Recent Cases Suggest ESG Means 'Ever-Shifting Guidelines'

By **Brian Israel and Aaron Reuben** (March 7, 2025)

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Over the last two months, several courts have weighed in on important cases related to environmental, social and governance issues, often with inconsistent outcomes. These decisions have exacerbated an already complex landscape that includes conflicting political priorities, new laws and changing regulatory guidance.

Taken together, the only true certainty for companies trying to navigate ESG issues is increasing unpredictability. These challenges will continue for some time, and lead one to ask whether, perhaps, the real meaning of ESG in the U.S. is "ever-shifting guidelines."

In this article, we highlight some of the competing and contradictory outcomes in recent ESG litigation, and offer practical takeaways for minimizing risk and enhancing opportunities.

ESG Litigation Risk: Here to Stay

ESG-related litigation is everywhere. As consumers, regulators, nongovernmental organizations and others have become more attuned to ESG-related initiatives, companies have been the target of numerous, varied lawsuits.

Previously, companies could reduce ESG-related litigation risks by monitoring compliance with long-standing environmental, consumer protection and disclosure laws, and related regulations or guidance.

However, claimants are increasingly bringing lawsuits applying state law concepts of unfair competition, deceptive marketing, fraud and nuisance, and other state laws to potentially hold companies liable for ESG-related statements, actions or omissions.

In some cases, NGOs have creatively asserted standing to challenge environmental and sustainability marketing, and long-standing corporate practices such as promotion of recycling.[1]

Unsurprisingly, the outcomes are not consistent across jurisdictions. Nonetheless, a few key takeaways are emerging.

But First, Some Jurisprudential Context

While ESG litigation is growing, litigation over ESG issues is nothing new. Since the beginning of the corporate form, companies have undertaken actions that were focused on broader community interests, from supporting the war effort in the 1940s, to charitable giving, to protecting neighborhoods.

And, not infrequently, shareholders have sued those companies, asserting that the company had violated its fiduciary responsibilities. One of the earliest of these cases involved drinking water.

In the 1870s, Contra Costa Water-works Co. sold drinking water to the residents of Oakland. At some point, Contra Costa decided to provide water for free to the city of Oakland. A shareholder sued, alleging that the practice of giving away water was resulting in "diminution of the dividends ... and ... the decrease in the value of their stock."[2]

In this case, Hawes v. Oakland, the U.S. Supreme Court ultimately decided in 1881 to reject the plaintiff's claim, and held that a company's directors are best situated to determine whether spending money for the community — in this case, giving away water to the city for free — is in the best long-term interest of the company.

In sustaining Contra Costa's decision to donate the corporation's water to the city of Oakland, the opinion stands as one of the first to establish a core principle of corporate governance related to ESG — namely, the significant operational discretion of management and directors to prioritize benefits other than short-term shareholder profit.[3]

Preliminary Guidance From Recent ESG Decisions

Today, claimants are suing companies in numerous ESG-related contexts, from sustainability and greenhouse gas emissions, to carbon credits and corporate ethics. Below, we review a few of these cases and some recent decisions.

Green marketing claims are sometimes dismissed ...

In City of New York v. Exxon Mobil Corp.,[4] New York City alleged that fossil fuel producers systemically misled consumers regarding impacts of fossil fuel products and renewable energy commitments, along with allegations of "product greenwashing" and "corporate greenwashing."

On Jan. 14, the New York Supreme Court granted the defendants' motions to dismiss. The court ruled that New York City failed to state violations under its consumer protection laws because the impact of climate change is already widely known, and alleged greenwashing claims were not made in connection with the sale of consumer goods.[5]

... But not always.

In Earth Island Institute v. Coca-Cola Co.,[6] Earth Island alleged that Coca-Cola's sustainability statements and efforts to promote recycling were deceptive. On Aug. 29, 2024, the District of Columbia Court of Appeals reversed the Superior Court of the District of Columbia's decision granting Coca-Cola's motion to dismiss.

According to the court, broad statements regarding plastic packaging were "very much statements about its 'goods and services'" pursuant to the District of Columbia Consumer Protection Procedures Act. The court also viewed "aspirational" statements as actionable under the act.

Finally, the court noted that the First Amendment did not bar these claims.

Carbon-neutral claims may backfire.

In Berrin v. Delta Air Lines Inc.,[7] the claimants targeted Delta for its claim that it was the "first carbon neutral" airline. The plaintiffs alleged violations of California's False Advertising Law and Unfair Competition Law.

The plaintiffs also alleged that Delta "grossly misstated" actual carbon reductions from investment in the carbon offset market, and argued that purchasing carbon offsets cannot make a company carbon-neutral.

On Dec. 11, 2024, the U.S. District Court for the Central District of California ruled that Delta customers had Article III standing under California's Unfair Competition Law, and a particularized, concrete injury redressable by courts largely based on the customers' loyalty to Delta and intention to purchase flights in the future.[8]

The court appeared receptive to the plaintiffs' claims that Delta knew, or should have known, about issues with the verification of carbon offsets by third parties and related claims regarding carbon neutrality.

Sometimes, companies can rely on the reasonable customer ...

On May 12, 2023, in Lizama v. H&M Hennes & Mauritz LP,[9] the U.S. District Court for the Eastern District of Missouri dismissed the plaintiffs' claims that H&M's Conscious collection deceived consumers into believing that the products were sustainable. The court determined that the claims did not pass the "reasonable consumer" test.

Under that test, common under various state laws, plaintiffs must show that a reasonable consumer would be misled. Applying that test, the court did not find that H&M made broad sustainability statements that would lead a reasonable consumer to believe H&M's Conscious collection line was "environmentally friendly."

The ruling relied in part on the fact that H&M's website provided product material information, along with a discussion of those materials' environmental impacts.

... But not always.

In Lee v. Canada Goose US Inc.,[10] the plaintiffs alleged that they relied on Canada Goose's statements that it was dedicated to the "ethical, responsible, and sustainable sourcing and use of real fur." The plaintiffs asserted alleged violations of consumer protection statutes, breach of warranty and unjust enrichment.

On June 29, 2021, the U.S. District Court for the Southern District of New York held that there was a "reasonable inference" that Canada Goose's purported commitment to "ethical" fur sourcing was misleading because Canada Goose obtained fur from trappers using allegedly inhumane practices.[11] The court reasoned that a reasonable consumer would associate Canada Goose's claims with higher animal welfare standards.

The facts, as alleged, matter.

In West v. Sambazon Inc.,[12] buyers of acai products brought a class action against Sambazon alleging the acai products were made with unethical labor practices, contrary to product labeling and Sambazon's website.

The products' packaging included statements marketing Sambazon's "fair and ethical production practices." Like in other ESG-related claims, the buyers alleged deceptive

business practices, false advertising and breach of express warranty.

Applying New York state law, the Southern District of New York held on Sept. 26, 2024, that the plaintiffs failed to state claims for deceptive business practices, false advertising and express warranty. The court noted that the plaintiffs had not shown that they had not seen some of the allegedly deceptive statements before buying the products.[13]

ESG: A Preliminary Guide for Navigating Narrow Shoals

The law of each applicable jurisdiction must be analyzed to assess litigation risk. But for many companies selling products throughout the U.S. and internationally, this approach is not possible.

Despite the wide range of claims and decisions, actionable takeaways have emerged. The following best practices can help.

The business judgment rule is always there for you.

The business judgment rule can protect a company if it can show that it acted on an informed, good faith basis in the best interests of the company. This defense is in the bedrock of corporate law throughout the U.S., as illustrated above.

To use this defense, a company should be prepared to articulate how ESG policies are aligned with, and promote, the company's long-term interests.

Substantiation is everything.

Substantiation is to ESG as location is to real estate. There simply is no substitute for being able to provide supporting evidence and substantiation of marketing claims.

In some cases, this evidence can be used to prevent or deter claims before they are filed. Generally, the more technical the claim, the more detailed the evidence supporting it should be.

Omitting key facts or evidence can also be deceptive. In some cases, publicly posting supporting evidence for a company's ESG-related marketing claim can be a helpful defense.[14]

Given the novelty of ESG litigation, detailed supporting evidence appears to be the most effective tool to fight ESG-related litigation risk.[15]

Modesty is back in fashion.

Companies should take extra care in crafting language surrounding the ethics or sustainability of products or services, and not get carried away with overly broad, vague or generalized claims — such as claims that their products are sustainable, green, ethical or eco-friendly — since these claims may, depending on the context, be criticized as allegedly deceptive or misleading.

On the other hand, legalistic precision is not always a defense, and companies should consider all reasonable inferences. Unrealistic climate goals and overstatements of environmental benefits have been the basis for litigation, and have required costly revisions to company reports.[16]

Assess statements under relevant guidance materials and standards.

Analyzing a company's claims under the Federal Trade Commission's Green Guides, which are incorporated into some state laws, can help derisk corporations' statements, and may even provide a safe harbor under applicable law.

However, some states — e.g., California — have promulgated standards that are more rigorous than the Green Guides. While compliance with third-party standards or guidance may not shield a company from liability from litigation, it will help in most instances.

Know your jurisdiction.

Many states' consumer protection laws look at claims through the eyes of a reasonable consumer, assessing whether a reasonable consumer would be misled or deceived by the statements or omissions in question.

However, not all states require actual subjective reliance on the allegedly misleading statement. In some states, courts also consider the location of supporting information — e.g., on packaging or a website — and whether a reasonable consumer is likely to view that information.

Finally, the available remedy, statutory exceptions and applicable conduct often differ by jurisdiction.

Companies should consider the entire business and product life cycle.

Increasingly, claimants are examining entire businesses and product life cycles — e.g., outcomes in recycling facilities — in order to argue that a particular claim is misleading or deceptive.[17]

Companies making ESG-related claims may want to evaluate whether the claims reflect a product's supply chain, externalities associated with production, the ultimate disposal or recycling of the product, and the entire business.

Conclusion

Despite — or because of — the uncertainties associated with ESG in today's political climate and courts, we expect that companies will increasingly need to fend off ESG-related claims in the coming years.

The specific strategies for avoiding and defending these claims will necessarily depend upon the company's particular circumstances and the types of claims that are or could be asserted, as well as the jurisdictions involved.

In the meantime, it would be prudent to continue to monitor the ever-shifting guidelines from courts across the country.

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[1] See, e.g., Sierra Club Inc. v. ExxonMobil Corp., No. 3:24-cv-07288 (N.D. Cal. Oct. 18, 2024).

[2] Hawes v. Oakland, 104 U.S. 450, 451 (1881).

[3] For further discussion of this principle, see Brian D. Israel et al., Leaving the Lights Off: A Short History of the Legal Issues Related to ESG, in Environment, Social, Governance: The Professional's Guide to the Law and Practice of ESG 3 (Brian D. Israel et al. eds., ABA 2023).

[4] City of New York v. Exxon Mobil Corp., --- N.Y.S.3d ----, No. 451071/2021, 2025 WL 209843 (N.Y. Sup. Ct. Jan. 14, 2025).

[5] The state of New Jersey also filed a complaint against twelve oil and gas companies and an industry trade association seeking to hold them liable for the effects of climate change. New Jersey alleged that the defendants sought to discredit scientific information concerning climate change, and misrepresented their efforts to combat climate change. On Feb. 5, a New Jersey Superior Court Judge dismissed all of the state's claims because it determined that federal law governs interstate and international aspects of air emissions ("transboundary emissions"), thus preempting all of the state's claims. See Platkin v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct. Feb. 5, 2025).

[6] Earth Island Inst. v. Coca-Cola Co., 321 A.3d 654, 659 (D.C. 2024).

[7] Berrin v. Delta Air Lines Inc., No. 2:23-cv-04150, 2024 WL 5371340 (C.D. Cal. Dec. 11, 2024).

[8] However, in Blackburn v. Etsy Inc., the U.S. District Court for the Central District of California ruled plaintiffs lacked standing under California's Unfair Competition Law for allegations that Etsy misrepresented the effectiveness of carbon offsets for shipping emissions. See Blackburn v. Etsy Inc., No. CV 23-5711 (C.D. Cal. Dec. 14, 2023). The plaintiffs then filed a second amended complaint, which was subsequently voluntarily dismissed.

[9] Lizama v. H&M Hennes & Mauritz LP, No. 4:22-cv-01170, 2023 WL 3433957 (E.D. Mo. May 12, 2023).

[10] Lee v. Canada Goose US Inc., No. 1:20-cv-09809, 2021 WL 2665955 (S.D.N.Y. Jun. 29, 2021).

[11] This case was later voluntarily dismissed.

[12] West v. Sambazon Inc., --- F. Supp. 3d ----, No. 23-CV-2961, 2024 WL 4308812 (S.D.N.Y. Sept. 26, 2024).

[13] Consideration of ESG goals and policies in connection with investment decisions also may create litigation risks. These claims are often based on breaches of fiduciary duties. As one recent example, in Spence v. American Airlines Inc., a participant in American Airlines' retirement plan filed a class action lawsuit alleging violations of the duties of prudence and loyalty due to the investment plan manager's pursuit of ESG goals and the influence of ESG in the investment process. On Jan. 10, the U.S. District Court for the Northern District of Texas concluded that the defendants breached their duty of loyalty — i.e., the duty that requires plan fiduciaries to act solely in the benefit interests of plan participants. The court emphasized the importance of focusing on maximizing financial returns. Spence v. American Airlines Inc., No. 4:23-cv-00552, 2025 WL 225127 (N.D. Tex. Jan. 10, 2025). For a more comprehensive analysis, see this blog post: Federal Court Determines American Airlines, Inc., 401(k) Plan Fiduciaries Breached Their ERISA Fiduciary Duty of Loyalty to Employees by Pursuing ESG Policy Goals, https://www.paulhastings.com/insights/phast-track-a-legal-blog-about-environment-energy-and-infrastructure/federal-court-determines-american-airlines-inc-breached-erisa-fiduciary-duty-of-loyalty-to-employees.

[14] Some new laws — e.g., California's A.B. 1305 — require companies to publicly substantiate certain types of emission reduction claims or claims regarding marketing or use of offsets.

[15] See, e.g., Dwyer v. Allbirds Inc., 598 F. Supp. 3d 137, 150 (S.D.N.Y. 2022). In dismissing a claim of sustainability misrepresentations, the U.S. District Court for the Southern District of New York noted that Allbirds "d[id] not mislead the reasonable consumer because it makes clear what is included in the carbon footprint calculation, and does not suggest that any factors are included that really are not."

[16] Fossielvrij NL v. KLM, C/13/719848/HA ZA 22-524 (District Court of Amsterdam March 2024).

[17] See, e.g., California v. ExxonMobil Corp., No. CGC-24-618323 (Cal. Super. Ct. Sept. 23, 2024).