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ESG LITIGATION TRENDS

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In recent years, companies have been under increased scrutiny from investors, consumers, and government agencies over environmental, social, and governance (ESG) issues. As companies continue to expand their ESG programs in part due to greater public and political attention on ESG issues, companies must also confront an increased risk of attention from private litigants.

Companies should anticipate ESG-related litigation in the form of shareholder derivative lawsuits, consumer protection litigation, suits by environmental advocacy groups, employment discrimination claims, and other private litigation. We have listed below a few categories of ESG-related litigation that have been on the rise thus far.

Green Marketing

As consumer demand for environmentally and ethically sustainable products grows, companies are expanding their assortment of "green" offerings and marketing them accordingly. This increased emphasis on green marketing—the promotion of environmentally friendly products or services—has led to a rise in private lawsuits. Although plaintiffs have historically targeted consumer goods with allegations of false and misleading marketing claims, there has been a notable increase of these claims within the green marketing sector, with plaintiffs often alleging that companies are misleading or deceiving consumers through their claims of environmental sustainability. Because of this increased liability risk, companies should be wary of making overstated, misleading, or inaccurate environmental claims (particularly in light of the growing number of consumers who have an increased expectation of transparency with respect to carbon emissions, the reduction of those emissions, and other environmental-related issues).

Within the green marketing sector, carbon emissions have become a hot target for plaintiffs. Although companies have explored multiple ways to reduce carbon emissions, one method is garnering attention from plaintiffs—the purchase of carbon offsets. For instance, plaintiffs have filed a consumer protection lawsuit alleging that the "carbon-neutral" claim on the label of Evian water is false and misleading. According to plaintiffs, a reasonable consumer would interpret the carbon-neutral label to suggest that no carbon dioxide was released in the manufacturing of Evian products. Plaintiffs also argue that the carbon-offset verification process is unreliable.

Delta Airlines is also facing a proposed class action lawsuit over its claim to be the world's "first carbon-neutral airline." In 2020, Delta announced a $1 billion pledge to become carbon neutral. To mitigate its greenhouse gas emissions, Delta purchased carbon credits. The plaintiff challenging Delta's claim alleges that Delta relies on "junk" offsets that do nothing to counteract the climate crisis. The plaintiff further argues that eco-conscious customers would not have purchased—or would have paid substantially less for—Delta tickets if they knew the airline's carbon neutrality claims were misleading.

These cases reinforce that as consumer expectations around carbon neutrality evolve, companies should assess their carbon neutrality claims to maintain customer trust and reduce potential litigation risks.

Similarly, words such as "clean" and "sustainable" are also giving rise to false advertising claims. For example, a utility company is currently defending claims that it deceptively advertises natural gas as a "clean" source of energy when natural gas combustion emits methane. In another instance, a personal and household cleaning products brand is being sued for advertising its products as "non-toxic," safe, and environmentally-friendly when the products allegedly contain toxic chemicals and substances.

In addition to these direct claims, when a company's claim about the environmentally-friendly attributes or qualities of a product leads to a drop in stock price, shareholders often bring a derivative action, alleging securities fraud and breach of fiduciary duty claims. For example, a bioplastics company was sued by its shareholders after the Wall Street Journal published an article alleging that the company's claim that its plastic substitute was 100% biodegradable was greatly exaggerated.

Climate Pollution

States and municipalities have also brought lawsuits against oil and gas companies for climate change deceit and other contributions to climate change. Generally, these states and municipalities allege that companies knowingly made false and misleading claims to deceive the public about the existence of climate change and the degree to which their products have been exacerbating anthropogenic global warming. To date, more than forty states and cities have filed this type of action.

Some environmental statutes allow a private party to bring lawsuits to enforce the statute against polluters. For instance, an environmental advocacy group recently sued a manufacturing company claiming that its production facility was polluting the Merrimack River in violation of the Clean Water Act. Although the U.S. Supreme Court has significantly limited the ability of the Environmental Protection Agency to enact anti-pollution regulations and reduced the reach of federal protections, companies looking to reduce litigation risk should understand their pollution output and devise a sustainable plan with various stakeholders to reduce that output over time.

Diversity, Equity, and Inclusion

With a growing emphasis on the importance of DEI in the workplace, employers are facing an increasing number of employment discrimination and shareholder derivative actions related to DEI missteps. For example, employees and investors have targeted the lack of diversity on corporate boards and leadership positions, discriminatory hiring and firing practices, and misleading statements about commitments to diversity and equity.

Since 2020, over a dozen corporations have faced shareholder derivative lawsuits based on their allegedly misleading statements about their commitment to diversity and equity. These lawsuits typically allege that the corporation's directors breached their fiduciary duties by failing to ensure the corporation complied with anti-discrimination laws or by authorizing false statements in public materials regarding the corporation's commitment to diversity, equity, and inclusion.

Shareholders recently brought a derivative action against a technology company, claiming that the company's board omitted from its proxy statements that its public claims of supporting diversity and inclusion at all levels, including on the company's board, were false or misleading. The derivative action pointed to the absence of any African American representation on the company's board and within the senior executive leadership team, as well as single-digit percentages of African Americans within leadership and managerial positions.

In another example, shareholders filed a derivative action against a bank and its executives, alleging the bank inflated its stock by misleading the investor community about the bank's workplace diversity efforts. The shareholders allege that the bank conducted fake job interviews to satisfy internal diversity guidelines, leading to stock drops, a class action, and a criminal probe. This misconduct, according to the complaint, renders false and misleading certain statements made in the bank's financial filings and press releases about its diversity initiatives.

Anti-ESG Measures

In response to increasing levels of ESG-related litigation, enforcement, and public conversation, certain state legislatures have proposed or enacted a wave of anti-ESG legislation or initiated anti-ESG investigations or other actions. Most often, these anti-ESG measures involve preventing state fund managers from considering ESG factors when investing state funds or preventing public entities from doing business with financial institutions deemed to be "boycotting" industries such as fossil fuels or firearms.

But anti-ESG legislation has begun to extend further. Florida, for example, has enacted a law that bans public colleges and universities from using state or federal funds for DEI programs. Texas lawmakers have approved similar legislation, pending approval by the governor, which would ban DEI offices, programs, and training at publicly funded universities. Other states have proposed legislation prohibiting or limiting mandatory DEI trainings for state employees.

We expect a number of states to propose or adopt additional anti-ESG laws and, in turn, other states to propose or adopt pro-ESG laws in response. For example, California and New York have introduced bills that would require corporations to track and disclose regularly the greenhouse gas emissions generated through their business activities.

Although there has not yet been any litigation involving these new anti-ESG measures, we expect plaintiffs (and certain governmental entities) to initiate litigation involving these measures. That litigation may range from challenging the measures to attempting to enforce compliance via monetary awards or otherwise.

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With an evolving ESG landscape, it is imperative that companies continue to monitor relevant regulatory and litigation trends. To reduce the risk of liability, companies should appropriately embed ESG principles into their business operations and adequately reflect their commitment to customers, employees, and other stakeholders.

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