# LITIGATION MINUTE: THE "S": SUITS BASED ON WHAT A COMPANY SAYS AND DOES

## ESG IN LITIGATION SERIES: PART TWO OF EIGHT

Date: 14 June 2022

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## WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Social factors, the “S” in “ESG,” consider how a business handles its relationships with suppliers, contractors, employees, and communities. These factors increasingly are becoming the target of class action plaintiffs' lawyers, who are using companies' statements about their environmental, fair trade, labor, and diversity practices and policies as the alleged basis for shareholder derivative class actions and other class actions. Companies that have experienced a one-off event that has impacted its surrounding community can also find themselves defending a class action lawsuit.

These two trends are part of the evolving landscape of environmental, social, and governance (ESG) class actions and are reviewed in more detail below.

### Class-Action Plaintiffs' Lawyers Diversify Their Approach

The current social justice zeitgeist has increased market and shareholder attention to companies' commitment—real and perceived—to diversity, equity, and inclusion (DEI) practices and social and racial justice. In particular, companies that do not have diverse boards and management teams have been targeted with shareholder derivative suits. Companies' own public statements have formed the basis of these lawsuits: for example, that a company “actively seeks women and minority candidates” or “celebrates diversity and prides itself on its diverse staff.” Courts to date have generally dismissed these claims, holding that the alleged misrepresentations were not actionable because they did not sufficiently allege causation, constituted “puffery” (expressing an opinion rather than fact), or were nonspecific.

Companies can expect that class action plaintiffs' lawyers will soon target other types of public statements as the types of lawsuits filed catch up to culture. For example, “blue washing”—which occurs when a company is promoting the United Nations Global Compact supporting human rights, labor and environmental standards, and anti-corruption, but engaging in child labor, slavery, or other similar labor practices—has gained increased cultural attention. “Pink washing” has, too, which is promoting LGBTQ+ Pride events or LGBTQ+ values but not sufficiently supporting LGBTQ+ individuals in the workplace. While there has not yet been a proliferation of “blue washing” or “pink washing” class actions filed, law is downstream of culture: The cases are likely to come as these issues gain increased cultural focus.

To mitigate against the risk of facing a class action based on social factors, companies should consider the following:

 

1. Including prominent disclaimers with their advertising, as appropriate, such as using the phrase “good faith efforts” when discussing achieving diversity goals, and stating clearly that efforts to increase diversity are based on outreach, recruitment, and other DEI initiatives, rather than a preference or quota.
2. Basing diversity goals on a workforce and availability analysis that shows whether there is under-representation in certain job groups compared to availability in the recruitment area.
3. Where appropriate, using language that reflects aspirational rather than factual statements (e.g., “goal” rather than “promise”) and not tying hiring managers' compensation to achieving diversity goals.
4. Conducting annual reviews of compensation and hiring systems through a privileged expert engaged by counsel.
5. Performing a pay equity review before publicly claiming that pay equity exists.

## Event-Based Claims

Class actions that are driven by a single ESG-related “event” are also increasing in number, covering a wide array of industries. These lawsuits typically follow an event that negatively impacts a company's stock price. If the company was slow to disclose the event to shareholders, shareholders may sue and claim securities fraud. Even if the company quickly disclosed the event, shareholders may sue and allege the company failed to disclose the vulnerabilities that allowed the event to occur. These cases often ride the coattails of a government investigation, investigative journalism, or heavy press coverage.

For example, a major social media company faced a putative class action alleging that it collected location and other data, even when a user disabled data tracking on their device. A prominent videoconferencing provider recently settled a class action with allegations surrounding the ability of unwelcome participants being able to join the call. And numerous companies in the health care industry have reached global settlements related to opioid claims.

While planning for everything is impossible, companies should consider regularly evaluating the risks of a major ESG event as part of an overall enterprise risk management (ERM) program in an effort to identify and, where appropriate, adopt improved mechanisms to prevent the events that have already given rise to litigation. And, while it may seem counterintuitive, increased mandatory, uniform ESG disclosures could provide some shelter to companies facing a securities class action based on certain types of ESG disclosures, because they would facilitate getting ESG-related information to shareholders and provide a defense that all applicable regulations were followed.

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