

‘A ‘Damned If You Do, Damned If You Don’t’-Type Thing: ESG Disclosures and the Prospect of Future Litigation

Heidi Friedman and Renee Zaytsev of Thompson Hine, whose firm just surveyed 130-plus corporate leaders about their approach to environmental, social and governance matters, discuss whether the market’s current focus ESG issues might spur litigation.

By Ross Todd
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There’s clearly something wrong with me.

The fact that certain investors are loudly demanding corporate commitments and disclosures on issues related to environmental, social and governance matters causes most normal people to think: “Hey ... That’s nice. For once, a corporate focus on something other than quarterly earnings and profit margins.”

Me?

I think: “What’s all this going to mean in terms of litigation?”

Especially after the U.S. Securities and Exchange Commission announced an “[all-agency approach](#)” to climate change and ESG-related issues earlier this year. “All-agency” includes the enforcement division, i.e. the agency’s litigators.

Thankfully, **Heidi Friedman** and **Renee Zaytsev** of **Thompson Hine** were game to discuss whether the market’s current focus ESG issues might spur litigation. Their firm just released [a survey of 134 in-house counsel](#) and other senior business executives at public and private companies in the U.S. asking about how they’re approaching ESG issues. Friedman, who is based in Cleveland, serves as national environmental counsel for large



Courtesy photos

(L-R) Heidi Friedman and Renee Zaytsev of Thompson Hine.

companies and is co-chair of the firm’s [ESG Collaborative](#). Zaytsev, who is based in New York, co-chairs the firm’s securities and shareholder litigation group. The following has been edited for length and clarity.

Litigation Daily: Where are you seeing ESG issues bubble up in litigation?

Renee Zaytsev: ESG is sort of a new framework that’s being put on a familiar set of claims. Event-driven litigation is nothing new. Whenever there

is a stock drop, you always have a plaintiff's bar that is going to be combing through a company's public statements to find something that was allegedly false or misleading that could relate to that stock drop. So now, whenever those statements relate to a workplace issue or an environmental issue or even things like data privacy and cyber security, they get moved into this so-called ESG framework. It's really not something that's particularly new to the world of securities litigation.

It's a rebranding of sorts?

Zaytsev: It's a rebranding more than anything right.

Heidi Friedman: I would say there's two other buckets outside of securities, where you're seeing a potential increase in the number of claims. But again, I would say these claims have been around at least five or six years on a significant basis, maybe even seven or eight. I would call one "greenwashing" claims. It's kind of the kitschy term **coined in the 1980s** relating to hotels and whether they were reusing towels. Greenwashing claims are usually based on misrepresentations of breaches of warranty that companies have and/or unfair and deceptive trade practices and alleged violations of consumer protection laws. These are often brought against product manufacturers. There are claims related to things like "Oh, you said you were recycling these things. And are you really doing that?" Class certification was recently granted in one of those kinds of cases. We're seeing a lot more where companies are saying, for example, "My product has less [volatile organic compounds] than my competitor's product." That's something I get involved with a lot. We get demand letters under the Consumer Protection Act and other laws saying, "Okay, well how much less?"

So what we're seeing a lot of now is companies thinking a lot more proactively on the front end about "How do we mitigate that?" and "Are we

collecting the data that we need to collect and doing the research and testing that we need to be doing so that we have that information so we can prove what we are saying?" A lot of what I'm doing right now is reviewing website information, product disclosure information, lots of things like that relate to these ESG-related goals.

The shift that I like coming out of all the ESG pressures is a lot of companies are conducting materiality assessments. That's a best practice stage one. They're identifying what is material with all the stakeholders. And then they're setting action items and saying "These are tier one, tier two, tier three, et cetera." And then they're implementing action steps. The good news is that counsel is often getting involved at the beginning. So, they are mitigating risks throughout the process. They're thinking whether by doing this or saying this, are they going to increase the chance that they might end up in one of these consumer class actions or the security fraud cases.

Well, is there any worry out there in the market about conducting these sorts of materiality assessments and making public statements on the ESG front might invite that scrutiny and potential litigation?

Zaytsev: Absolutely. I mean it's a little bit of a "damned if you do, damned if you don't"-type thing. There's no real consensus on what should be disclosed. The SEC says that it's working on some standards that it's going to put out in terms of disclosure requirements in this realm. But the reality is that investors want to see it. So a lot of companies are making disclosures relating to ESG and disclaiming them as forward looking statements. That may or may not work.

They want to satisfy investors. They want to make sure that they don't withhold information that could be considered material. But of course, once you do say something, you have an obligation

to speak truthfully. And even if your statement is somewhat generic, we've seen a lot of litigation over the last few years based on generic statements about a company's commitment to diversity or their commitment to apply ethics codes to various officers and directors. I'm not saying that those suits are necessarily successful but they do drive litigation.

Out of the in-house counsel who responded to your firm's recent ESG survey, 10% listed litigation as their company's most pressing ESG concern in the next year. And 8% said it was the most pressing concern over the next five-to-10 years. What do you make of that? Are clients' assessment of ESG-related litigation risks in line with your own or not?

Friedman: I was a little surprised by that; I'll be honest. But when you kind of drill down a little bit, I think it's consistent. Remember, this is public companies and private companies. Almost 50% of private companies had not even started formulating an ESG program. So I think, for them to think about litigation, it's like "who knows when that will happen?" My guess is more public companies were worried about the litigation. I think people are worried right now about "What are we disclosing?" and "Do we have the data?" Litigation is more of a long-term issue

When in-house counsel were asked about short-term concerns, across the board people are really focused on "How do we gather the data that we need to prevent litigation down the road?"

In October, November, we'll potentially see these SEC regs. People are going to start making more disclosures, and then we're going to have a

lot more challenges, either on the regulatory level or on the private party level.

So what will you be watching in the next year on the ESG front?

Zaytsev: I think we are going to see an uptick in litigation on all sorts of claims made based on these somewhat generic statements, I don't think that those types of claims are going away. It's what [Institutional Shareholder Services] and many others call event-driven litigation, which is a little bit of a change from the early days when securities litigation tended to be focused on accounting misconduct and things like that. So I don't think that these types of suits are going away. They don't find tremendous success. But they do sometimes. All it takes is a couple of big ones for them to be worth it to a plaintiff's lawyer. I think the pandemic is still going to be a ripe area for potential claims. It'll be very interesting to see how board diversity continues to impact these types of claims. There have been a couple of litigations relating to those. Again, they haven't been very successful yet. But I don't expect those to go completely by the wayside.

Friedman: The FTC puts out these "**Green Guides**," and they are often asserted even in private litigation on the kinds of greenwashing claims we've been talking about. They're doing an update next year in 2022. So I'm really interested to see what they're going to do and how they're going to be revising the current green guides. They obviously can bring their own regulatory actions as well. That may be a little bit of a framework to define what the future litigation might look like as well.