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New Offense Expands Liability for Corporate Enviro Fraud

Article

November 20, 2024 | *Law360* | 7 minute read

The legal tools to hold companies accountable for environmental issues are expanding at an accelerating pace.

On November 6, the UK Home Office published much-anticipated guidance on the new “failure to prevent fraud by a corporate organization” offense, that is, the corporate fraud offense.[1]

The new offense provides yet another mechanism for a growing class of claimants to bring proceedings against companies for climate issues, such as greenwashing. It is a single, albeit significant, piece of an evolving environmental compliance landscape. As standards mature, companies must adapt swiftly to stay compliant.

In parallel, an expanding set of entities — from regulators like the Advertising Standards Authority and the Competition and Markets Authority, to nongovernmental offices dedicated to environmental issues — is employing increasingly sophisticated and aggressive strategies to influence corporate behavior.

As a result of these pressures, the legal routes available for environmental compliance claims have grown in number and have become more inventive, with creative arguments deployed in areas once considered unconventional.

Here we discuss derivative actions against directors of a company for breach of their duties and the extension of a tortious duty of care to parent companies in respect of subsidiary liability.

Alongside practical commentary on what these novel routes to liability mean for legal professionals and affected companies, we also briefly explore a subset of inventive routes to accountability that include the judicial review of planning applications and proceedings brought by governmental bodies.

Related People

Mark
Partner
LONDON
+44 (0) 20 7448 4297
mark.hunting@bracewell.com

Henry
Associate
LONDON
+44 (0) 20 7448 4264
henry.day@bracewell.com

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Corporate Fraud Offense

Housed in Sections 199-206 and Schedule 13 of the Economic Crime and Corporate Transparency Act 2023, or ECCTA, the express goal of the new corporate fraud offense — coming into force on September 1, 2025 — is to "make it easier to hold organizations to account for fraud."

The recent government guidance should therefore not go ignored, since it sets out procedures that large companies can put in place to prevent persons associated with them from committing the new offense.

In overview, a large organization, as defined in Section 201 of the ECCTA, commits the corporate fraud offense when:

- A so-called associated person commits a fraud with the intention of benefiting the company, another company within the same group or, in certain circumstances, clients of the company; and
- The company did not have reasonable fraud prevention procedures in place when the fraud was committed.

The corporate fraud offense provides a wide basis for claims against companies suspected of greenwashing — the practice of misleading consumers and investors about environmental practices for corporate benefit.

Pivotally, the new offense lowers the bar for establishing corporate criminal liability for fraud because it is no longer necessary to demonstrate that the company's senior managers or directors ordered or knew about the fraud.

The new offense also provides for liability to extend across corporate groups, permitting claimants to press for accountability within larger, multinational entities.

Notably, the corporate fraud offense closely mirrors the failure to prevent bribery offense, which itself provided unprecedented impetus for companies to develop anti-corruption compliance programs due to its wide adoption in common law jurisdictions globally.

This mirroring is present in the UK's recent guidance: It repurposes the same six principles to determine whether prevention procedures are adequate and reasonable:

- Top-level commitment;
- Risk assessment;
- Proportionate risk-based prevention procedures;
- Due diligence;
- Communication, including training; and

- Monitoring and review.

Despite these similarities, consideration is required as to when preexisting components of a company's compliance program will need to be supplemented or changed to cater to the new corporate fraud offense. In practice, following courses of action should be considered.

Update Company's Approach

Update the company's approach to top-level commitment by building fraud assessments into risk assessment processes. Such assessments should seek to identify where and what type of fraud may take place. In relation to potential greenwashing claims, efforts should be made to index and monitor environmental representations to ensure that no associated person risks committing the base fraud by false representation.

Distinguish Between Controls

Distinguish between controls designed to protect the company from being a victim of fraud on the one hand, and controls designed to prevent their company from committing the new corporate fraud offense on the other. Fraud protection controls remain important but are unlikely to suffice as reasonable fraud prevention measures for the purposes of the new offense. Risks under the ECCTA should be thought of as distinct from fraud risks that a company may face as a victim.

Build Out Due Diligence Policies

Build out due diligence policies and procedures to include specific fraud-related searches, particularly in relation to potential agents and service providers, and develop appropriate training for reviewers to recognize and address fraud issues. Adequately adapting due diligence procedures is likely to comprise a significant part of the increased administrative burden flowing from the corporate fraud offense.

Prepare Proportionate Guidance

Prepare proportionate guidance and procedures for those responsible for dealing with counterparties or customers. Such procedures will need to address myriad disparate issues, including dishonest sales practices, provision of information to third parties and conduct in financial markets. Ensuring that the requirements of proportionality are met will depend greatly on the company's specific circumstances and, in our view, present a formidable challenge ripe for adversarial scrutiny.

Derivative Actions

Derivative actions may be brought by the members of a company against directors for failing to comply with their duties. Recent years have seen a number of attempted derivative claims that directors have failed to act in the best interests of the company through inadequate handling of climate risks.

Such a claim was dismissed by the Court of Appeal in 2023 in *McGaughey & Davies v. Universities Superannuation Scheme Ltd.*[2] Shareholder claimants alleged that directors had failed in their duties by continuing to invest in fossil fuels, despite the company's stated ambition to be carbon-neutral by 2050.

While the court's decision clarified that derivative claims should not be pursued when direct challenges are available, i.e., for breach of trust, it ultimately depended on the facts of the case and did not preclude similar claims where relevant conditions are met, such as satisfactory evidence of loss.

In practice, directors may do well to align climate strategy with stated sustainability goals, documenting decisions rigorously to demonstrate fulsome evaluation of climate risks.

While courts are currently reluctant to find directors on the wrong side of their duties, as can also be seen in the Court of Appeal's decision in relation to a similar derivative action brought by Client Earth against Shell in November 2023,[3] evolving corporate standards may lead to shifts in the content of directors' duties that are brought to light in further derivative actions.

Class Actions and Parent Company Liability

Recent years have also seen widespread use of tort claims to redress environmental harms caused by corporate activities.

For example, in 2021, the UK Supreme Court established in *Okpabi & Ors v. Royal Dutch Shell PLC* that Shell's UK parent entity also owed a duty of care to the claimant

Nigerian citizens in respect of alleged environmental damage and human rights abuses by a subsidiary entity, due to the degree of control and de facto management exercised by the parent company.[4]

The oversight and control exercised by foreign parent companies to more accurately estimate potential liability created by overseas subsidiaries' operations should be properly assessed. In many cases of potential parent liability for the torts of a subsidiary, the way that the corporate group shares risk management policies or delegates responsibility for such policies has proven a key consideration.

Inventive Claims

In addition to these mechanisms, a range of more creative avenues are being pursued to hold companies accountable.

Scrutiny of Advertisements

In August, the Advertising Standards Authority found that Virgin Atlantic Airways Ltd.’s unqualified claim that it uses 100 percent sustainable aviation fuel in a flight from London to New York was misleading, and it directed the airline to explain the environmental impact of the fuel in future adverts.[5]

Judicial Review of Planning Applications

Failure to consider Scope 3 emissions in environmental impact assessments has been litigated at every level of appeal in recent years, e.g., *Friends of the Earth v. South Lakeland Action on Climate Change* in the High Court of England & Wales in September.[6] Untested facts may give rise to further allegations that the environmental effects of a proposed project have not been adequately considered as part of the planning process.

Claims Under Financial Services and Markets Act 2023

While there have been relatively few Financial Services and Markets Act cases on environmental issues, there is an industrywide consensus that unfounded environmental, social and governance claims, made to attract investment with the effect of misleading investors, will result in an uptick in claims made under Sections 90 and 90A of the act. It is also expected that there may be substantial overlap between Financial Services and Markets Act claims and the new corporate fraud offense.

CMA Investigations

On March 27, the CMA announced that it had accepted extensive voluntary undertakings from ASOS, Boohoo.com UK Ltd. and Asda Stores Ltd. in relation to various environmental representations made by the entities.[7]

The voluntary undertakings resulted from the CMA's investigation of certain so-called green claims, having identified greenwashing concerns in contravention of the CMA's Green Claims Code.[8] The undertakings extended to not using natural imagery to suggest a product is more eco-friendly than it is.

While this investigation targeted practices in the fashion industry, the CMA announced in early November that it also pushed Unilever PLC to modify the green claims displayed on its household essentials products, ending an investigation commenced in late 2023.[9]

It is expected that the CMA will continue to secure further undertakings from large market participants, holding companies to account for their market representations.

Conclusion

To sum up, the means to hold companies accountable on environmental grounds have expanded rapidly. The introduction of the corporate fraud offense underscores the UK's commitment to tackle corporate misrepresentation, especially in cases of greenwashing, by creating a clear path for criminal liability.

Concurrently, alternative routes to liability such as derivative claims, tort-based class actions and Financial Services and Markets Act claims are evolving, providing claimants with a wider set of tools to wield against companies. Heightened regulatory scrutiny from bodies such as the Advertising Standards Authority means that companies must be more precise and transparent in their sustainability disclosures, ensuring that claims are backed by concrete actions.

As a result, businesses must now incorporate rigorous environmental oversight into their compliance strategies, aligning stated goals with tangible outcomes. This shifting landscape demands that companies not only meet compliance standards, but also establish a culture of accountability, where their environmental practices can withstand the scrutiny of courts, regulators and a growing class of claimants.

[1] https://www.gov.uk/government/publications/offence-of-failure-to-prevent-fraud-introduced-by-eccta/economic-crime-and-corporate-transparency-act-2023-guidance-to-organisations-on-the-offence-of-failure-to-prevent-fraud-accessible-version.

[2] *McGaughey & Davies v. Universities Superannuation Scheme Ltd.* [2023] EWCA Civ 873: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230721_2022-EWHC-1233-Ch-2023-EWCA-Civ-873_judgment-1.pdf.

[3] *Client Earth v. Shell & Ors CA-2023-001866*: https://www.clientearth.org/media/w2rdknei/07-court-of-appeal-pta-decision.pdf.

[4] *Okpabi & Ors v Royal Dutch Shell plc & Anor* [2021] UKSC 3: https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf.

[5] https://www.asa.org.uk/rulings/virgin-atlantic-airways-ltd-g23-1224417-virgin-atlantic-airways-ltd.html.

[6] *Friends of the Earth and others v South Lakeland Action on Climate Change* – Towards Transition and Others [2024] EWHC 2349: https://www.supremecourt.uk/cases/docs/uksc-2022-0064-judgment.pdf; https://www.bailii.org/ew/cases/EWHC/Admin/2024/2349.html.

[7] https://www.gov.uk/government/news/green-claims-cma-secures-landmark-changes-from-asos-boohoo-and-asda.

[8] https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services.

[9] https://www.gov.uk/cma-cases/fast-moving-consumer-goods-fmcg.

Article was originally published by Law360 on November 20, 2024.