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# ESG and Group Actions: Developments and What You Need to Know

**Class & Collective Actions:  
Global Trends and Impacts Series**

Franco Corrado, Christina Renner, and Keir Baker

**Thursday, October 5 | 4.30 pm-5.30 pm BST/ 11.30 am-12:30 pm EST**

# Presenters



**Franco A. Corrado**



**Christina Renner**



**Keir Baker**

# Overview – What Will be Covered

## **ESG Group Actions in the US – Franco Corrado**

- The main focus of ESG claims in the US and examples
- Lessons to be learned
- Mitigation: how to avoid ESG group actions and what to do when faced with a claim

## **ESG Group Actions in the EU – Christina Renner**

- A rapidly evolving ESG framework
- An increasing push for collective action
- Representative cases
- Possible mitigation

## **ESG Group Actions in the UK – Keir Baker**

- Current status
- ESG, securities claims and litigation funders
- What the future holds
- Avoiding, anticipating and preparing for ESG litigation



# ESG Group Actions in the US

Franco Corrado

# ESG Class Actions in the US - Topics

- The main focus of ESG claims in the US
- Some examples
- What can be learned
- Mitigation:
  - How to avoid ESG claims
  - What to do when faced with an ESG claim

# Environmental, Social, Governance and Sustainability

## Greenwashing Litigation

- Greenwashing = representations that products are more sustainable or environmentally friendly than they actually are, e.g.:
  - “100% Natural” / “Organic” / “Antibiotic-free” / Recyclable
  - May also include misrepresentations regarding fair trade, labor equities, animal welfare, etc.
- Often styled as nationwide class actions
  - Unfair or Deceptive Business Practices
  - Unfair Competition and False Advertising Laws
  - Warranty/Unjust Enrichment
- Main Venues: California, New York, Florida



# Environmental, Social, Governance and Sustainability

## What's At Stake? Potential Risks & Costs

Greenwashing lawsuits:

- Can be difficult to defeat in early stages (reasonable consumer standard);
- Require a great deal of time, effort, and money; and
- May lead to bad publicity, loss of goodwill







# Environmental, Social, Governance and Sustainability: Exemplar Suits

*Ellis v. Nike USA, Inc.*, No. 4:23-cv-632 (E.D Mo. May 10, 2023)

- Nike marketed a “Sustainability” line of clothing, “made with recycled and organic fibers” to “reduce waste and our carbon footprint”
- Plaintiff alleges Nike misleads customers because clothing is actually made of “virgin synthetic and non-organic materials”
- Alleged violation of Missouri consumer protection law, unjust enrichment, and negligent misrepresentation
- Nike moved to dismiss on Aug. 24, 2023



# Environmental, Social, Governance and Sustainability: Exemplar Suits



*Lurenz v. The Coca-Cola Co.*, No. 7:22-cv-10941 (S.D.N.Y. Dec. 28, 2022)

- Coca-Cola marketed its Simply Tropical juices as containing only filtered water, fruit juice and puree, cane sugar, and natural flavors and that it was “all-natural”
- Plaintiff alleges that independent testing demonstrates the juices contained polyfluoroalkyl substances (“PFAs”) that could have been filtered out
- Coca-Cola intends to file a motion to dismiss on the grounds that the Plaintiff has not been harmed in any way, and that a reasonably consumer would not be misled by the presence of “migratory substances” like PFAs
- Case is pending

# Environmental, Social, Governance and Sustainability: Exemplar Suits

*Berrin v. Delta Air Lines, Inc.*, No. 2:23-cv-4150 (C.D. Cal. May 30, 2023)

- Delta advertises itself as “the world’s first carbon-neutral airline” and “carbon neutral”
- Plaintiff alleges that Delta’s claims are “manifestly and provably false” and challenges the notion that the purchase of carbon offsets makes a company “carbon neutral” and that she “would not have purchased [Delta’s] services if she understood at time of purchase that [Delta’s] carbon neutral representations were false”
- Plaintiff asserts claims under California consumer protection laws, including the Consumer Legal Remedies Act, False Advertising Law, and the Unfair Competition Law
- Case pending



# Environmental, Social, Governance and Sustainability: Exemplar Suits

*Falcone v. Nestle USA, Inc.*, No. 3:19-cv-00723 (S.D. Cal.)

- Nestle markets its hot cocoa products and chocolate chips as “sustainably sourced” and claims it helps improve the lives of farmers
- Plaintiff alleged that Nestle sources its cocoa from West African plantations reliant on child labor
- Nestle moved to dismiss the Third Amended Complaint on the basis that it did not identify, and Nestle did not make, any false or misleading statements
- Court denied motion to dismiss, finding that Plaintiff plausibly alleged that Nestle’s reliance on child labor had in fact increased, and allowed the case to proceed
- Plaintiff’s class certification motion is due on November 10, 2023

100% sustainably  
sourced cocoa.

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# Environmental, Social, Governance and Sustainability:

## Exemplar Settlements

Case	Summary	Settlement Amount
<i>Connary v. S. C. Johnson &amp; Son Inc.</i> , No. RG20061675 (Superior Court of California, Alameda County) (filed in 2020; settled in 2021)	Plaintiffs alleged that Defendants falsely mislabeled Method cleaning products as “non-toxic” despite products’ alleged capacity to harm humans and environment	\$2.25M
<i>Dickens, et al. v. Thinx Inc.</i> , No. 1:22-cv04286 (S.D.N.Y.) (filed in 2022; settled in 2023)	Plaintiffs alleged that Defendants falsely marketed underwear products as safe and sustainable despite inclusion of harmful PFAs in products	\$4M
<i>Moran v. Sunshine Makers, Inc.</i> , No. 4:20-cv-03242 (N.D. Cal.) (filed in 2020; settled in 2021)	Plaintiffs alleged Defendants falsely advertised cleaning products as “non-toxic”; alleged products contain ingredients known to cause harm to humans, animals, and environment	\$4.35M
<i>Smith v. Keurig Green Mountain, Inc.</i> , No. 18-cv-6690 (N.D. Cal.) (filed in 2018; settled in 2022)	Plaintiffs alleged that Defendants falsely advertised pods as recyclable; alleged pods were not recyclable due to small size and need to remove paper filter and foil lid	\$10M
<i>Fairlife Milk Products Marketing and Sales Practices Litigation</i> , MDL No. 2909, Lead Case No. 1:19-cv-03924 (N.D. Ill.) (filed in 2019; settled in 2022)	Plaintiffs alleged that Defendants falsely labeled and marketed certain dairy products produced using milk from cows that were allegedly not treated humanely	\$21M

# Environmental, Social, Governance and Sustainability: Green Guides

- Guides for the use of Environmental Marketing Claims, 40 C.F.R. Part 260 (“Green Guides”)
- Primary source of guidance for environmental marketing in the U.S.
- The guides address the applicability of Section 5 of the FTC Act, 15 U.S.C. 45(a), to environmental advertising and labeling claims
- First issued in 1992, last updated in 2012; currently under revision
- While the FTC is a consumer protection agency, the guides apply to “business-to-business transactions”

## Environmental Claims Summary of the Green Guides

### General Environmental Benefit Claims

- Marketers should not make broad, unqualified general environmental benefit claims like ‘green’ or ‘eco-friendly.’ Broad claims are difficult to substantiate, if not impossible.
- Marketers should qualify general claims with specific environmental benefits. Qualifications for any claim should be clear, prominent, and specific.
  - When a marketer qualifies a general claim with a specific benefit, consumers understand the benefit to be significant. As a result, marketers shouldn’t highlight small or unimportant benefits.
  - If a qualified general claim conveys that a product has an overall environmental benefit because of a specific attribute, marketers should analyze the trade-offs resulting from the attribute to prove the claim.

Claiming “Green, made with recycled content” may be deceptive if the environmental costs of using recycled content outweigh the environmental benefits of using it.

# Environmental, Social, Governance and Sustainability: Best Practices & Mitigation

- Is there a mechanism in place for lawyers to review/assess claims before they are made?
- What claims are implied? How could the claim be interpreted (and misinterpreted)?
  - Includes images that may imply something more or different than the express statements.
- Can the claim be substantiated? How?
  - Is it contemporaneously documented?
  - Does it rely on hard data?
  - Are the data up to date?
- Consider aspirational/forward-looking claims



# ESG Group Actions in the EU

Christina Renner

# ESG Collective Actions Landscape in Europe - Topics

- A rapidly evolving ESG framework
- An increasing push for collective action
- Representative cases
- Possible mitigation



# A Rapidly Evolving ESG Framework

# Accelerated law making at EU level...



**Detailed Reporting Requirements:** The Corporate Sustainability Reporting Directive (**CSRD**)



**Increased Due Diligence Requirements:**

The Supply Chain Directive (*Proposal*)  
The Corporate Sustainability Due Diligence Directive (**CSDDD**) (*Proposal*)



**Reform of Consumer Protection Rules:** Directive on Empowering Consumers for the Green Transition through Better Protection Against Unfair Practices (*Proposal*)



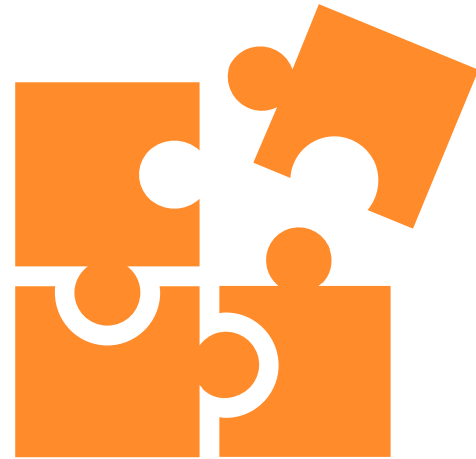
**Harmonized Standards for Green Claims:** Green Claims Directive (*Proposal*)



**Joint Rules for Collective Actions:** Representative Actions Directive

# ...and a puzzle across EU Member States

- National consumer protection rules
- National supply chain laws
- National reporting obligations
- National rules on representative actions



# Push for Collective Action

EU Level and MS Level

# EU Level: Finding the Protective Norm



Representative Actions Directive: Expanded scope to cover the Green Claims Directive and the Directive on Empowering Consumers for the Green Transition



CSDDD Proposal paves way for representative action



European Court of Justice: potentially expanded manufacturer liability (*Diesel* case)?



EU Taxonomy, CSRD to become actionable rules?



# Member State Level: Forum Shopping

- National supply chain laws
- National Tort rules
- National Antitrust Agencies
- National Consumer Protection Rules
- National (Financial) Reporting Rules



# Representative Cases

EU Level and MS Level

# EU and Member State Level: Selected Examples



EU: potential extension of manufacturer liability



Germany: greenwashing and supply chain law



Netherlands: environmental claims



France: participation in non-sustainable energy projects



Italy: violation of Paris Agreement by private corporation

# Possible Mitigation

# Mitigation Avenues

Train management and staff on ESG factors and ESG policies

Examine need to make a public ESG claim

Prior review by legal department of public statements relating to ESG factors

Verify that ESG claim can be substantiated

Priority risk assessment of business areas most exposed to risk of ESG

Continuous review of ESG policies by legal department

Continuously track customer/counterparty claims and monitor arising trends

Set up a crisis response plan to complaints and litigation scenarios

# ESG Group Actions in the UK

Keir Baker

# ESG Group Actions in the UK - Topics

- The current status of ESG claims in the UK
- Securities claims in the UK and how ESG plays into those claims
- The role of litigation funders
- The future shape of ESG litigation in the UK
- Avoiding, anticipating and preparing for ESG claims in the UK



# ESG in the UK

- Long-standing awareness and interest in various ESG matters from key stakeholders (regulators, legislators and the public). However, ESG not a standalone concept in terms of regulation.
- A shift towards more formal, mandatory regulatory position anticipated, and is starting to be seen in relation to key ESG topics.
- Supplemented by certain key Court decisions.
- Still certain challenges for ESG-related actions in the Courts.

# Group Actions in the UK

- As compared to other jurisdictions (USA, Australia), the UK does not have a strong tradition of group actions.
- Pursuing class actions in UK historically perceived to be difficult due to various hurdles, including 'loser-pays' costs risks and limited availability of opt-out regimes.
- This is changing:
  - Expansion of the market participants
  - Judicial willingness to accommodate large class actions.
  - Judicial guidance on the procedural route.
- Specific sectors/types of claims of increasing interest:
  - Competition/antitrust
  - Data privacy
  - ESG (including, in particular, securities litigation)



# ESG Group Actions in the UK

'E' – some limited examples; difficult without funding, and difficult to make economic

- *Mariana & Ors v BHP Group Plc* [2022] EWCA Civ 951 (environmental disaster claims)
- Competition claims against water companies
- Dieselgate claims
- As of May 2021: 1,841 global climate change litigations – 73 cases in the UK

'S' – on the rise, and expected to grow

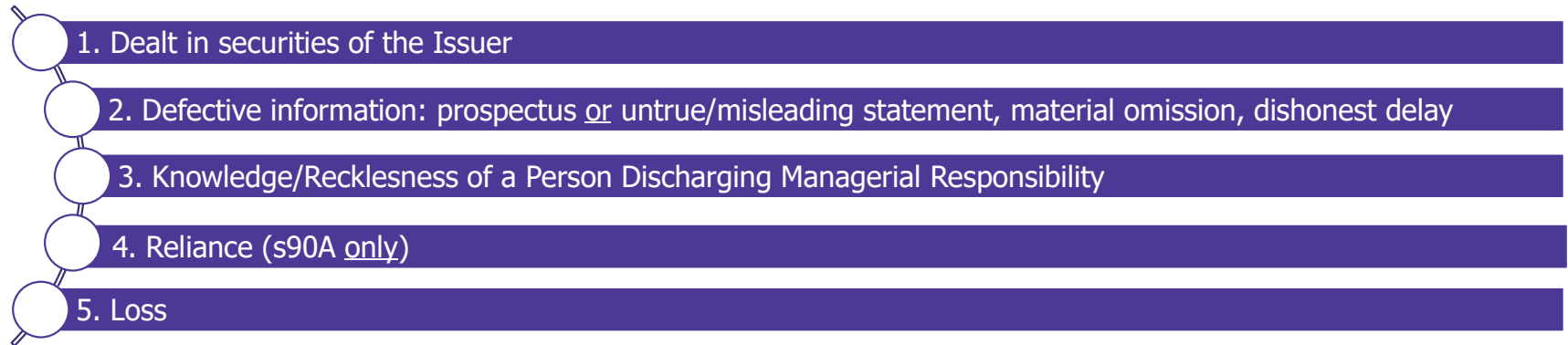
- Equal pay claims
- Further claims in light of expanding reporting requirements in areas such as diversity and inclusion
- Expected Labour general election victory

'G' – currently the main type of ESG group action in the UK

- Securities litigation

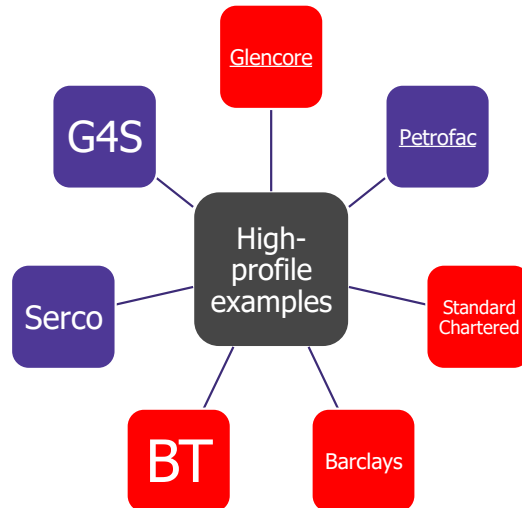
# Securities Litigation in the UK

- Up until around 2016, securities litigation rarely pursued in the UK.
- A landmark moment: claims brought by institutional investors against *Tesco* in connection with its 2014 accounting scandal. [Morgan Lewis involved](#)
- A steep rise in securities litigation claims using “underutilised” remedies: Section 90 and Section 90A of the Financial Services and Market Act 2000:



# ESG Securities Litigation in the UK

- Participation in UK securities litigation is often marketed to institutional investors as part of their stewardship activities.
- Typically brought in relation to 'G' issues. As set out in the chart below, numerous actions have been commenced in respect of alleged governance breaches.
- As reporting requirements expand into 'E' and 'S' areas, more claims may emerge.



**Purple** = Morgan Lewis involved

Underlined = Multiple groups of institutional investors

# Role of Litigation Funders

- Litigation funding on the rise in the UK:
  - Increased number of players in the market, some of whom have brought experience from other jurisdictions (such as Australia)
  - Increased acceptance of (and interest in) funding from practitioners and clients
  - Conventional funding of litigations and arbitrations common
- However, certain funders have particular interest in the group actions space, and positioned themselves as 'ESG' specialists. They have been central to the rise in securities litigations.
- A recent hurdle: *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28



# The Future Shape of ESG Group Litigation in the UK

- Securities litigation likely to play a major part, though a judgment on one or more of the ongoing cases could alter the direction of travel.
- Various factors likely to enhance participation in group actions:
  - Public awareness/concern over Climate Change
  - Increased judicial guidance on procedural topics
  - High-profile claims (and successes)
- Shifts in regulator/legislative focus:
  - 'E': FCA's recent drive to tackle greenwashing
  - 'S': New scrutiny/reporting on 'S' issues; upcoming UK General Election
  - 'G': New "failure to prevent fraud" offence in the Economic Crime and Corporate Transparency Bill





# Avoiding, Anticipating and Preparing for ESG Litigation in the UK

## Avoid:

- Engagement with stakeholders
- Prioritise, and invest in, transparency and best practices (internal and external)
- Regular consultations with appropriate advisers
- External investigation best practices

## Anticipate:

- Engagement with stakeholders
- 'Stock drop' monitoring

## Prepare:

- Engagement with stakeholders

# THANK YOU

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Franco A. Corrado represents clients facing a broad range of lawsuits, with a particular focus on complex business disputes and class action defense. His clients span across multiple industries, including the technology, retail, food and beverage, manufacturing, pharmaceutical, and insurance sectors. Franco defends clients against consumer class actions related to deceptive trade practices, false advertising, product liability, and warranty claims in state and federal courts across the United States.

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Christina Renner concentrates her practice on European Union (EU) and German merger control/foreign direct investment (FDI) and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, as well as EU state aid laws. Christina has experience in handling multijurisdictional merger and FDI filings for a variety of clients and regularly advises on complex cross-border competition and EU regulatory compliance matters. She also regularly advises on a variety of EU cross-border trade issues, including EU sanctions and foreign subsidies.

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Keir Baker advises clients on complex commercial disputes in the English courts and in international arbitration. His recent experience includes advising institutional shareholders in UK-listed companies in complex securities litigation and he is involved with a number of market-leading claims under Section 90A of the Financial Services and Markets Act 2000, including cases in which the English courts have considered novel questions of law relating to that provision.

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