On May 26, 2021, a Dutch court ordered Royal Dutch Shell Plc (“Shell”) to cut its greenhouse gas emissions by 45% (from 2019 levels) by 2030. Shell had previously pledged to reduce its emissions by 20% (from 2016 levels) by 2030 and to reach net-zero emissions by 2050. The Dutch court held that this commitment was insufficient based on the “very serious threat” that Shell’s carbon emissions pose to Dutch residents.

**Impact on U.S. Companies Subject to Actions in U.S. Courts**

The Dutch court held that Shell’s greenhouse gas reduction plan failed to meet its obligations under Dutch and international law. In its reasoning, the court explained that:
[Shell] has an obligation, ensuing from the unwritten standard of care pursuant to ... Dutch Civil Code to contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group. For the interpretation of the unwritten standard of care, use can be made of ... human rights, specifically the right to life and the right to respect for private and family life, as well as soft law endorsed by [Shell], such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact and the [Organisation for Economic Co-Operation and Development] Guidelines for Multinational Enterprises.... [Shell] violates this obligation or is at risk of violating this obligation with a hazardous and disastrous corporate policy for the Shell group, which in no way is consistent with the global climate target to prevent a dangerous climate change for the protection of mankind, the human environment and nature.

Although the case is a significant legal decision, the reasoning behind it is unlikely to get traction in U.S. courts any time soon. First, while the U.S. Environmental Protection Agency regulates air emissions, including greenhouse gas emissions, U.S. law does not include broad standards of care based on human rights or subject companies to United Nations-based guidelines or principles. Second, in the U.S., the duty of care in the corporate context is a fiduciary duty that applies to a company’s officers and directors and mandates the exercise of care in making decisions based on adequate information and a good faith belief that the decisions are in the best interest of the company and its stockholders. Importantly, however, outside of special circumstances like insolvency, this duty only extends to the company and its stockholders. U.S. law, therefore, does not encompass the same duty of care suggested by the Dutch court. Certain states allow companies to take other stakeholders, including employees and the general public, into consideration in their decisions, but these “constituency” statutes do not create breachable fiduciary duties to those stakeholders. Third, a challenge to a company’s actions on the basis of breach of fiduciary duty must overcome the business judgment rule. This common law rule establishes a presumption that in making business decisions, directors acted on an informed basis and in the honest belief that the action was in the best interest of the company and its stockholders. The focus is not on the decision itself but rather on the process to come to the decision; and, if the process is rational or employed in a good faith effort to advance corporate interests, U.S. courts will be hesitant to intervene.

Just because it is currently unforeseeable that a U.S. court will follow in the Dutch court’s footsteps, however, does not mean that plaintiffs will not try to bring similar lawsuits. Lawsuits which, even if thrown out in the early stages, will still require companies to spend time and money responding to them and may result in reputational damage. A more plausible basis for liability in the U.S. stems from securities law violations – for example, misleading disclosures regarding sustainability metrics in Securities & Exchange Commission (“SEC”) filings or in other disclosures such as corporate sustainability records. As the form and content of ESG disclosures change and, perhaps even become more regulated, plaintiffs may have more opportunities to capitalize.

Impact on U.S. Companies Subject to Actions in Dutch or EU
Courts

U.S. companies that are subject to Dutch law, or European Union law more broadly, however, should pay particular attention to this ruling and the human rights responsibilities set out in the UN Guiding Principles on Business and Human Rights, the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and other internationally accepted human rights on which the Dutch Court relied for interpreting the unwritten standard of care. This latest ruling confirms the importance of human rights standards for regulating the approach of public entities as well as corporations to climate change in these jurisdictions.

In a previous landmark ruling known as the Urgenda case, the Dutch Court had already recognized that the human rights principles offer protection against the consequence of dangerous climate change due to CO2 emissions concluding that “the serious and irreversible consequences of dangerous climate change (...) pose a threat to the human rights of Dutch residents.” The latest decision extends the principles developed in the Urgenda case to private companies that have an individual responsibility to respect human rights, which also protect against hazardous climate change.

Much of this climate change litigation in the EU has been prompted by the adoption of the Paris Agreement adopted at the climate conference (COP21) in December 2015, which makes specific reference to “human rights” and which resulted in a growing number of cases brought both at national and regional level within the EU.

While there has been notable successes by plaintiffs in the EU before the national courts, none of the cases brought before the EU Courts have been successful so far as the applicants failed to satisfy the EU Courts’ stringent standing requirements. The EU Courts require plaintiffs to demonstrate that they are individually affected by the contested act in a manner that is “peculiar to them.” The far-reaching nature of the effects of climate change makes it obviously difficult to give rise to an individual concern. Further, the EU courts take the position that any claim of infringement of fundamental rights by climate change is not sufficient in itself to establish standing.

In the context of the new European Green Deal initiative to transition the EU economy to a sustainable economic model with the overarching objective for the EU to become the first climate neutral continent by 2050, climate change considerations which are taking an even greater importance in the EU are likely to result in more climate change litigation at the EU level. Among its set of measures designed to ensure alignment with its EU emission reduction targets, the EU recently put forward legislative proposals requiring companies to integrate considerations of sustainability, human rights and environmental impacts into their everyday business practices. The EU has already made it clear that these proposals will not only apply to companies established in the EU but to all companies doing business in the EU – i.e. organizations that supply goods or services into the EU market. Therefore US companies operating in Europe might well be caught at least to the extent of their European businesses.

This proposed legislation may accordingly have significant impact on US companies with established businesses in the EU and result in increased climate change-
related disputes. In France, following the introduction of new corporate duty provisions on human rights and the environment, the nongovernmental organization Friends of the Earth used the obligations imposed by the new law to bring claims against energy company Total. As with the rights-based claims in the Netherlands, these claims seek to oblige companies properly to assess their impact on the environment and to act in a way where climate damage is limited.

**Takeaway**

The world is paying greater attention to greenhouse gas emissions. Some companies are making serious investments in a post-carbon world. Whether through self-initiation, imposition by a court, shareholder proposal, or a hostile proxy-fight resulting in a board shift, carbon-intensive companies are feeling the pressure to cut emissions hard and fast.

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