



# Global Class Action Summit: ESG/Sustainability Panel

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# Panelists

The Growth of ESG (Environmental, Social, and Governance) Litigation

**To explore these issues from a number of different perspectives, we have:**

- **Isabelle Ord** – Co-Chair, Class Action Litigation practice; US Co-Chair, Financial Services sector; US Co-Head, Global Class Actions; Litigation Partner, San Francisco
- **Colleen Carey Gulliver** – Litigation Partner, New York.
- **Angela Agrusa** – Managing Partner, Los Angeles office; Co-Chair, Food and Beverage subsector; Co-Chair, US Product Liability, Mass Torts & Class Actions Litigation Group; Member of DLA Piper's Executive Committee
- **George Gigounas** – Co-Chair, Environmental practice group; Litigation Partner, San Francisco
- **Jeremy Sher** – International Co-Head, Global Class Actions; Litigation Partner, London
- **Adam Baas** – Litigation Partner, San Francisco

# Introduction

## **The Growth of ESG (Environmental, Social, and Governance) Litigation**

- ESG, or SESG (with the first “S” standing for “Sustainability”), is a complicated issue that is creating exposure for companies around the world, and driving class action litigation.
  - Over 2,000 cases have been recorded on climate litigation tracking databases.
  - Two-thirds of those cases have commenced since the Paris Agreement in 2015, and around 200 of them were filed in the last twelve months.
  - The jurisdiction with the highest overall volume of cases continues to be the US, followed by Australia, the UK and the EU.
- We are seeing consumers, regulators, and investors increasingly focused on how businesses are embracing sustainable practices, addressing climate change, and enhancing diversity in their workforces.

# ESG Consumer Class Actions and Effective Defenses

## Types of Cases in this Space

- With the growing number of ESG-focused cases, we are seeing trends form, which industries are most impacted, what jurisdictions they are being filed in, what type of allegations we are seeing, and what the outcomes have been so far.
  - **Class actions involving consumer protection claims** alleging misrepresentation involving the marketing and labeling of products brought against product manufacturers, food and beverage companies, and cosmetic companies;
  - **Government enforcement actions** including state Attorney Generals bringing actions for deceptive and unfair business practices; and
  - **Securities class actions** surrounding companies' stewardship practices and fiduciary responsibilities.

# ESG Consumer Class Actions & Effective Defenses (cont.)

## Effective Defenses for Consumer Class Actions – Reliance and Causation

- Most consumer protection claims require proving the elements of reliance and causation.
  - See, e.g., New York General Business Law § 349 (“Section 349”). Section 349 applies to all businesses that engage in deceptive acts and practices that are considered to be unlawful. A consumer must prove three factors: 1) that the business conducted a deceptive or materially misleading act or practice, 2) that the act or practice was consumer-oriented, and 3) that the consumer suffered injuries as a result of the act or practice.
- Some of these claims are difficult for plaintiffs to prove because they’re relying on company disclosures that consumers are not seeing (ex: website disclosures).
- Therefore, key arguments to raise at the motion to dismiss are (1) Plaintiff did not **rely** on the purported misrepresentation, and (2) Given that Plaintiff did not review the website prior to the purchase, the purported misrepresentation did not **cause** the alleged injury.

# ESG Consumer Class Actions & Effective Defenses (cont.)

## Effective Defenses for Consumer Class Action – Factual Challenge to Standing

- A key argument to raise on a motion to dismiss is lack of subject matter jurisdiction, including Article III standing (FRCP 12(b)(1))
- To satisfy Article III standing, a plaintiff must allege:
  - The plaintiff suffered an actual, concrete, and particularized injury-in-fact.
  - The defendant caused the injury.
  - Judicial intervention is likely to redress the injury.
    - No exception for class actions: The class representative must be able to show they have suffered a concrete harm in order to bring the claim on behalf of a class. (See *Spokeo*)
- If a defendant makes a factual challenge, the defendant may submit affidavits or declarations introducing facts from outside of the pleadings that disprove the plaintiff's allegations. A plaintiff must then respond with her own evidence.
- For example, in *Zapadinsky v. Blue Diamond Growers*, 2023 WL 5116507 (E.D. Wis. Aug. 7, 2023), the Court agreed with Blue Diamond Growers' (BDG) "robust" factual challenge to standing and held that Plaintiff lacked an injury-in-fact because BDG's "undisputed evidence" demonstrated that "Plaintiff did not pay a price premium for the Almonds" overcoming the conclusory allegation of a price premium from the complaint.

# Global Impact of ESG Concerns

## ESG Concerns Felt Globally

- From both a legal and regulatory perspective, the ripple effects of the heightened concerns over ESG compliance is being felt globally. The US, EU, China, Switzerland, and other countries have developed rules and guidelines for ESG reporting. The effect of proposed legislation in the US is that globally situated companies that are advertising ESG statements must pay close attention to the claims used, or else run the risk of litigation.
- Since EU member states implemented the EU's Representative Action Directive, a legal framework for U.S.-styled consumer class actions in 2022, there will likely be a continuing impact on ESG litigation in the EU.

# Social and Governance Aspects of ESG

## Social and Governance Cases

- Social factors—the “S”—consider how a company manages relationships with its employees, customers, and suppliers. Class action claims in this category include employment claims for hostile work environment, discrimination and sexual harassment, forced labor, supply chain issues, workplace safety, diversity and inclusion, and consumer protection.
  - Shareholders in particular have paid closer attention to companies’ commitment to diversity, equality, and inclusion practices, and companies without diverse boards have been targeted with shareholder derivative suits
- Governance—the “G”—deals with a company’s leadership, internal controls, and shareholder rights, and can be assessed by looking to whether a company uses transparent accounting methods, employs diverse leadership, and is accountable to shareholders.
  - Claims in this area include corruption, money laundering, COVID-19 concerns, data privacy, and duty of oversight claims—along with stockholder suits based on breach of fiduciary duties and misleading investors.



# Social and Governance Aspects of ESG

## Types of Cases Handled by DLA Piper Partners

- ESG cases are increasingly focused on the social and governance prongs, including:
  - Sex trafficking cases
  - Cases involving banks and financial institutions
  - New waves of cases including retailers and clothing providers in addition to food and beverage companies
- In addition to the expanding list of companies being targeted in these lawsuits, it will be important to monitor the reputational issues implicated.
- There has also seen an uptick in social/governance cases, including against clients in the financial services and technology sectors.

# Environmental Aspect of ESG

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## Environmental Cases

- Environmental factors—the “E”— examine how a company protects the environment, including corporate policies addressing climate change, energy use, and treatment of animals
  - Common legal claims in these class actions and mass torts revolve around greenhouse gas emissions, environmental damage, and the use of plastics.
  - Meanwhile, regulators are likewise keeping a close eye on companies’ environmental claims. There has been a rise in State Attorneys General prosecuting claims. In turn, this government action is likely to spur class action litigation.
- Our global class actions team has seen an uptick in consumer class actions surrounding carbon offsets and corporate sustainability commitments, as well as cases alleging that businesses have overstated their green credentials to boost their public image – known as “greenwashing.”

# Conclusion

- The key takeaways are:
  - For consumer class actions, we have tools to help successfully defend clients, including factual challenges to standing and causation and reliance defenses
  - For cases involving social and governance, we have a talented team of attorneys who are familiar with the risks and trends from clients ranging from financial institutions to clothing retailers
  - And with environmental cases, we have unique insights into regulatory enforcement actions and ensuing class actions
- Providing global solutions, including implementing a culture of accountability across sectors, will help companies transition into a more sustainable future.

Thank you