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2021 ESG Litigation Offers Pointers For The Year Ahead

By **Renee Zaytsev, Riccardo DeBari and Edward Babbitt** (January 3, 2022)

Corporate stakeholders' interest in environmental, social and governance matters continued to surge in 2021, with economic, public health and social justice crises intensifying scrutiny of companies' public statements and actions.

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Unsurprisingly, increased scrutiny led to increased litigation, with several high-profile ESG cases filed in the past year, and a number of earlier-filed cases yielding judicial decisions that offer critical insight into how courts are beginning to address novel ESG claims, and where ESG litigation may be headed in 2022.

Guidance from the U.S. Supreme Court on how courts should consider the generic quality of alleged misstatements, and increased enforcement action by the U.S. Securities and Exchange Commission, round out our key ESG trends and takeaways from 2021.

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Greenwashing Cases See Success in 2021

Litigation challenging companies' environmental and sustainability disclosures showed no signs of slowing in 2021. Activist organizations and consumers teamed up to file suits alleging that blue-chip companies overstated the recyclability of their single-use plastic products.

These cases included David Swartz v. The Coca-Cola Company and Sierra Club v. The Coca-Cola Company, both decided on June 16, 2021, and Greenpeace Inc v. Walmart Inc., decided on Oct. 15, 2021, all in the U.S. District Court for the Northern District of California.

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In The Last Beach Cleanup v. TerraCycle Inc., a California-based nonprofit sued TerraCycle and several major brands in the Northern District of California for advertising certain products as recyclable while allegedly knowing that the products were exceedingly difficult to recycle.[1]

And In re Oatly Group AB Securities Litigation was a class action filed in the U.S. District Court for the Southern District of New York by investors, who alleged federal securities law violations based in part on claims that the Swedish oat milk company used a supplier that contributed to deforestation and endangerment of species in Africa.

These so-called greenwashing cases highlight the risks companies continue to face when making broad or categorical assertions about their environmental or sustainability practices. Indeed, recent decisions in greenwashing cases underscore that courts are willing to allow such claims to proceed to discovery, when plaintiffs adequately allege that a company's environmental and sustainability actions don't match its public statements.

For example, in March 2021, in Organic Consumers Association v. Tyson Foods, the District of Columbia Superior Court denied a motion to dismiss a D.C. consumer protection claim involving allegations that Tyson deceived customers when it made dozens of statements affirming a commitment to animal welfare and "environmental stewardship."

In so holding, the court rejected Tyson's argument that its statements were "merely opinions, predictions, and aspirations" that no reasonable consumer would rely on, despite the fairly generic quality of the specific statements identified by the court, such as statements affirming the company's commitments to "environmental stewardship" and "sustainability."[2]

The relative success of greenwashing claims at the motion-to-dismiss stage should give companies pause as they consider making even generic statements concerning the sustainability and environmental impact of their products or services.

Board Diversity Litigation Falls Flat

The second half of 2020 saw activist investors bring a slew of shareholder derivative suits, alleging that company directors violated federal securities laws and/or breached their fiduciary duties by publicly touting inclusion, while failing to ensure diversity on their own boards.

Unlike the greenwashing claims highlighted above, these suits did not fare well in 2021. Courts unanimously granted motions to dismiss in these cases, expressing skepticism at the notion that board members violate the law when they fail to live up to generic or aspirational commitments to diversity.

For example, in Ocegueda v. Zuckerberg, the Northern District of California dismissed claims that Facebook's board of directors violated Section 14(a) of the Securities Exchange Act and breached its fiduciary duties, among other state law violations, by affirming a commitment to diversity while allegedly failing to include minority members on the board.

In granting the defendants' motion to dismiss, the court concluded that the company's statements about diversity were either aspirational or nonactionable puffery, and that the plaintiff had further failed to adequately allege any actions taken by the defendants that were inconsistent with Facebook's stated commitment to diversity. The court also noted that many of the plaintiff's factual allegations were demonstrably false, such as the claim that Facebook did not have any minority directors when, in fact, two of the company's nine directors were Black.

With respect to the plaintiff's fiduciary claims, the court went on to conclude that the plaintiff had failed to plead demand futility, citing the absence of any nonconclusory factual allegations that Facebook's board either ignored red flags or faced substantial liability.

The Zuckerberg decision marked the first in a string of pleadings-stage losses for board diversity litigation plaintiffs in 2021, calling into question the continuing vitality of investor suits as a vehicle for challenging corporate commitments to diversity and inclusion.[3] Given these recent outcomes, we anticipate that plaintiffs attorneys will be more discerning in their pursuit of board diversity litigation going forward.

Supreme Court Raises Bar for Class Certification in ESG Securities Fraud Litigation

Although the Supreme Court's June 2021 decision in Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System does not explicitly address ESG-specific claims, its holding that generic statements "often will be important evidence of price impact" at the class certification stage has enormous implications for companies defending against ESG-related securities litigation going forward.

In Goldman, shareholders alleged that Goldman Sachs maintained an inflated stock price by making repeated misrepresentations about its conflict of interest policies, including statements touting its conflict of interest "procedures and controls" and emphasizing that "[i]ntegrity and honesty are at the heart of our business."

When it was subsequently revealed that Goldman had engaged in certain conflicted transactions, its stock price dropped, and investors filed a class action suit. The district court denied Goldman's motion to dismiss the claims and granted class certification. The U.S. Court of Appeals for the Second Circuit affirmed certification, and Goldman subsequently appealed to the Supreme Court.

In vacating the Second Circuit's affirmance, the Supreme Court held that it was not clear whether the lower court properly considered the generic nature of the alleged misrepresentations in assessing the impact those statements may have had on Goldman's stock price.

While the court acknowledged that the generic quality of an alleged misstatement is traditionally a merits stage inquiry, it held that courts considering class certification motions should not ignore the fact that generic misrepresentations are less likely to have a classwide price impact than more specific statements.

While it remains to be seen how aggressively courts will apply the Goldman holding in ESG-related litigation, allowing courts to consider the generic quality of a statement before certifying a class undoubtedly places companies defending against misrepresentation claims in a stronger position. Although risks associated with generic ESG statements remain, this is no small victory for defendants, given the importance of class certification in federal securities actions.

SEC Announces Climate and ESG Enforcement Task Force

The SEC announced forthcoming action on several ESG issues in 2021, a clear sign that it intends to increase scrutiny of ESG-related funds, transactions and statements.

Most notably, in March, then-acting SEC Chair Allison Herren Lee announced the creation of a new Climate and ESG Task Force in the Division of Enforcement, with a focus on identifying material misstatements in issuers' disclosures of climate risks and analyzing issues relating to investment advisers' and funds' ESG strategies. The agency plans to "use sophisticated data analysis to mine and assess" registrants' climate and ESG disclosures.[4]

As Steven Peikin, a former co-head of the SEC's enforcement unit, observed in July 2021, "Usually you don't stand up a task force unless you're pretty sure that task force is going to produce something."[5] Companies should therefore expect an uptick in enforcement actions in 2022, and be especially vigilant about fact-checking public statements concerning ESG issues in the event of regulatory scrutiny.

Developments in 2021 underscore that ESG issues remain top of mind for both corporate stakeholders and plaintiffs attorneys alike. Companies are thus advised to exercise caution as they continue to navigate the ever-evolving ESG landscape.

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[1] Defendants agreed to increase auditing of their recycling practices and alter their disclosures as part of a settlement announced in November 2021.

[2] See also Bush v. Rust-Oleum Corp., No. 20-cv-03268-LB, 2021 U.S. Dist. LEXIS 507, at *1 (N.D. Cal. Jan. 4, 2021) (denying motion to dismiss California consumer-protection claims arising from Rust-Oleum's allegedly misleading marketing of products as "non-toxic" and "earth friendly," citing allegation that the products in fact harmed humans and the environment); In re S.C. Johnson & Son Inc., No. 20-cv-03184-HSG, 2021 U.S. Dist. LEXIS 141101, at *3 (N.D. Cal. July 28, 2021) (declining to dismiss greenwashing claims arising from "non-toxic" labeling of allegedly harmful window cleaner).

[3] See, e.g., Lee v. Fisher, No. 20-cv-6163 (N.D. Cal. April 27, 2021) (dismissing claims against Gap directors); Klein v. Ellison, No. 20-cv-4439 (N.D. Cal. May 21, 2021) (dismissing claims against Oracle directors); In re Danaher Corp. Shareholder Derivative Litigation, No. 20-cv-2445 (D.D.C. June 28, 2021) (dismissing claims against Danaher directors); Esa v. NortonLifeLock Inc., No. 20-cv-5410 (N.D. Cal. Aug. 30, 2021) (dismissing claims against NortonLifeLock directors); Lee v. Frost, No. 21-cv-20885 (S.D. Fla. Sept. 1, 2021) (dismissing claims against OPKO Health directors); Kiger v. Qualcomm Inc., No. 21-cv-409 (D. Del. Nov. 15, 2021) (dismissing claims against Qualcomm).

[4] SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (March 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[5] Al Barbarino, Top SEC Official Suggests More ESG Enforcement Is Coming, Law360 (July 13, 2021), https://www.law360.com/articles/1402762/top-sec-official-suggests-more-esg-enforcement-is-coming?copied=1.