USA	0.97	0.00	0.08
16. Kuwait Petroleum Corp.	9.80	0.23	65. Lafarge, France	1.04	0.00	0.00
17. Abu Dhabi NOC, UAE	8.84	0.26	66. Holcim, Switzerland	1.01	0.00	0.00
18. Sonatrach, Algeria	7.96	0.40	67. Canadian Natural Resources	0.83	0.04	0.09
19. Consol Energy, Inc., USA	8.38	0.00	68. Apache, USA	0.81	0.04	0.10
20. BHP Billiton, Australia	6.97	0.06	69. Bahrain Petroleum	0.78	0.05	0.11
21. Anglo American, UK	6.68	0.00	70. Talisman, Canada	0.79	0.04	0.09
22. Iraq National Oil Company	6.70	0.14	71. Murray Coal, USA	0.73	0.00	0.06
23. RWE, Germany	6.31	0.00	72. UK Coal, UK	0.73	0.00	0.06
24. Pertamina, Indonesia	6.16	0.21	73. Husky Energy, Canada	0.59	0.02	0.05
25. Libya National Oil Corp.	6.22	0.15	74. Nexen, Canada **	0.59	0.02	0.04
26. Nigerian National Petroleum	6.06	0.15	75. HeidelbergCement, Germany	0.59	0.00	0.00
27. Petrobras, Brazil	5.49	0.16	76. Cemex, Mexico	0.55	0.00	0.00
28. ENI, Italy	5.20	0.24	77. Polish Oil & Gas	0.42	0.02	0.03
29. Rio Tinto, UK	5.50	0.00	78. Italcementi, Italy	0.46	0.00	0.00
30. Arch Coal, USA	5.43	0.00	79. Murphy Oil, USA	0.37	0.02	0.03
31. Petronas, Malaysia	4.56	0.22	80. Taiheiyo, Japan	0.40	0.00	0.00
32. Anadarko, USA	4.56	0.18	81. OMV Group, Austria	0.30	0.01	0.03
33. Occidental, USA	4.63	0.09	Total IOC & SOE producers	543.23	15.68	43.58
34. Statoil, Norway	3.89	0.15	Total CDIAC, 1751-2010	1,323.09	na	114.65
35. Oil & Gas Corporation, India	3.71	0.14	Percent this study of CDIAC	41.06%	na	38.01%
36. Lukoil, Russian Federation	3.60	0.09				41.54%
37. Sasol, South Africa	3.24	0.00	<p>This table includes each entity's estimated emissions from fuel combustion (net of non-energy uses), flaring, own fuel use, and ancillary emissions of CO₂ and CH₄ (in CO₂e units). Emissions from cement manufacturing are listed under product emissions, but are vented process emissions from the calcination of calcium carbonate. * not extant; production and emission quantified for these entities but not attributed to extant entities. ** Nexen was acquired by CNOOC in 2012.</p>			
38. Qatar Petroleum	3.00	0.13				
39. Repsol, Spain	2.96	0.13				
40. Marathon, USA	2.64	0.11				
41. Yukos, Russian Federation *	2.69	0.06				
42. Egyptian General Petroleum	2.48	0.09	0.12	2.88	0.20%	
43. Rosneft, Russian Federation	2.50	0.07	0.20	2.77	0.19%	
44. Petroleum Development Oman	2.40	0.08	0.15	2.72	0.19%	
45. Hess, USA			0.18	2.66	0.18%	
46. Xstrata, Switzerland						
47. Massey Energy, USA						
48. Alpha Natural Resources, USA						

Policyholders face increasing pressure



Insurers face increasing pressure



Liability Exposure

Liability exposure like any other liability exposure

Liability Insurance

- duty to defend
- duty to settle
- duty to indemnify

Long tail liability claim

vertical and horizontal liability exposures

captives and reinsurance

Solutions – seen this before

Long tail pollution / environmental claims

Asbestos

MTBE

Tobacco



Wording and Coverage

Exclusions

for pollution
arising from
vapours or
waste materials
deposited upon land

for pollution ... from ... gases ...
or pollutants into ... atmosphere

caused to by or
the use of smoke
liquids or gases
pollutants into or
water;

This Policy does not cover
seepage, pollution

claims ... from ... pollution

or indirectly from

Wording and Coverage

Pollution exclusion does not apply to:
(d) Product Pollution Liability



“Product Pollution Liability” means liability or alleged liability for Personal Injury or Property Damage arising out of the end-use of Insured’s Products.

Automobile, Watercraft or Aircraft.

Wording and Coverage

“Occurrence” means ... event ... neither intended or expected

to result from one Occurrence.

***AES Corporation v. Steadfast* 725 S.E.2d 532 (2012)**

Kivalina asserts that the deleterious results of emitting carbon dioxide and greenhouse gases are something that AES knew or should have known about. If an insured knew or should have known that certain results were the natural or probable consequences of intentional acts or omissions, there is no "occurrence" within the meaning of a CGL policy. See 1 Barry R. Ostrager & Thomas R.

Exclusions

Goals

Traction

Caution

Debate

3rd party vs 1st party

Fines and penalties?

**“GLOBAL
WARMING ISN’T
REAL BECAUSE I
WAS COLD
TODAY! ALSO
GREAT NEWS:
WORLD
HUNGER IS
OVER BECAUSE
I JUST ATE.”**

.....
- STEPHEN COLBERT



Lessons Learned and Forgotten?

MTBE GROUND AND WATER POLLUTION EXCLUSION ENDORSEMENT

Without limiting Paragraph (1) of Exclusion K, this Policy shall not apply to, and the Company shall have no liability in respect of, Personal Injury, Property Damage or Advertising Liability arising out of the Discharge of MTBE Pollutants into or upon, or any other contamination by MTBE Pollutants of, land or real estate, or any body of water whether above or below ground, and the provisions of paragraph (2) of Exclusion K of this policy do not apply to MTBE Pollutants. The term "MTBE Pollutants" means any Pollutant or any other substance consisting of or containing any amount of methyl tertiary butyl ether/ethyl ("MTBE"), including all other chemicals blended together to formulate the product MTBE or degradation products thereof. However, it is not the intention of this exclusion to eliminate pollution coverage per the policy due to the mere existence of MTBE in the Pollutant (the mere existence being understood to mean that the Pollutant can not contain any more than 15% MTBE) but rather the intention is to exclude coverage for occurrences where MTBE is the primary Pollutant and/or the primary cause of Personal Injury, Property Damage or Advertising Liability.

Lessons Learned and Forgotten?

Notwithstanding any other provision in this policy, it is hereby agreed that no coverage is provided under this (re)insurance for any actual or alleged liability of the Insured for causing or contributing to climate change or its consequences.

Follow the Fortunes

Reinsurance

Captives

Claims Cooperation vs Claims Control

Cedant's discretion to determine coverage

Governing Law

Conflict of Law

Action needed

Company level

Underwriting and claims level

Reality

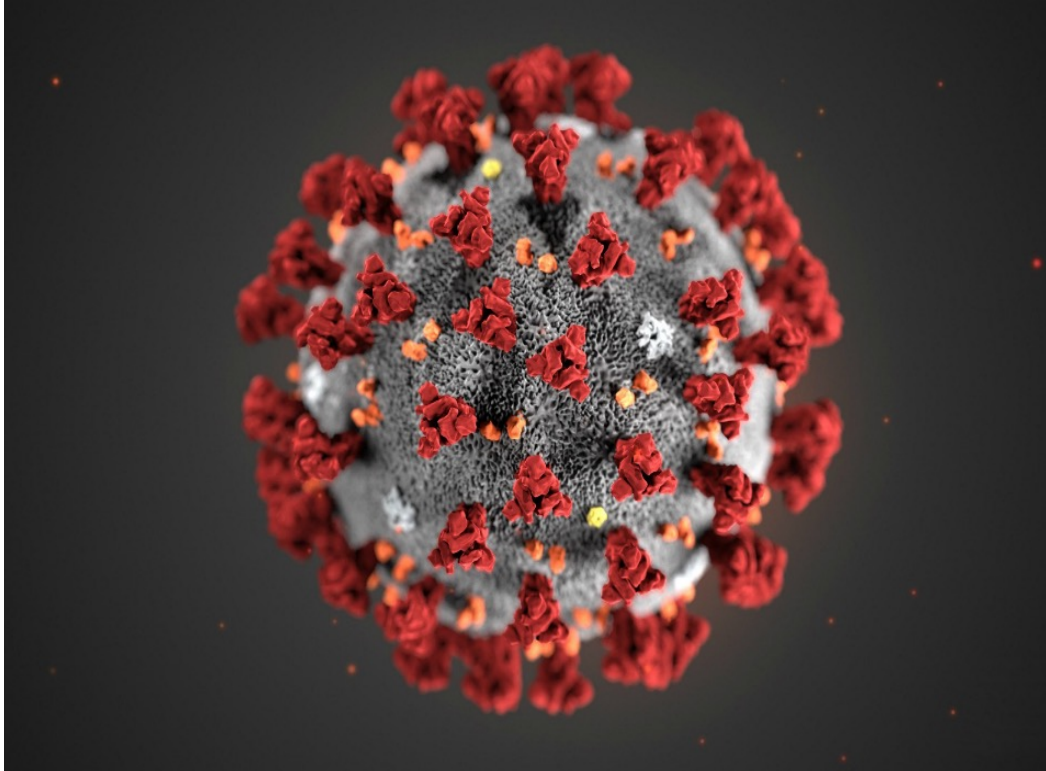
Litigation risks

This report defines litigation risk as any risk related to litigation pertaining to climate change and breach of the underlying legal frameworks on both the business and corporate levels.

Climate change-related litigation risks are generally not yet assessed by the insurance industry in a quantitative and scenario-based manner. Based on the literature review conducted to date for this study, insurers and insurance coverages do not yet seem to have paid out claims based on climate change-related litigation. Given this context, it appears that insurers have not yet placed significant focus on this issue.

This context was also validated by the survey that was conducted. The majority of respondents tend to monitor ongoing court cases but they do not seem to necessarily see sufficient materiality of climate-related litigation risks so far to apply a method that enables them to assign a potential financial impact.

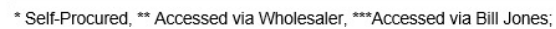
What If We're First?!



Affirmation

Accountability

Global Program
June 15, 2019 – July 1, 2020





What's The
Number?

Climate change and insurers

Climate change = business issue = insurance issue

Unique exposure:

- (1) investor risk / shareholder obligations
- (2) underwriting side / paying claims

Coverage & strategic concerns

Opportunity to shape change

Insurance reflects economy

Sovereign issue?