West Virginia v. EPA: Insurers Should Consider How Big of a Bite the U.S. Supreme Court Took Out of the "E" in ESG

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We have written extensively about environmental, social, and governance ("ESG") otherwise known as sustainability, and its impact on insurers and their policyholders.[1] We have pointed out how ESG has impacted insurers *qua* businesses (in terms of their practices and strategies as business entities), insurers *qua* insurers (in their underwriting practices and the claims confronting them), and insurers *qua* investors (in making portfolio investment decisions). Insurers and their policyholders, regulators, rating agencies, employees, vendors, and other constituencies are watching closely and are impacting and being impacted by ESG. Insurers cannot afford to ignore ESG or make serious ESG missteps. Although some ESG decisions may seem clear, others may be murky or produce mixed or even negative results. Formulating successful ESG strategies and adroitly implementing them is key for insurers and their policyholders in these times.

The Biden administration has employed an "all of government" approach to implementing its policy goals relative to ESG. Many believe the focus on the environmental portion – the "E" in ESG – is necessary to save the planet. Others believe that this focus on regulation of climate change may outpace technology and the ability of the U.S. and the world economies to meet the demands for green energy, contributing substantially to the four decade's high inflation rate in the U.S., leading to unprecedented shortages in the supply chain and consumer goods, and even prolonging war. Both views may be true.

Time will tell the extent to which the "E" efforts live up to the hype and promises and whether the benefits outweigh the costs in the long run. Insurers—like all businesses—must exercise good judgment in their ESG-related decisions and ensure that they truly are acting in the interests of their constituencies. Just as there is momentum for bold changes in the area of ESG, it will be equally important to ensure that changes are cogent and suitably paced.

Political Pundits Have Different Views About the Supreme Court Decision

On June 30, 2022, the U.S. Supreme Court issued its decision in *West Virginia v. EPA*.[2] There is general consensus this decision will hinder, delay, complicate, or otherwise impact the Biden Administration's climate goals.

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[1] *See, e.g.*, S. Seaman, *Insurers Take the Lead on ESG/Sustainability Initiatives*, JD SUPRA (Oct. 1, 2021), https://www.jdsupra.com/legalnews/insurers-take-the-lead-on-esg-6954367/; *see also* S. Seaman & S. Anderson, *Part One: Reviewing Key U.S. Insurance Decisions, Trends, & Developments – ESG*, JD SUPRA (Feb. 11, 2022), https://www.jdsupra.com/legalnews/part-one-reviewing-key-u-s-insurance-5324533/.

[2] *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780, 2022 U.S. LEXIS 3268, (June 30, 2022).

Commentators vary considerably on both the legal correctness of the decision and in their assessment of what the impact of the decision will be. We offer a couple of examples.

According to this CNN report:

> The Supreme Court's decision on Thursday dealt a major blow to climate action by handcuffing the Environmental Protection Agency's ability to regulate planet-warming emissions from the country's power plants, just as scientists warn the world is running out of time to get the climate crisis under control.
>
> It is a major loss for not only the Biden administration's climate goals, but it also calls into question the future of federal-level climate action and puts even more pressure on Congress to act to reduce emissions.
>
> Experts tell CNN the decision could set the U.S. back years on its path to rein in the climate crisis and its deadly, costly impacts.
>
> The opinion makes it "more difficult to achieve larger-scale emissions reductions," Andres Restrepo, senior attorney for the Sierra Club's Environmental Law Program, told CNN. "To avoid the worst impacts of climate change we need to do a lot more and move a lot faster. That's why today's ruling is such a setback."[3]

Unsurprisingly, Fox News offered a different view:

> For some time, the Environmental Protection Agency has wanted to destroy the American coal industry and has issued regulations with that end in mind. Today, the Supreme Court said it cannot do that without a clear grant of authority from Congress. This ruling not only stops environmental zealots in the EPA, but it should also stop major power grabs by bureaucrats at other agencies. It's a landmark ruling against the agencies that have become like a fourth branch of government.
>
> In the June 30 ruling in West Virginia v. EPA, the Court was concerned with an Obama-era regulation called the Clean Power Plan. The EPA felt it had a duty to reduce greenhouse gas emissions and drew up rules that would force states to do so. In the process, the agency decided the "best system of emissions reduction" was one that the coal industry could not survive under. Regulators relied on a little-used provision of the Clean Air Act that had only ever been used to make emission reduction systems operate more cleanly, not to eliminate them. The Court said they couldn't do this.[4]

We will not enter the fray of political commentary, but instead we provide a brief summary of the decision below; we invite you to draw your own conclusions.

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[3] Ella Nilsen, *How the Supreme Court ruling will gut the EPA's ability to fight the climate crisi*s, CNN POLITICS (June 30, 2022), https://www.cnn.com/2022/06/30/politics/epa-supreme-court-ruling-effect/index.html.

[4] Ian Murray, Supreme Court ruling limits EPA power, returns it to Congress where it belongs, Fox News (June 30, 2022), https://www.foxnews.com/opinion/supreme-court-ruling-limits-epa-power?yptr=yahoo.

An Overview of the Supreme Court's Decision in *West Virginia v. EPA*

In *West Virginia v. EPA*, the Supreme Court addressed the Clean Power Plan, a rule promulgated by the Environmental Protection Agency ("EPA") to address carbon dioxide emissions from existing coal and natural gas-fired power plants.[5] The Clean Power Plan set forth three important measures: (1) "heat rate improvements," which were practices that power plants could use to burn coal more cleanly; (2) a shift in electricity production from coal-fired power plants to natural gas-fired power plants; and (3) a shift from coal and gas plants to more renewable energy production, such as wind and solar power.[6] The EPA also set forth "final emission guidelines for states to follow in developing plans" to regulate the existing power plants.[7] At issue was whether the EPA had the authority to regulate these emissions via the "best system of emission reduction" identified in the Clean Power Plan. The Supreme Court found that the EPA, which purported to derive its authority from Section 111(d) of the Clean Air Act, did not have the broad authority to do so.[8]

The case resulted in a 6-3 ruling from the Supreme Court, with the majority opinion penned by Chief Justice Roberts. The court began by addressing threshold issues of justiciability. The majority held the State petitioners had standing as they were injured because the EPA rule would require them to more stringently regulate power plant emissions within their borders.[9] As to mootness, the court rejected the government's argument that the case is moot based upon its representation that the EPA does not intend to enforce the Clean Power Plan prior to promulgating a new Section 111(d) rule.[10] The court stated that " 'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[11] The court noted that the government did not suggest that, if this litigation was resolved in its favor, it would not reimpose emissions limits predicated on generation shifting.[12] Although this aspect of the ruling is hardly groundbreaking, it will support the standing of states to challenge future agency action.

The court reversed the D.C. Circuit Court of Appeal's ruling striking down the Trump administration's Affordable Clean Energy rule, which had repealed the Obama-era Clean Power Plan and replaced it with more limited regulations of carbon dioxide emissions from existing power plants. The Supreme Court's ruling, instead, restricted the EPA's "power to regulate greenhouse gas emissions from power plants, finding that the Obama administration exceeded its authority under the Clean Air Act by allowing states to

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[5] *West Virginia v. EPA*, 2022 U.S. LEXIS 3268, at *1.

[6] *Id*. at *2-3.

[7] *Id*. at *3-4.

[8] *Id*. at *12.

[9] *Id*. at *32.

[10] *Id*. at *33.

[11] *Id*. (quoting *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719, 127 S. Ct. 2738 (2007)).

[12] *West Virginia v. EPA*, 2022 U.S. LEXIS 3268 at *34.

issue regulations aimed at increasing the use of cleaner sources of electricity generation."[13] The majority determined that the EPA exceeded the congressionally mandated authority by using the Clean Power Plan to give states the option to promulgate regulations that would encourage "generation shifting," or moving away from power sources like coal to cleaner ones, like natural gas or renewables.[14] According to Chief Justice Roberts:

> Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.[15]

Chief Justice Roberts stated the government—under the major questions doctrine— could not point to "clear congressional authorization" for its manner of regulations but instead pointed to the EPA's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction … adequately demonstrated."[16] According to the majority, "[s]uch a vague statutory grant" was "not close to the sort of clear authorization required" by the Court's precedent.[17]

In her dissent, Justice Kagan stated Section 111 of the Clean Air Act did, in fact, broadly authorize the EPA to devise the "best system of emission reduction" for power plants and that the parties did not dispute that the "best system" was generation shifting.[18] Accordingly, Justice Kagan's dissent viewed the majority's decision as depriving the agency of "the power needed—and the power granted—to curb greenhouse gases."[19] Justice Kagan added that "[a] key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems.[20] She accused the majority of substituting its own policymaking ideas for those of Congress and stated that the majority's decision was "really an advisory opinion on the proper scope of the new rule EPA is considering," as the Biden administration stated it would not revive the 2015 Clean Power Plan.[21]

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[13] Keith Goldberg, *High Court Pares Down EPS'a Clean Air Act Power*, LAW360 (June 30, 2022), https://www.law360.com/articles/1486055/high-court-pares-down-epa-s-clean-air-act-power.

[14] *West Virginia v. EPA*, 2022 U.S. LEXIS 3268 at *54.

[15] *Id*. (internal citations omitted).

[16] *Id*. at *50.

[17] *Id*.

[18] *Id*. at *82.

[19] *Id*. at *83.

[20] *Id*.

[21] *Id*. at *82.

The Impact of the Decision on Federal and State Agency Regulation of Greenhouse Gas Emissions

It will take a while to know the true impact of the Supreme Court's decision. However, the impact likely will not be as limiting on regulators as some fear and others hope.

The Supreme Court recognized that the EPA does have power to regulate greenhouse gas emissions, and the ruling does not prevent the EPA from regulating outright power plant greenhouse gas emissions under Section 111(d) or under the Clean Air Act. Indeed, in response to the decision EPA Administrator Michael Regan stated, "[w]hile I am deeply disappointed by the Supreme Court's decision, we are committed to using the full scope of EPA's authorities to protect communities and reduce the pollution that is driving climate change."[22]

The EPA undoubtedly will look to other sources of authority, rely on more traditional tools such as those used to regulate other air pollutants, and will be required to exercise greater care in regulating greenhouse gas emissions. It may take more time and more steps to achieve its goals.

We note, however, that much has been left undecided by the Supreme Court's decision. For instance, the issue of whether the EPA must stay within the fence line of a power plant when crafting greenhouse gas emission regulations, as the Trump administration maintained in enacting the Affordable Clean Energy rule, was not decided by the court. The court's decision also does not address the EPA's regulation of greenhouse gas emissions from other sources, such as vehicles.

The Supreme Court's reliance upon "the major questions doctrine" is significant. In his concurrence, Justice Gorsuch described the doctrine as a tool to ensure that the government does "not inadvertently cross constitutional lines."[23] The major questions doctrine has previously been used to guard against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Both liberal and conservative justices have relied upon the major question doctrine in the past. The related "non-delegation" doctrine prevents Congress from intentionally giving away its own power. Application of the major questions doctrine often results in requiring Congress—the people's elected representatives—to weigh in legislatively to solve more contemporary problems or issues. In the majority's decision in *West Virginia v. EPA*, the doctrine was used to prevent the EPA's authority from being based upon "vague" statutory grants and require the EPA to point to clear congressional authorization.[24] This is likely to result in future challenges to EPA regulations and limit greenhouse gas rulemaking.

The decision potentially gives states a greater role to play with respect to clean energy requirements, which likely will play out differently in traditionally red states versus traditionally blue states. Currently, many states tether their air quality standards to federal standards by specifically incorporating reference to parts of Section 111 into their own statutes and regulations. Others choose to implement the EPA's determinations as a baseline or guide for minimum air quality standards. As such, the Supreme Court's decision will have a direct impact on state law.

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[22] Nielson, *supra* note 3.

[23] *West Virginia v. EPA*, 2022 U.S. LEXIS 3268 at *64.

[24] *Id*. at *51.

The Washington Post has suggested the ruling in *West Virginia v. EPA* may not bode well for the Biden administration in the challenge to the Clean Water Act, currently scheduled for argument this fall in the case *Sackett v. EPA*.[25] *The Washington Post* stated, "the conservative justices court also find in that case that the EPA overstepped its authority when regulating the nation's wetlands and waterways, despite a lack of clear guidance from Congress."[26] The *Sackett v. EPA* case will address the issue of what constitutes the "waters of the United States," which was something the Clean Water Act of 1972 was created to protect. The plaintiffs notably favor a narrower definition proposed by the late Justice Antonin Scalia and championed by business groups such as the U.S. Chamber of Commerce. According to *The Washington Post*, "if they prevail, by some estimates, 90 percent of federally regulated waterways in America would lose protections."[27]

The decision in *West Virginia v. EPA* has placed a hold on several other court decisions and regulations as courts and regulators across the nation digest the impact of the decision. For example, *Law360* reported that "a federal judge for the sixth time delayed ruling on Massachusetts' expanded 'right to repair' law" in order to consider the implications of the Supreme Court's decision "restricting the government's ability to regulate greenhouse gas emissions."[28] Meanwhile, the D.C. Circuit has extended a pause in an appeal argued by Republican-led states over whether California has the authority to craft its own vehicle greenhouse gas emissions standards, deciding to wait until related litigation gets decided.

Wider Impact of the Ruling

The decision—particularly its reliance upon "the major questions doctrine"—likely has implications beyond the EPA and greenhouse gas emissions. It signals the view of the majority of justices that the "administrative state" may be out of control and that it may be sympathetic to efforts to limit the broad and growing power of unelected government bureaucrats in federal administrative agencies. Stated differently, rather than treating such assertions of power as normal statutory interpretations, as to which judges are highly deferential to agency actions, courts may approach extraordinary, novel actions of administrative agencies "with far-reaching consequences with a greater degree of skepticism."[29] Certainly, "[i]f Congress wishes to effect a sweeping overhaul of the nation's economic activity, it must now do so explicitly—with 'clear congressional authorization,'" according to Justice Roberts.[30] "Agencies may not, on their own initiative, transform a statutory scheme used for one thing to perform some other

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[25] *Supreme Court's EPA ruling upends Biden's environmental agenda*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/climate-environment/2022/06/30/epa-supreme-court-west-virginia/.

[26] Id.

[27] Id.

[28] Chris Villani, *High Court EPA Ruling Stalls 'Right To Repair' Decision Again*, LAW360 (July 1, 2022), https://www.law360.com/articles/1508099/high-court-epa-ruling-stalls-right-to-repair-decision-again.

[29] *Will West Virginia v. EPA Cripple Regulators? Not if Congress Steps Up.*, BROOKINGS INSTITUTION (July 1, 2022), https://www.aei.org/articles/will-west-virginia-v-epa-cripple-regulators-not-if-congress-steps-up/.

[30] *Id.*

ambitious work, even if the law's language makes their statutory interpretation 'colorable.'"[31] The decision may have implications beyond the context of ESG as well.

The Potential Impact on Insurer Climate Change Activities

One important takeaway from the Supreme Court's decision is a lesson learned by most Presidential administrations: namely, in a democracy, courts and judicial challenges can delay and derail an administration's policies no matter the number of resources or the amount of political capital devoted to them. The bigger and more sweeping the policy, the more subject to challenge the policy may be. Insurers (and policyholders) in making decisions—whether underwriting, business, or other decisions should keep in mind that climate change—will continue to face hurdles, delay, and pushback. Although companies must comply with regulations, they must exercise judgment to ensure that they are not being used as proxies to effectuate government policymakers' ESG goals, particularly where regulators are pushing the limits of their regulatory authority.

Reliance on Carbon Credits or Offsets can be Problematic

Many companies rely upon carbon credits or offsets in formulating or announcing their policies relative to greenhouse gas emissions or "net zero." A number of studies have identified serious problems with some carbon offset credits. "Studies of the world's two largest offset programs – the Clean Development Mechanism (CDM) and Joint Implementation (JI), both administered by the United Nations under the Kyoto Protocol – suggest that up to 60-70% of their offset credits may not represent valid GHG reductions."[32] One concern is that a large number of offset credits come from energy sector projects that have significant sources of other revenue besides offset credits, suggesting that they would have happened anyway and do not represent additional mitigation. There have also been issues regarding the over-estimation of emission reductions. We simply suggest companies take the issue into account where they or their constituencies are relying upon carbon offsets or credits. There is general agreement that reduction of emissions remains the most important action.[33]

Beware of Greenwashing Claims

Insurers and policyholders must be aware of the potential for greenwashing claims. As *Law360*'s Shane Dilworth recently pointed out:

> Increased scrutiny of companies accused of engaging in so-called greenwashing – or falsely conveying that their products are more environmentally friendly than they really are – will likely lead to insurance coverage disputes as federal regulators zero in on environmental, social and governance issues this year.

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[31] *Id*.

[32] Carbon Offset Guide, https://www.offsetguide.org/concerns-about-carbon-offset-quality/. (last visited July 5, 2022).

[33] *See* Nancy Averett, *The problem with carbon offsets*, OUTSIDE BUSINESS JOURNAL (February 25, 2022), https://www.outsidebusinessjournal.com/issues/the-problem-with-carbon-offsets/.

> Companies such as Exxon Mobil Corp., Suncor Energy and Chevron Corp. came under fire for greenwashing in lawsuits brought by local governments that claim they suffered increased infrastructure costs as a result of rising sea levels and severe weather events. The plaintiffs in those cases accuse the energy giants of intentionally misrepresenting their knowledge about the association between burning fossil fuels and climate change.
>
> Another theory on greenwashing, experts say, involves whether companies are being properly managed or clearly representing to investors information about their societal governance and efforts to operate in an environmentally friendly manner.[34]

Indeed, the SEC and other regulators are reviewing public statements and disclosures surrounding ESG issues, as are investors. As identified in that article, greenwashing may have severe reputational, financial, and legal consequences on companies.

Recognize That ESG Policies are Viewed Differently by Constituencies and Factions Within Constituencies

Many insurers believe that policyholders with ESG awareness have a better risk profile than those not focused on ESG or policyholders with poorly conceived ESG policies or strategies. Understandably, insurers are reviewing policyholder ESG policies and performance with increasing frequency and in greater depth. Insurers also should recognize that when a policyholder's ESG awareness becomes ESG activism, it could result in additional risks resulting in claims against the policyholder. ESG activism could present similar risks to insurers in their own business strategies and policies. This applies to the "S" and "G" components of ESG—social and governance—as well as the "E" component.

Ben & Jerry's ice cream provides an example in the context of D&O Claims. On June 15, 2022, U.K. consumer products company Unilever was sued by a shareholder alleging that the company mishandled the decision by its Ben & Jerry's unit to stop selling ice cream in Israeli-occupied Palestinian territories.[35] Unilever acquired Ben & Jerry's ice cream in 2000, but Ben & Jerry's retained an independent board. In July 2020, the independent Ben & Jerry's board passed a resolution to end Ben & Jerry's sales of its products in areas the board considered to be Palestinian territories illegally occupied by Israel. The newly filed securities class action complaint in the Southern District of New York against Unilever and some of its executives alleges that the defendants made "false and misleading representations," as "Unilever acknowledged the importance of maintaining successful customer relationships with existing customers but omitted discussing that the B&J board had already decided to end sales to existing Israeli customers, which risked reduced sales and a customer backlash."[36] According to the complaint, Unilever acknowledged that its brands and reputation are "valuable assets that could be impacted by unethical conduct but omitted discussing Ben & Jerry's boycott decision, which risked damage to Unilever's brands,

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[34] S. Dilworth, *Greenwashing Claims Likely To Kick-Start Coverage Battles*, LAW360 (March 16, 2022), https://www.law360.com/insurance-authority/articles/1466262

[35] Jonathan Stempel, *Unilever shareholder sues over Ben & Jerry's Israel boycott*, REUTERS (June 15, 2022), https://www.reuters.com/article/unilever-ben-jerrys-israel-lawsuit-idAFL1N2Y22MS.

[36] *City of St. Clair Shores Police and Fire Retirement System v. Unilever Plc et al, U.S. District Court,* No. 1:22-cv-05011 (S.D.N.Y. June 15, 2022).

reputation, and business results."[37] The complaint also states that "Unilever acknowledged that complying with all applicable laws and regulations was important but omitted discussing Ben & Jerry's boycott decision, which risked adverse governmental actions for violations of Anti-BDS Legislation."[38] As seen above, it was Ben & Jerry's social activism that gave rise to the lawsuit.

Another example is Disney's handling of The Parental Rights in Education Act, dubbed the "Don't Say Gay" legislation, in Florida. The company's handling of the issue seemed to anger people on both sides of the issue and had adverse consequences for the company in terms of legislative action and stock price.[39] The National Basketball Association's stand or failure to take a stand with respect to policies in China also may present issues. Simply stated, different people view many "S" and "G" policies differently, and individuals may be impacted differently by the policies even within the same constituency. The foregoing illustrates the importance of not mishandling ESG issues as well as the difficulties ESG issues can present to companies. Taking a position—or not taking a position—can impact a company.

ESG will continue to present important issues, challenges, and opportunities to insurers and their policyholders in the wake of *West Virginia v. EPA*. In the context of ESG policies or decisions, the observation of the New Jersey Supreme Court regarding environmental insurance coverage law seems apt: "It sometimes appears that just as soon as one issue of importance is resolved, like Hydra the many-headed serpent in Greek mythology, at least two new issues arise to replace it."[40]

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[37] *Id.*

[38] *Id.*

[39] *See generally* Ariel Zilber, *Ex-Disney exec on Florida 'Don't Say Gay' flap: 'They pissed off the left and the right'*, NEW YORK POST, (June 21, 2022), https://nypost.com/2022/06/21/how-disney-botched-florida-dont-say-gay-flap/; *see also* Travis Clark, *Disney extends CEO Bob Chapek's contract for 3 years, putting to rest doubts after dustup with Florida Gov. DeSantis on 'Don't Say Gay' law*, THE BUSINESS INSIDER, (June 28, 2022), https://www.businessinsider.com/disney-extends-ceo-chapek-contract-florida-desantis-dont-say-gay-2022-6.

[40] S. Seaman & J. Schulze, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS, xiv (Thomson Reuters, 10th ed. 2021) (*citing General Accident Ins. Co. v. State of New Jersey*, 627 A.2d 1154 (N.J. 1996)).

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