

# No Good Deed Goes Unpunished: Growing ESG Litigation Risks

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## Summary

Plaintiffs are inventing new theories to attack businesses for alleged ESG-related deficiencies. Companies need to carefully manage their ESG initiatives, performance, and representations.

## Introduction

Public companies are facing increased pressure to develop and publish goals around Environmental, Social and Governance (“ESG”) objectives. A number of groups and organizations have developed scoring metrics which attempt to grade companies on their ESG performance. Private investor groups have added pressure by indicating they will invest their dollars in companies which meet certain criteria. For example, in his January 2021 letter to CEO’s, Blackrock Investments’ Larry Fink wrote this:

*Given how central the energy transition will be to every company’s growth prospects, we are asking companies to disclose a plan for how their business model will be compatible with a net zero economy – that is, one where global warming is limited to well below 2°C, consistent with a global aspiration of net zero greenhouse gas emissions by 2050. We are asking you to disclose how this plan is incorporated into your long-term strategy and reviewed by your board of directors.*

The Securities and Exchange Commission (“SEC”) has also weighed in, making the case for enhanced ESG disclosures.

More than 95% of the Fortune 50 now include some ESG disclosures in their SEC filings. The topics on the rise in 2020 included Human Capital Management, Environmental, Corporate Culture, Ethical Business Practices, Board Oversight of E&S Issues, Social Impact and Shareholder Engagement.

## Developing Litigation Trends

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While the increased attention on ESG presents an opportunity for companies to showcase their good work, it also creates increased litigation risk. These new challenges primarily fall into three areas: misrepresentations, unfair and deceptive trade practices, and securities fraud.

### **1. Misrepresentation & Breach of Warranty: Challenges to Misleading ESG Statements**

While claims alleging defective products and labels are nothing new, the increased amount of publicly available ESG information has given plaintiffs' attorneys new targets. In *Ruiz v. Darigold, Inc./Nw. Dairy Ass'n*<sup>1</sup>, the dairy association highlighted the company's social consciousness in a Social Responsibility Report. Consumers sued stating they purchased the products in reliance on these statements, which plaintiffs contended were false. The court dismissed the claims, finding that the statements were largely statements of opinion, and that "a reasonable consumer would not have interpreted the 2010 CSR as a promise that there were no problems at any of the 500+ dairies that make up the NDA or that Darigold's products were generated by only healthy, happy, respected workers and cows."<sup>2</sup>

The court reached a similar result in *Nat. Consumers League v. Wal-Mart Stores, Inc.*<sup>3</sup>, finding that Walmart's "aspirational statements" were not actionable, although other claims based on detailed information about auditing programs could proceed. The case settled before any final judgment.

After Chiquita made a number of marketing representations on its website regarding its environmentally safe business practices, including that it protects water sources by reforesting all affected natural watercourses it was sued by a non-profit.<sup>4</sup> While the court dismissed a number of claims, the claims for unfair and deceptive trade practices and for breach of express warranty were allowed to proceed.

Governments have also asserted claims against companies which exaggerate their ESG accomplishments. One decision which received considerable attention was brought by the Commonwealth of Massachusetts claiming that ExxonMobil had deceived both investors and consumers with a "greenwashing" campaign.<sup>5</sup> Greenwashing refers to the practice of making false or misleading claims about sustainability or environmental compliance. The federal court declined jurisdiction, and sent the case back to Massachusetts state courts.

Another example is the 2019 settlement of an FTC complaint against Truly Organic, which advertised its product as vegan, even though they contained honey and lactose. Truly Organic paid \$1.76 million to settle the case.

### **2. Unfair and Deceptive Business Practices**

Most states have laws designed to protect consumers from unfair and deceptive trade practices. These consumer protection laws can form the basis for greenwashing claims.<sup>6</sup>

In one landmark case, consumers brought a class action against Fiji Water, which marketed itself as carbon-negative and featured a green drop on the bottle. After the trial court dismissed the case, plaintiffs appealed. The California appeals court concluded that "no reasonable consumer would be misled to think that the green drop on Fiji water represents a third party organization's endorsement or that Fiji Water is environmentally superior to that of the competition."<sup>7</sup> This case has been cited hundreds of times by courts and commentators.<sup>8</sup>

In 2019, purchasers of StarKist tuna filed a class action alleging the company falsely claimed that its

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products were 100 percent “dolphin-safe” and sustainably sourced. The court concluded that plaintiffs had stated a claim that StarKist’s fishing methods were not actually dolphin-safe.<sup>9</sup> Discovery in this case is on-going, and the court recently required production of fishing records.<sup>10</sup> Labels with claims such as “100 percent” are likely to draw similar attacks.

Keurig, which sells millions of disposable coffee pods, labeled some pods as “recyclable.” Consumers sued, alleging that in fact the pods were not recyclable in a practical way. The court concluded the claims were adequately pled under the reasonable consumer test.<sup>11</sup> In September, 2020, the court granted class certification in the matter.<sup>12</sup> This case serves a warning to be very careful about recycling claims.

In an even more recent case, California courts considered claims against Rust-Oleum, which marketed its products as “Non-Toxic” and “Earth Friendly.” The court concluded that these terms were not deceptive as used, because there was a sufficient allegation that the products were harmful or damaging to the earth. The Court rejected plaintiffs’ argument that the wording amounted to an environmental claim about the packaging.<sup>13</sup>

Like other unfair and deceptive acts and practices complaints, consumer claims of greenwashing may be enforced by the FTC pursuant to 15 U.S.C.A. § 45. The FTC has published the Green Guides, 16 C.F.R. §§ 260.1 et seq., to assist manufacturers and retailers in avoiding making false or misleading claims about the environment benefits of products and/or services. Failing to follow these guidelines are often cited by consumer plaintiffs as a basis for liability.

### **3. Securities Fraud Claims**

Section 10-b of the Securities Exchange Act and SEC Rule 10b-5, which form the common legal grounds for claims of securities fraud, prohibit any false or misleading statement of material fact or omission of material fact in connection with the purchase or sale of any security.<sup>14</sup> Liability potentially extends to individual officers and directors for ESG-related misstatements or omissions about which they knew or should have known.<sup>15</sup>

Shareholders frequently bring claims under the Securities Exchange Act for statements made by public companies. In *Ramirez v. Exxon Mobil Corp.*<sup>16</sup>, the court found that the plaintiffs sufficiently alleged that: (i) the company made material misstatements regarding its use of proxy costs of carbon in formulating business and investment plans; (ii) the company made material misstatements concerning the financial implications of specific projects with climate change implications; and (iii) the defendants made the requisite statements with the scienter (i.e., intent to deceive) required for securities fraud claims.

Yum! Brands, which owns Taco Bell and KFC, made a number of statements regarding the importance of food safety and strict compliance with safety standards in their securities filings. After news broke about several instances of food contamination, shareholders sued. The court dismissed the claim, finding “a reasonable investor would pay little, if any, attention to Defendants’ statements concerning the quality of Yum!’s food safety program. Those statements are vague and subjective, evidencing only the opinion of management, or derived from sources that are aspirational, rather than reliable.”<sup>17</sup>

On the other hand, statements about health and safety practices made by Transocean in SEC filings led the court to deny a motion to dismiss security fraud claims filed against that company following the Deepwater Horizon disaster.<sup>18</sup> The case remains in litigation. Another securities fraud case was

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filed against Brazilian mining company Vale after two dam collapses. The plaintiffs alleged that the safety-focused statements in Vale's SEC filings were deceptive. Vale ultimately settled the case for \$25 million.

## **Action Items**

### **1. Carefully consider Voluntary Disclosures**

All public disclosures create a risk of liability. As a result, any non-mandatory disclosure must be carefully evaluated to determine whether the benefit of the disclosure outweighs the potential risk. Aspirational statements involve less risk than concrete statements and metrics, but the line between these is often blurred. If the benefit justifies the risk, then the company must take affirmative steps to: (i) ensure the accuracy of the disclosure, (ii) prevent inconsistencies with other company disclosures; and (iii) evaluate which party should make the disclosure and the reporting framework.

### **2. Review the Green Guides and other FTC Guidance**

The Green Guides were first issued in 1992 and were revised in 1996, 1998, and 2012. They remain relevant today for companies looking for guidance. A few items to pay particular attention to include:

- Companies should avoid general environmental benefit claims, like the term “eco-friendly.”
- Carbon offsets must be properly quantified, and companies must disclose if they are more than two years in the future. Offsets required by law are not a “reduction.”
- Claims about compostability, degradability and recyclability must be carefully documented.
- Claims of “made with renewable energy” are often deceptive, because it can be difficult to prove where the energy actually came from, unless it is generated entirely within the same facility.

### **3. Evaluate which Sustainability Standard will be used**

For many years, companies looked to GRI's Sustainability Reporting Framework. However, a number of new and different standards are emerging, including SASB, TCFD and the UN Global Goals.<sup>19</sup> While a full review of these standards is beyond the scope of this article, companies should carefully select a standard for tracking and reporting and then be in a position to demonstrate compliance with those requirements. Particular attention must be paid to disclosures around implementation, especially as it relates to supply chain impacts.

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<sup>1</sup> *Ruiz v. Darigold, Inc./Nw. Dairy Ass'n*, No. C14-1283RSL, 2014 WL 5599989, at \*2 (W.D. Wash. Nov. 3, 2014)

<sup>2</sup> 2014 WL 5599989, at \*6.

<sup>3</sup> *Nat. Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, 2016 WL 4080541, at \*1 (D.C. Super. July 22, 2016)

<sup>4</sup> *Water & Sanitation Health, Inc. v. Chiquita Brands Int'l, Inc.*, No. C14-10 RAJ, 2014 WL 2154381, at \*1 (W.D. Wash. May 22, 2014).

<sup>5</sup> *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 38 (D. Mass. 2020).

<sup>6</sup> See *Cause of Action Under State Consumer Protective Law for "Greenwashing,"* 79 Causes of

Action 2d 323 (Originally published in 2017).

7 *B. Hill v. Roll Internat. Corp.*, 195 Cal. App. 4th 1295, 1301, 128 Cal. Rptr. 3d 109, 113 (2011).

<sup>8</sup> See, e.g. *Jou v. Kimberly-Clark Corp.*, No. C-13-03075 JSC, 2013 WL 6491158, at \*7 (N.D. Cal. Dec. 10, 2013) (concluding “pure & natural” was a sufficiently specific representation).

<sup>9</sup> *Gardner v. Starkist Co.*, 418 F. Supp. 3d 443, 449 (N.D. Cal. 2019).

<sup>10</sup> *Gardner v. Starkist Co.*, No. 19-CV-02561-WHO, 2021 WL 303426, at \*5 (N.D. Cal. Jan. 29, 2021).

<sup>11</sup> *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 847 (N.D. Cal. 2019).

<sup>12</sup> *Smith v. Keurig Green Mountain, Inc.*, No. 18-CV-06690-HSG, 2020 WL 5630051, at \*1 (N.D. Cal. Sept. 21, 2020).

<sup>13</sup> See *Bush v. Rust-oleum Corp.*, 2020 WL 8917154 (N.D. Cal.).

<sup>14</sup> 15 U.S.C. §§78a et seq.

<sup>15</sup> See *Growing ESG Risks: The Rise of Litigation*, 50 ELR 10849 (2020).

<sup>16</sup> *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832 (N.D. Tex. 2018)

<sup>17</sup> *In re Yum! Brands, Inc. Sec. Litig.*, 73 F. Supp. 3d 846, 864 (W.D. Ky. 2014), *aff'd sub nom.*

*Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483 (6th Cir. 2015).

<sup>18</sup> *In re BP P.L.C. Sec. Litig.*, No. 4:12-CV-1256, 2013 WL 6383968, at \*1 (S.D. Tex. Dec. 5, 2013).

<sup>19</sup> [The ESG Movement: Why All Companies Need to Care](#), Womble Bond Dickinson (US) LLP and Pamela Cone

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