

Navigating the threat of ESG class actions: strategies for retail owners and operators

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The rise of environmental, social, and governance (ESG) considerations presents both opportunities and challenges for retail owners and operators grappling with the constantly evolving landscape of consumer preferences and market trends. Understanding and effectively navigating the threat of ESG class actions in the U.S. retail sector is essential to protecting reputation and maintaining consumer trust.

In recent years, there has been a dramatic increase in the United States of class actions concerning ESG-related topics.

“Greenwashing” refers to the alleged practice of exaggerating or misrepresenting a product’s environmental benefits. A related concept termed “social washing” refers to a business’s alleged practice of making misleading statements about corporate social responsibility.

Examples of the former include improperly marketing a product as “natural” or “sustainable,” and examples of the latter include making misrepresentations regarding fair trade, labor equities, or animal welfare. Such claims not only create litigation risk but also erode consumer trust and damage reputation.

This article explores the impact of ESG-related class action claims on retail businesses, offers practical mitigation strategies, and highlights the importance of proactive measures for long-term success.

The current landscape of ESG class actions

In recent years, there has been a dramatic increase in the United States of class actions concerning ESG-related topics. The clothing, food and beverage, and personal care product industries remain frequent targets of these claims.

These cases typically challenge some attribute of the finished product or some practice that plaintiffs claim undermines supply chain integrity. In such cases, the plaintiffs usually allege that companies have charged a premium over and above a comparable product not sold with such marketing claims. These lawsuits are particularly prevalent in states with stringent consumer protection laws like California, Florida, and New York.

Regulators may also seek to bring actions, such as the New York Attorney General’s recent claims challenging one retailer’s statements concerning carbon neutrality. *State of New York v. JBS USA Food Company and JBS USA Food Company Holdings*, No. 450682/2024 (N.Y. Sup. Ct. Feb. 28, 2024),

What’s at stake?

The stakes in such actions are potentially significant for retail businesses. Retailers who find themselves the subject of such claims will incur the real litigation costs from lawyers, experts, and vendors. The potential exposure associated with litigating the claims beyond the early stages could include a payment of damages to the putative class, statutory penalties, the cost of corrective action, and potentially the cost of a class action settlement.

Penalties imposed by regulatory authorities for violations of ESG regulations can even go beyond monetary fines to include mandatory corrective actions, such as product recalls or advertising retraction.

But perhaps even more concerning than the financial costs of such actions is the potential for irreparable reputational harm because these claims have a tendency to grab headlines when filed in court. Negative publicity resulting from greenwashing lawsuits can tarnish a retail business’s brand reputation, erode consumer trust, and undermine customer loyalty. Even if allegations are later disproven or resolved, the lingering stigma of being associated with deceptive practices can have long-term repercussions, impacting market share and competitiveness.

Finally, the disruptive effects of such litigation can extend to operational issues. Employees subject to the discovery process will be distracted from their daily obligations. There is also the potential for turnover and/or negative effects on morale.

Mitigating the risk of greenwashing claims

There are several important steps retailers can take to help mitigate the risk of ESG-related class actions, including:

- **Consider how statements may be interpreted:** Evaluate how claims may be interpreted by consumers and stakeholders. Assess whether images or statements could imply something different from what is intended to avoid potential misrepresentation.

- **Substantiate claims with evidence:** Ensure that all claims made by the business can be substantiated with credible evidence. This may involve maintaining documentation, relying on hard data, and regularly updating information to reflect current practices. Apply rigor before accepting representations from vendors when sourcing ingredients/materials for your products.
- **Consider using aspirational statements:** Aim for aspirational statements over other language that could be construed as a promise or guarantee.
- **Understand and adhere to regulatory guidelines:** Executives and in-house counsel will want to familiarize themselves with the relevant regulatory guidelines, such as the Federal Trade Commission's (FTC) Green Guides, which provide standards for environmental marketing claims. Compliance with these guidelines helps ensure that retail businesses operate within legal boundaries and uphold ethical standards.
- **Establish robust legal review and assessment mechanisms:** Establish processes for thorough review and assessment of claims by legal counsel before they are made. This will ensure proper compliance with regulations and reduces the risk of misleading consumers. Businesses may also wish to conduct regular audits of marketing practices, product labeling, and supply chain operations to ensure alignment across business divisions with legal requirements and consumer expectations.

In addition to these considerations, securing buy-in from the board of directors and the C-suite is paramount to effectively implementing these mitigation strategies and safeguarding the business from litigation and reputational harm.

Navigating greenwashing litigation

Even with the above mitigation strategies in place, a company may still find itself embroiled in litigation. Engaging experienced class action counsel with detailed knowledge of consumer protection law, relevant regulations, plaintiff's counsel, and the court are keys to success.

On the reputational front, transparent communication with stakeholders, including customers, employees, investors, and the

media, will be essential for maintaining credibility and integrity throughout the litigation process. Each circumstance is unique; however, retailers may want to consider proactively addressing allegations by providing accurate information. Working with crisis communications teams may also be helpful for retail businesses to demonstrate a commitment to ethical business practices and corporate responsibility.

Navigating this new world of evolving ESG class actions in the retail sector requires strategic foresight, proactive measures, and a commitment to transparency and compliance.

Greenwashing concerns are also increasingly becoming a focus of regulators and plaintiffs in other countries, particularly in the United Kingdom and European Union, which are experiencing a growing appetite for collective actions on ESG claims. Retailers with operations in these jurisdictions would do well to familiarize themselves with recent litigation developments on this front and relevant regulations, including the EU's Corporate Sustainability Reporting Directive and the UK's Anti-Greenwashing Rule and Sustainability Disclosure Requirements and Labelling Regime.

Conclusion

Navigating this new world of evolving ESG class actions in the retail sector requires strategic foresight, proactive measures, and a commitment to transparency and compliance.

By implementing robust mitigation strategies, adhering to regulatory guidelines, and working across all business divisions from the board to the marketing and social media teams, retail owners and operators can mitigate the risks associated with greenwashing litigation while safeguarding their reputation and ensuring long-term success in an increasingly ESG-conscious marketplace.

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