

The Case For Company-Directed Offensive ESG Litigation

By Bob Koneck (June 24, 2022)

Environmental, social and governance, or ESG, describes a broad range of issues companies must work to protect or advance.

This obligation may be self-imposed, legally required or both. A company's ESG obligations often result from the demands of various stakeholders, such as investors, customers, employees and the local communities in which the company operates.

ESG is a firmly established part of corporate and investment parlance. As such, ESG is now a significant area of interest to the legal industry. Law firms have created new practice areas addressing ESG issues. And legal commentary is saturated with the seemingly endless legal dimensions of the ESG movement.



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This existing commentary characterizes the ESG movement as mostly a source of legal and reputational liability. But this framing is too narrow. The legal industry would benefit from an ESG paradigm shift — rather than treat ESG litigation as a mere source of liability, companies and their lawyers should evaluate and pursue offensive ESG litigation as a linchpin of their broader ESG strategies.

The Current State of the Legal Industry's Focus on ESG Issues

Plaintiffs and their lawyers rarely, if ever, use the acronym ESG to describe their litigation.[1]

Companies and their counsel are instead the main adopters of ESG language and themes, which they use to identify, classify and respond to areas of legal exposure.

To illustrate, recent legal commentary on ESG issues has addressed the following topics, among others, that are roughly representative of the legal industry's ESG focus to date:

- The **impending surge** of ESG-related government enforcement actions;
- The U.S. Securities and Exchange Commission's **climate disclosure proposal**;
- The SEC's ESG **task force**;
- The private ESG litigation companies are **likely to face** in 2022;

- The primary ESG-related risks for companies and the ways law firms can **structure responsive** ESG practices;
- The ways ESG compliance programs and risk mitigation efforts can **enhance company** value; and
- The **increased scrutiny** among insurers of companies' ESG programs.

A 2022 survey from the Harvard Law School Center on the Legal Profession and EY Law offers additional insight. The survey, which included 1,000 senior in-house lawyers from 20 countries, aimed "to understand how law departments are responding to the rising importance" of ESG issues.

Among other questions, the survey asked respondents to select the most important areas of ESG-related risk. Respondents identified the most important ESG-related risks as "[l]oss of customers due to reputational damage" and "[d]amage to the organization's brand."^[2]

In short, lawyers tend to concentrate their efforts on minimizing the risk that their clients will become, or be regarded as, ESG offenders.

A Paradigm Shift: Company-Directed Offensive ESG Litigation

To be sure, the legal industry rightly emphasizes the myriad ways that ESG issues could engender legal and reputational liability.

But companies are more than mere ESG targets. Companies can — and should — become the plaintiffs targeting ESG offenders.

A comprehensive survey of company-directed offensive ESG litigation is beyond the scope of this article. Nevertheless, by way of example, such litigation could include opt-out antitrust litigation that, if successful, would generate a substantial monetary recovery for the company and a fairer market for businesses and consumers alike.

It could also include abbreviated new drug application litigation, which companies could pursue as an explicit part of an ESG program. If successful, this ANDA litigation would result in a benefit to the company and a fairer marketplace for consumers, who could buy more affordable generic versions of life-enhancing and lifesaving drugs.

Companies could even adopt the entrepreneurial mentality of the plaintiffs bar to initiate novel, offensive ESG litigation. As a theoretical example, companies could consider asserting breach of contract claims related to a supplier's noncompliance with the newly enacted Uyghur Forced Labor Prevention Act, or UFLPA, which took effect June 21.

Under the UFLPA, there exists a rebuttable presumption that any goods "mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China" were produced using forced labor.^[3] Unless an importer rebuts this presumption, the UFLPA prohibits the importation of the relevant goods.^[4] Companies

pursuing breach of contract claims related to noncompliance with UFLPA may play a small — albeit meaningful — role in facilitating the end of modern slavery.

Claims like these and many others could become a key component of a company's ESG initiatives. Identifying such company-directed offensive ESG litigation may be easy for some in-house lawyers. Others may consider consulting internal or external ESG litigation experts to explore possible ESG claims.

The Possible Benefits of Company-Directed Offensive ESG Litigation

The following is a nonexhaustive list of possible benefits of company-directed offensive ESG litigation.

First and most important, this litigation has the potential to meaningfully improve the state of the world. Therefore, companies should pursue it.

Second, companies initiating ESG litigation may enhance their reputations and their brands. As the above Harvard Law and EY Law survey revealed, senior in-house lawyers regard reputational damage and brand damage as the top areas of ESG risk.

Of course, companies can and should neutralize this risk by avoiding ESG violations. But a history of company-directed offensive ESG litigation may position a company as a champion of ESG causes, allowing the company to become a dynamic ESG leader. The benefits of such a reputation are obvious.

Third, companies pursuing ESG litigation could earn a large monetary recovery. The potential for this large capital infusion is particularly significant given that the above-cited Harvard Law/EY Law survey found that 94% of legal leaders believe they lack "the required funds to support their organization's" ESG programs.[5]

Companies could therefore use the proceeds from their company-directed offensive ESG litigation to bankroll their broader and often underfunded ESG programs. Put differently, company-directed offensive ESG litigation could financially sustain a company's entire ESG program.

As the impact of ESG concerns in legal departments continues to develop, the potential for reputation-enhancing action through litigation should be a major focus for leading companies and lawyers.

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[1] This feature of the plaintiffs bar may change in jurisdictions that alter Rule 5.4 to allow nonlawyer ownership in law firms. In these jurisdictions, investors with an ESG mandate may explore investments in law firms focused on plaintiff-side ESG litigation. Law firms interested in these investments may begin to describe their practices as "ESG litigation" to attract nonlawyer investors.

[2] Cornelius Grossman, The General Counsel Imperative: How the law department is key in unlocking your sustainability strategy, EY Law (Apr. 6, 2022), https://www.ey.com/en_gl/law/how-the-law-department-is-key-in-unlocking-your-sustainability-strategy.

[3] See Pub. L. No. 117-78, 135 Stat. 1525 (2021).

[4] Id.

[5] Cornelius Grossman, The General Counsel Imperative: How the law department is key in unlocking your sustainability strategy, EY Law (Apr. 6, 2022), https://www.ey.com/en_gl/law/how-the-law-department-is-key-in-unlocking-your-sustainability-strategy.