Bloomberg Law

ESG Litigation: Greenwashing and Other Risks

2024 Litigation Trends Series

Introduction

As of early 2024, it's still a mystery what companies' obligations under ESG-related legal requirements will look like. But that uncertainty is not stopping stakeholders from attempting to rein in potential acts of greenwashing, social-washing, and other ESG risks through existing legal frameworks.

Drawing from Bloomberg Law's comprehensive access to federal court dockets across the country, this report features pending ESG-related lawsuits, analyzes their common threads, and considers how the courts' decisions in these cases could bring answers to outstanding questions about company liability for misleading ESG representations.

With court precedent at a minimum in this still-nascent litigation area, the clues to these answers can often be found outside the courtroom. They are hidden in plain sight among the Federal Trade Commission's interpretations of companies' environmental marketing representations; the Securities and Exchange Commission's enforcement actions; and the patchwork of state statutes that stakeholders are leveraging to mitigate ESG risks.

Section 1 provides insights into current **environmental marketing** lawsuits under state law by analyzing opportunities for courts to interpret FTC guidance in 2024 in three states: Missouri, Massachusetts, and California.

Section 2 looks at the current state of **emissions reporting** and analyzes how courts in pending cases against carbon-intensive companies could decide on whether emissions-related representations are misleading to stakeholders.

Section 3 dives into pending lawsuits against companies, states, and plan administrators for their requirements, representations, and considerations of ESG issues in **financial decisions**.

Section 4 focuses on the role of **voluntary ESG and sustainability reports** in securities litigation and identifies cases that may allow courts to determine the weight of sustainability representations made outside of SEC filings.

Methodology

The information in this report comes from Bloomberg Law's **SEC Admin Enforcement Analytics**, **Bloomberg Law Smart Code®**, and customized searches of **Bloomberg Law Dockets**.

For each of the four main topics covered in this report, we have analyzed pending ESG-related lawsuits that follow Federal Trade Commission (FTC) or Securities and Exchange Commission (SEC) enforcement actions and could put courts in the position to narrow in on ESG issues.

Pending ESG-related lawsuits include lawsuits against major corporations involving a similar ESG topic and legal claims to recent enforcement actions.

As court dockets may be updated after the data collection for this report, some filings may not be fully represented in the analysis, including case dismissals and transfers.

Bloomberg Law Dockets obtains data from PACER, which includes duplicate entries in certain cases, such as intra-district transfers or changes in judge assignment.

Keyword searches across dockets that identify mentions of ESG, sustainability reports, and recycling representations may include mentions in the text and/or as a separate attachment.

Nature-of-suit and industry filters for dockets can be found in Bloomberg Law's **Advanced Docket Search**.

Bloomberg Law's **Smart Code** identifies court opinions that cite a specific section of the United States Code or state codes. For this research, relevant statutes were identified from pending lawsuits, and Smart Code was used to identify opinions that cite that statute. As court dockets may be updated, courts may have issued opinions after the data collection for this report.

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Section 1

Environmental Marketing Representations

Environmentally conscious consumers are weighing the costs of purchasing a product with the potential environmental benefits. To stay competitive in the market, companies are increasingly making environmental representations about their products.

But when do environmental representations become greenwashing?

The FTC created the Green Guides to help companies answer that question. First drafted in 1992, the Green Guides set the agency's position on environmental marketing so that companies can avoid making representations that would violate Section 5 of the **Federal Trade Commission Act**, which prohibits unfair or deceptive practices in or affecting commerce.

Regulatory Pressure

Since 1992, the FTC has brought nearly 90 environmental marketing **enforcement actions**.

The Guides were last updated in 2012—before 'greenwashing' became a commonly used word—leaving plenty of time for companies to assert novel and innovative environmental representations.

The most recent environmental marketing enforcement actions were against **Kohl's Corp.** and **Walmart Inc.** in April 2022.

The **enforcement actions** alleged that the companies violated **Section 5** of the FTC Act by marketing rayon textile products as bamboo. These textile misrepresentations allegedly violated the Act by deceiving consumers as to the environmental benefits of the products. An enforcement action within the purview of the Guides has not been publicly announced since.

But the Green Guides aren't binding on the FTC or the public—meaning that enforcement actions can only lend limited insight into the types of greenwashing stakeholders are challenging. So, what is the legal recourse for stakeholders looking to pull back greenwashing?

Litigation Efforts and Pending Cases

Consumers are leveraging state law to bolster their claims under the Green Guides—and three jurisdictions are providing blueprints for how stakeholders may bring these claims in the future.

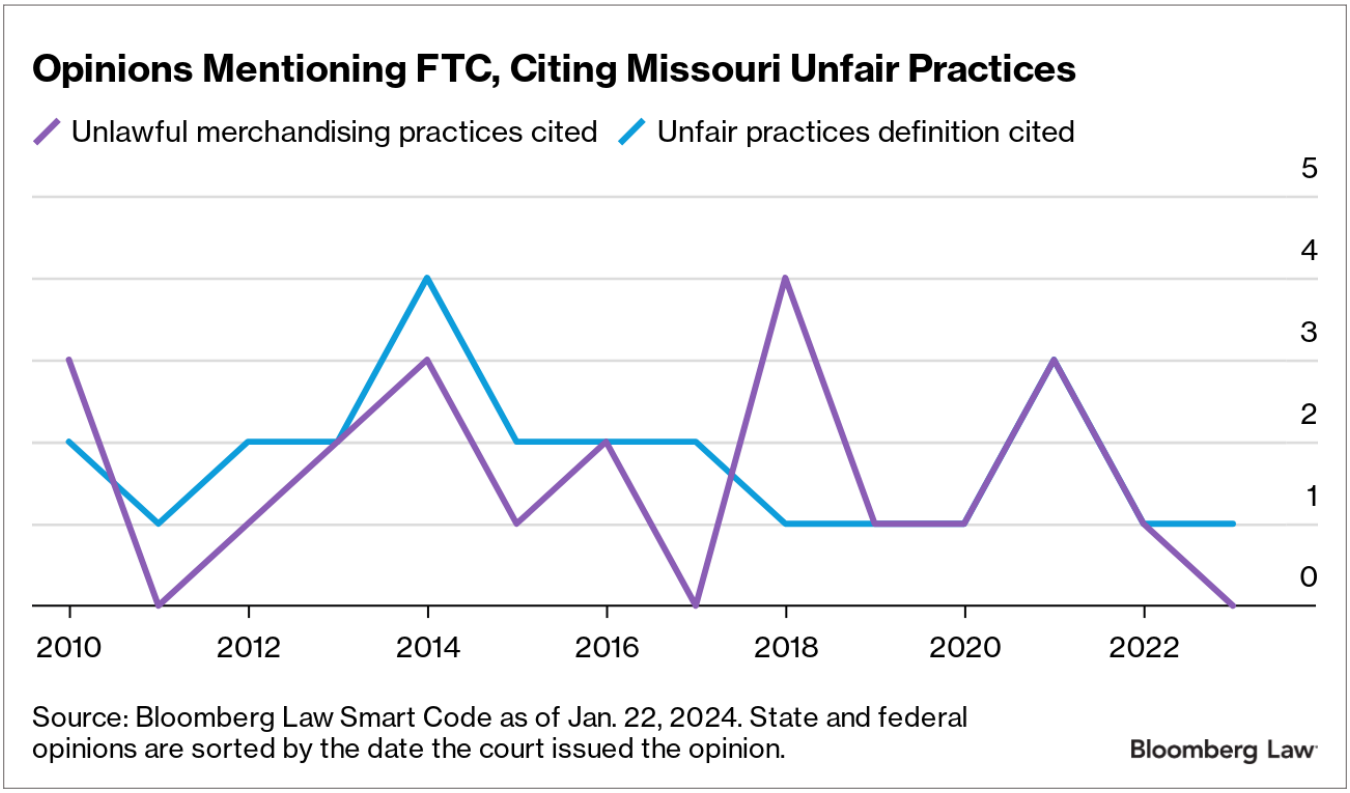
Missouri and Massachusetts are rare states: They permit courts to consider FTC interpretations when deciding whether a trade practice is unfair or deceptive, and are lined up to potentially decide on whether or how the Green Guides are interpreted under state law. And California goes a step further by having laws that specifically incorporate the Green Guides.

Litigation Efforts in Missouri

Missouri's **Merchandising Practices Act** (MPA) prohibits parties from advertising products through the use of unfair practices in Section 407.020. The attorney issued a rule, codified at 15 C.S.R. 60-8.020, defining "**unfair practice**" under the MPA as a practice that "offends any public policy as it has been established by … the Federal Trade Commission, or its interpretive decisions."

The frequency with which plaintiffs leverage this provision to bring in FTC guidance can be seen in the text of Missouri's court opinions.

From 2010 through 2023, courts have mentioned the FTC in **22 opinions** citing Mo. Rev. Stat. § 407.020, which outlines unlawful merchandising practices, and **25 opinions** citing 15 C.S.R. 60-8.020, which defines unfair practices, according to Bloomberg Law Smart Code®.



The willingness of federal and state courts in Missouri to incorporate FTC interpretations into their decisions on MPA claims may mean that the Green Guides could similarly shape what is an unfair business practice in the jurisdiction.

So far, that hasn't happened yet: Missouri court opinions have mentioned the FTC's Green Guides when interpreting unfair practices under the Act only **once**.

In that case, the Eastern District of Missouri issued an order dismissing a complaint for failure to state a claim. Specifically, the court said the consumer plaintiffs failed to allege that the defendant, **H&M Hennes & Mauritz** (H&M), marketed its "Conscious Choice" line as environmentally friendly or sustainable. In its order, the court in that case said it assumed, without deciding, that the Green Guides could be used to interpret unfair practices under the MPA.

But two currently pending cases may have Missouri federal courts weighing in more directly.

Pending Cases in Missouri

In November 2023, consumer plaintiffs **filed** a potential class action against H&M alleging that the retailer's green clothing tags—along with its recycled and organic material representations—are purported environmental benefits that the product does not have. *Sally v. H&M:* **Docket No. 4:23-cv-01451**.

In a May 2023 complaint, **Nike Inc.** consumers separately **allege** that the brand's "Sustainability Collection" products misrepresent their environmental benefits because they are derived from plastic-based materials. *Ellis v. Nike:* **Docket No. 4:23-cv-00632**.

The consumer plaintiffs in both cases allege that the respective brands violate the MPA (as well as common law claims), and specifically call out the Green Guides and 15 C.S.R. 60-8.020's callback to FTC interpretations. Both lawsuits seek damages, restitution, and disgorgement for the consumer plaintiffs as well as the potential class.

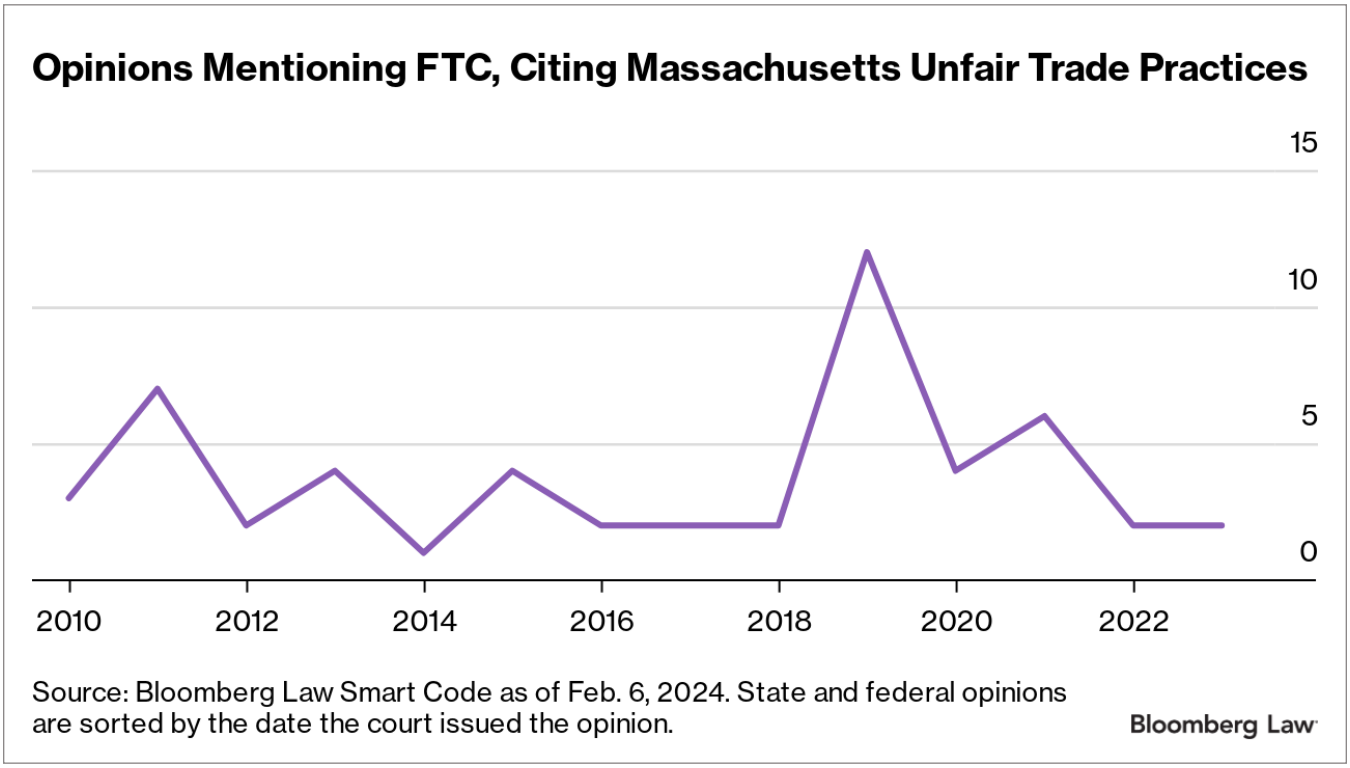
The plaintiffs also request that the court order H&M and Nike to cease and desist from selling allegedly misbranded products and issue a corrective advertising campaign.

Both the H&M and Nike cases are still ongoing. Each of these consumer-initiated cases would require the court to interpret the Green Guides' applicability under the MPA.

Litigation Efforts in Massachusetts

Massachusetts's **Consumer Protection Act** is crafted similarly to Missouri's in that it prohibits unfair practices (under G.L. c. 93A, § 2) and clarifies that courts should be guided by the FTC's interpretations of **Section 5**—as well as federal court interpretations of Section 5.

State and federal courts in Massachusetts have mentioned the FTC in **53 opinions** citing unfair practices under the Massachusetts Consumer Protection Act since 2010, according to Bloomberg Law Smart Code.



Although state and federal courts in Massachusetts have weighed in on FTC interpretations, those courts have mentioned the Green Guides in only **two opinions** citing unfair practices under the state's Consumer Protection Act.

In a **2021 order** against **Keurig Dr Pepper Inc.** over its representations that its single-use coffee pods were recyclable, the District Court of Massachusetts mentioned the Green Guides in support of the plaintiff sufficiently asserting their injury to survive a motion to dismiss.

In January 2024, the Southern District of New York mentioned the Guides in an **order** granting in part and denying in part a motion to dismiss involving Danone Waters of America. The outstanding claims against Danone Waters in this case—as well as a second pending case against a blanket manufacturer—may soon lead the court to weigh in on the Green Guides and the Massachusetts Consumer Protection Act in a more substantive way.

Pending Cases in Massachusetts

In the Danone Waters case, consumer plaintiffs filed a potential class action **complaint** against **Danone Waters of America Inc.** for allegedly misleading consumers that its water bottle is carbon neutral, when it merely purchased carbon credits to offset emissions.

The court dismissed some of the claims under New York's **Consumer Protection Law** but **did not** dismiss those claims under Massachusetts's Consumer Protection Act associated with the Massachusetts class.

While carbon neutral representations are not included in the Green Guides, the Guides outline the scientific and qualification requirements for carbon offset representations—meaning that if the court in this case decides to interpret the Guides, it could also weigh in on gaps between them and existing environmental marketing practices. The case is ongoing in the Southern District of New York. *Dorris v. Danone Waters:* **Docket No. 7:22-cv-08717**.

In June 2023, consumer plaintiffs filed a potential class action **complaint** in the District Court of Massachusetts against **Berkshire Blanket Inc.** for allegedly misrepresenting the environmental impacts of their EcoSoft Blanket made with "eco thread dry dye."

The marketing of this product included water reduction representations as well as a "for the earth" statement that allegedly violates the Illinois **Consumer Fraud and Deceptive Business Practices Act**, Texas's **Consumer Protection Act**, Tennessee's **Consumer Protection Act**, Idaho's **Consumer Protection Act**, and Massachusetts's **Consumer Protection Act**; and common law claims.

The plaintiffs do not assert that the defendants breached the Guides, but they use the content and scope of the Guides to bolster how a reasonable consumer is likely to interpret Berkshire's ecological representations.

The consumer plaintiffs in both *Danone Waters and Berkshire Blanket* seek damages as well as injunctive relief.

The Green Guides generally warn companies not to make general environmental benefit statements without qualification. The court in this case could potentially weigh in on how consumers are likely to interpret the environmental benefits of products that they merely represent to be "eco." This case is still ongoing. *Woodiwiss v. Berkshire:* **Docket No. 3:23-cv-30068**.

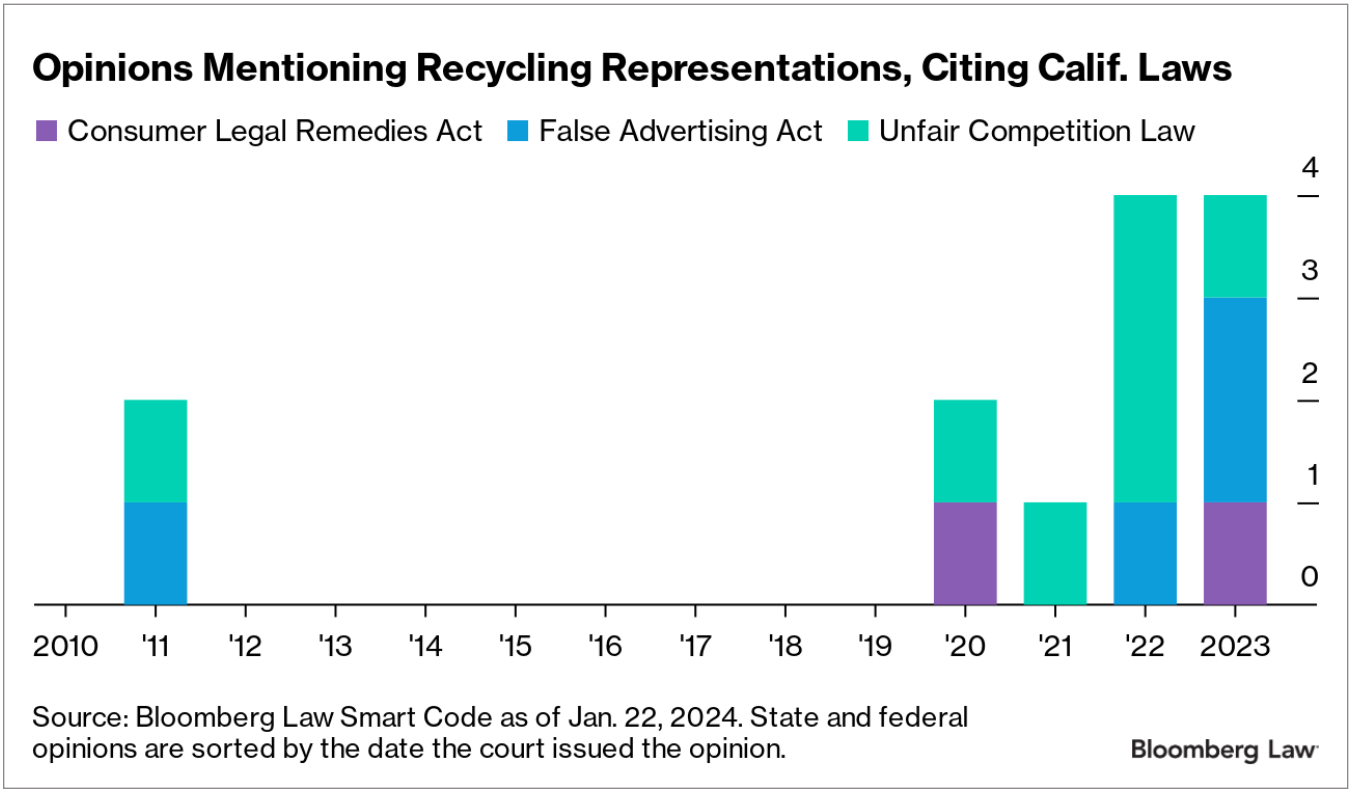
Litigation Efforts in California

California is one of the few jurisdictions that has enacted a specific **environmental marketing statute** prohibiting untruthful, deceptive, or misleading environmental marketing representations. (For a state-by-state look at ESG-related laws and regulations, see Bloomberg Law's **State ESG Laws & Regulations** table.) California's laws address some of the same questions that are before courts in Missouri and Massachusetts by explicitly bringing in the standards contained in the Green Guides—a more direct approach than merely mentioning FTC interpretive decisions—for certain environmental marketing representations, including recycling.

Despite California's incorporation of the Green Guides standards into state law, stakeholders are still bringing complaints alleging misleading environmental representations under one or more state statutes, such as the **Consumer Legal Remedies Act**, **False Advertising Law** (which includes the environmental marketing provisions), and **Unfair Competition Law**.

Under the Green Guides, a company making a representation about the recyclability of its products must include qualification statements on each product if such recycling is not available to 60% of consumers or communities where the product is sold. But the courts are still grappling with what types of qualification statements are sufficient and how to ensure their products are recyclable for 60% of consumers.

Since 2010, state and federal courts have mentioned recyclability representations in 13 opinions that cite any of these three statutes, according to Bloomberg Law Smart Code. The bulk of that activity has taken place over the last few years, with no opinions mentioning these claims from 2012 through 2019.



Court consideration of the standards set in the Guides is about to get even more complicated, thanks to a fourth law. This new law, prohibiting deceptive or misleading recyclability representations as part of the **Public Resources Code**, became effective in January 2024.

Unlike Missouri and Massachusetts, it is certain that federal courts in California will interpret pending claims under the Green Guides' recyclability provisions. But with such limited case law since 2010 to draw from, questions remain as to how this will play out.

Pending Cases in California

Two sets of consumer plaintiffs have filed potential class action complaints—against **S.C. Johnson & Son Inc.** and **Colgate-Palmolive Co.**—in the Northern District of California, claiming that the companies' recyclability representations for their plastic bags and toothpaste tubes, respectively, did not comply with the Green Guides or California law.

In the March 2023 **complaint** against S.C. Johnson, consumer plaintiffs allege that the defendant's qualification statement, which reads "recyclable when clean and dry at drop-off bins at participating retailers" on the bottom of its storage bags, is an insufficient qualification statement when making a recyclability representation for products that are not recyclable to most consumers.

Meanwhile, Colgate consumer plaintiffs filed **suit** in August 2023, alleging that the brand's representation of its tubes as recyclable is misleading because facilities that can recycle the tubes serve "at best a miniscule number of consumers."

Both sets of plaintiffs allege violations under the **Consumer Legal Remedies Act**, **False Advertising Law**, as well as common law violations. They heavily cite the **recyclable provisions** of the Guides throughout to bolster their claims. The S.C. Johnson plaintiffs also allege violations of the state's **Unfair Competition Law**.

Both sets of consumer plaintiffs seek damages as well as injunctive relief. Both cases are still ongoing. *Garvey v. S.C. Johnson & Son*: **Docket No. 4:23-cv-01518**; *Weingartner v. Colgate*: **Docket No. 3:23-cv-04086**.

Both of these pending recyclability lawsuits will require the federal court to interpret how the Guides fit in to California's legal framework for recyclability representations.

Section 2

Emissions Representations

In line with the changing regulatory landscape and mounting consumer pressure, a growing number of companies are attempting to reduce their carbon footprint by reducing the greenhouse gas (GHG) emissions associated with their operations.

Regulatory Pressure

In the emissions space, the Environmental Protection Agency is a critical player. The EPA is tasked with protecting human and environmental health, with specific responsibility under the **Clean Air Act** to protect air quality and the ozone layer. As part of these responsibilities, the EPA sets federal emissions standards for vehicles and engines.

Companies that make false emissions-related representations have the potential to find themselves subject to enforcement actions from the EPA and/or the SEC. A prominent example in recent years is **Volkswagen AG**, which was enmeshed in a scandal known as "Deiselgate."

In 2015, the EPA issued a **notice of violation** of the Clean Air Act to Volkswagen, alleging that certain vehicles circumvented emissions standards. Just four years after these environmental charges, Volkswagen was charged—this time by the SEC—for **defrauding** investors as to the environmental benefits of its clean diesel fleet. As a result of the enforcement actions, Volkswagen paid billions in fines and damages.

This scandal had lasting effects on more than just Volkswagen, however. Over the last decade, enforcers and consumers have continued to challenge the environmentally friendly representations of carbon intensive industries.

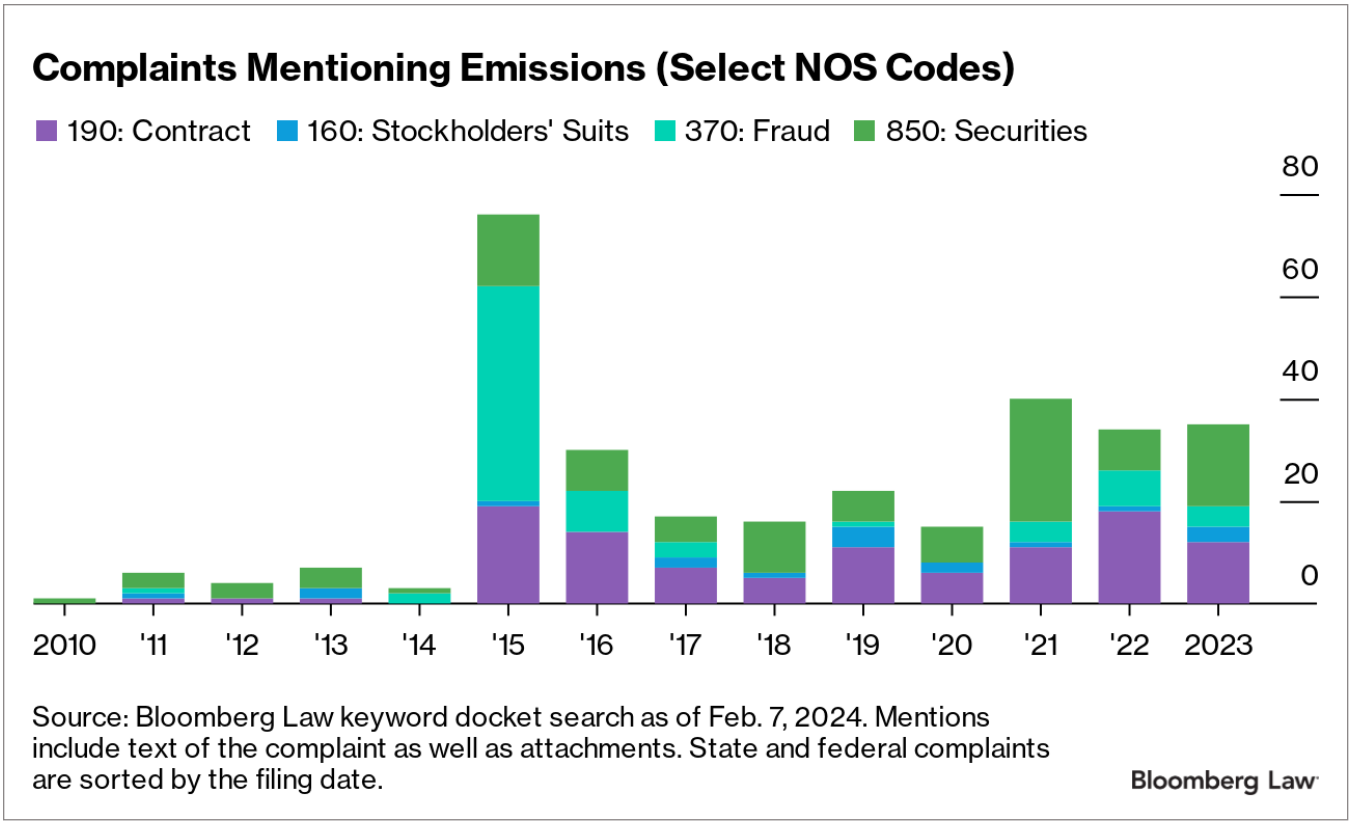
In September 2020, the SEC filed an **enforcement action** against **Fiat Chrysler Automobiles NV** for misrepresenting the results of internal audits of its emissions control systems. Fiat Chrysler had issued a press release and annual report stating that internal audits revealed that the company's cars complied with environmental regulations. However, the statements were allegedly misleading, because the internal audits were limited in scope—auditing only those systems that were similar to those targeted by the Volkswagen **scandal**. Fiat Chrysler agreed to pay a civil penalty of $9.5 million.

Litigation Efforts

Vehicle and engine manufacturers are not the only types of companies that are making emissions-related representations. Stakeholders are currently challenging the sustainability representations of air couriers, airlines, and delivery services. And unlike the enforcement actions against automobiles, the novel sustainability representations asserted by these companies—often relying on terms like "sustainable" and "green"—are undefined by regulators.

This section outlines pending cases against airlines and delivery service companies that would require the courts to determine whether emissions-related sustainability representations amount to greenwashing.

From 2010 through 2023, more than 300 fraud, contract, stockholder, and securities **complaints** have been filed in state and federal courts that mention emissions, either in the filing document or in an attachment.



It's important to note that these lawsuits are not filed only against automakers—and companies in any carbon-intensive industry may face challenges from skeptical stakeholders.

Four lawsuits currently filed against companies in these industries may give courts a chance to weigh in on the issue of whether unregulated environmental representations are permissible.

Pending Cases: Carbon Neutral Representations

Two companies were sued in 2023 in the Central District of California regarding carbon neutral representations that each company made about their transportation operations.

In May 2023, a consumer plaintiff filed a **contract complaint** alleging that **Delta Air Line Inc.**'s marketing of the company as carbon neutral was false because those representations were predicated on the purchase of carbon offset credits. The case is ongoing. *Berrin v. Delta:* **Docket No. 2:23-cv-04150**.

In July 2023, a consumer plaintiff filed a potential class action **contract complaint** against **Etsy Inc.** in the Central District of California for representing that the online retailer offset 100% of emissions for delivery through its purchase of carbon credits. These representations are allegedly misleading because carbon offset vendors utilize inaccurate accounting, the plaintiff claimed. This case was voluntarily dismissed after data collection. *Blackburn v. Etsy:* **Docket No. 2:23-cv-05711**.

Both Delta and Etsy consumers alleged that the respective company's emissions representations violated the California **Consumer Legal Remedies Act** as well as the **false advertising** and **unfair trade practices** provisions of the **Business and Professions Code**. The plaintiff challenging Etsy's representations also alleged **negligent misrepresentation**.

Both plaintiffs seek to certify classes, ascertain damages, and enjoin the defendant from future deceptive acts.

A decision in either case would require the court to determine whether companies could claim carbon neutrality through the purchase of carbon offset credits, rather than engaging in actual emissions-reducing behavior. The Etsy case would have also required the court to determine whether 100% representations are accurate based on the company's operations.

Pending Cases: Sustainability Representations

Two airlines, United Airlines and KLM, face consumer challenges regarding the airlines' use of sustainable fuel and general sustainability representations.

In November 2023, a consumer plaintiff filed a potential class action **fraud complaint** against **United Airlines Holdings Inc.** in the District of Maryland, alleging that its representations that the airline is "100% green" and uses sustainable fuel were false. Claiming that fossil fuels account for most of the airline's fuel, the consumer plaintiff alleges that these representations violate the **Maryland Consumer Protection Act** and constitute fraud. The consumer plaintiff seeks to certify a class and to obtain monetary damages. The case is ongoing. *Zajac v. United Airlines:* **Docket No. 8:23-cv-03145**.

In November 2023, a consumer plaintiff filed a potential class action **contract complaint** against **Koninklijke Luchtvaart Maatschappij** (KLM) in the Eastern District of Michigan, an airline company based in the Netherlands. The consumer plaintiff alleges that KLM's climate-related corporate targets, sustainability resolutions, biofuel usage, and "fly responsibility" representations are misleading because any environmental benefits from KLM's activities—such as its alleged 0.2% use of biofuel—are negligible. These representations allegedly violate Michigan's **Consumer Protection Act** and constitute fraud. The consumer plaintiff seeks to certify a class and to obtain monetary damages. This case is still ongoing. *Simijanovic v. KLM:* **Docket No. 5:23-cv-12882**.

KLM has a similar lawsuit filed against it in the **District Court of Amsterdam**.

Decisions in these cases would require courts to weigh in on the ability of airlines and other carbon intensive industries to make vague sustainability representations such as "responsible" or "green," as well as the issue of how much biofuel must be used to assert that the company uses sustainable fuel.

Section 3

ESG-Related Investment Decisions

ESG factors are often leveraged by investors to supplement traditional financial analysis through the identification of material environmental, social, and governance risks and opportunities that materially impact a company's operations.

But it is not always clear to all stakeholders what ESG is, how ESG is weighed alongside other financial factors, and how ESG factors can conflict with short-term value—all considerations that have created tension around ESG investing in the last few years.

Regulatory Pressure

The SEC's mandate is to protect investors and it achieves this by taking enforcement actions against a variety of corporate misdeeds, such as the filing of materially misleading or false statements with the agency or failure to enforce policies. The SEC has taken at least three greenwashing/ESG representation enforcement actions in the last few years: **SEC v. Goldman**, **SEC v. BNY Mellon**, and **SEC v. DWS**.

The SEC announced enforcement actions against **Goldman Sachs Group Inc.** and **BNY Mellon Investment Adviser Inc.** in 2022 that targeted similar representations regarding ESG investments.

Goldman Sachs allegedly failed to adopt policies regarding ESG-related investments and, once they were adopted, failed to implement them properly. Goldman paid a $4 million civil penalty to settle the charges.

BNY Mellon allegedly represented that its Overlay Fund Investments underwent an ESG quality review for all investments but did not subject some investments to that review. BNY paid a civil penalty of $1.5 million to settle the charges.

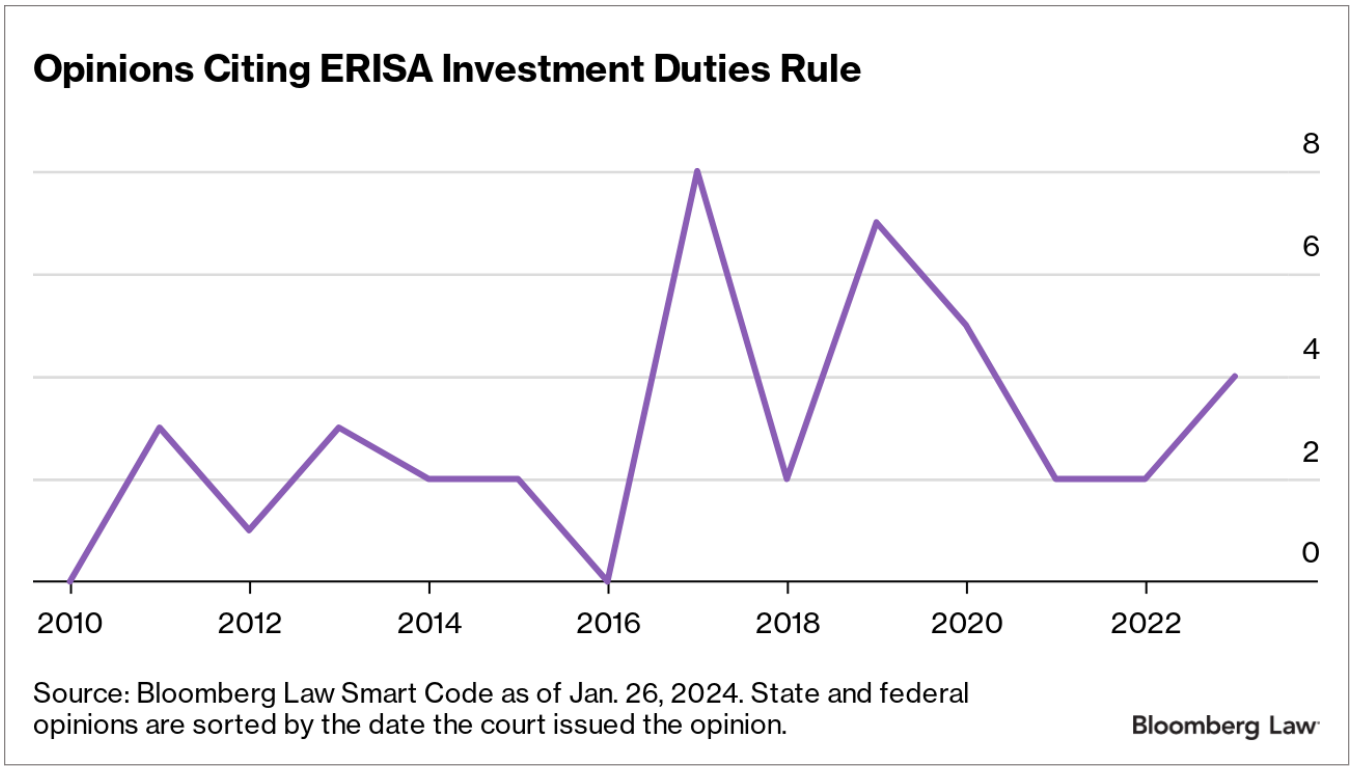
In September 2023, an enforcement action arose as a response to **DWS Investment Management Americas Inc.**'s alleged failure to fulfill the promises set forth in its ESG integration policy, which represented that research analysts included material ESG factors in their valuations and decision-making processes. DWS allegedly failed to adequately implement the policy through research or compliance. These failures allegedly rendered the public disclosures of such a policy misleading. To settle the charges, DWS paid a $19 million civil penalty.

But as stakeholders are joining the SEC in trying to reconcile the role of ESG in investments, retirement plan beneficiaries and states are weighing on how and when ESG fits into investment decision-making.

Litigation Efforts

Many US citizens invest in their retirement and want to ensure that their funds are invested in line with their values and in a way that helps ensure the health of their financial future. One of the reasons why the **Employee Retirement Income Security Act of 1974** is in place is to provide some safeguards, so that plan beneficiaries can achieve those goals. ERISA's provisions set forth restrictions on the types of considerations that fiduciaries can make in their investment decisions.

Federal and state courts have cited ERISA's investment duties rule **29 C.F.R. § 2550.404a-1**, in at least **41 state and federal opinions** from 2010 to 2023, according to Bloomberg Law Smart Code.



The most recent mention of these provisions—and the only one that specifically calls out ESG—is **Utah v. Walsh**, a case where 26 states challenged a Department of Labor rule amendment that deleted the requirement that fiduciaries distinguish among investments based on "pecuniary" factors alone and clarified that fiduciaries may consider ESG factors so long as the investment choice is reasonably determined to be based on a risk and return analysis. **Summary judgment** was entered in favor of the DOL in September.

But this one case left unanswered how ESG logistically fits into investment duties as well as what kind of guardrails, if any, states can put in place—two questions that courts may soon weigh in on.

Pending Cases: Retirement Plan Administration

There are two groups of stakeholders filing lawsuits against major players tasked with administering retirement plans: plan beneficiaries and shareholders.

Plan Beneficiaries

In June 2023, a retirement plan beneficiary filed a **complaint** in the Northern District of Texas against **American Airlines Group Inc.**, its employee benefits committee, **FMR LLC** (Fidelity Institutional Asset Management), and **Financial Engines Advisors LLC**, alleging that the defendants had breached their investment duties under ERISA. In particular, the plaintiff alleges that the defendants selected and included investment options that are managed by companies that pursue ESG goals, failed to remove ESG funds with poor financial performance, and failed to monitor the activities of funds.

The plaintiff seeks damages for the losses incurred because of the defendants' alleged breach of its fiduciary duties. The plaintiff also seeks injunctive relief.

This lawsuit may give the court the chance to weigh in on the connection between ESG analysis—including labeling of funds—and financial analysis. This case is still ongoing. *Spence v. American Airlines:* **Docket No. 4:23-cv-00552**.

In May 2023, a somewhat similar case was filed under New York common law. Retirement plan beneficiary plaintiffs alleged in their **complaint** filed with the New York Supreme Court that the **New York City Employees' Retirement System** and Teachers' Retirement System of New York violated their fiduciary duties because they divested from fossil fuels.

The plaintiffs seek monetary damages as well as injunctive relief pertaining to future divestment actions.

The carbon emissions and other ESG impacts of the fossil fuel industry leave open questions about how industry divestments will be considered by court. This case is still ongoing. *Wong v. New York City Employee Retirement System:* **Docket No. 652297/2023**.

Shareholders

In December 2023, Tennessee filed a **complaint** against **Blackrock Inc.** for its ESG-related investment decisions in the Circuit Court of Williamson County. In particular, the state argues that Blackrock's actions are not in line with shareholder returns and that its activities such as joining climate organizations, proxy voting in favor of ESG-related proposals, and its fund labels violate the **Tennessee Consumer Protection Act**.

Tennessee seeks to permanently enjoin Blackrock from engaging in behavior that allegedly violates the state's consumer protection laws. It also seeks money damages for customers, disgorgement, and payment of a civil penalty for each violation.

This lawsuit against Blackrock challenges multiple aspects of the Tennessee law, from ESG labeling and analysis to the power of Blackrock's proxy voting—thereby testing the manner in which fiduciaries consider ESG. This case is still ongoing. For updates on *Tennessee v. Blackrock*, view the Tennessee Attorney General's **website**.

Pending Cases: Other Investment Decisions

Although the Utah v. Walsh case is closed (but an appeal is pending), the states are also looking to set guardrails around where and how ESG fits into investment decisions.

There is a growing policy divide among the states as to whether and how ESG factors fit into investment decisions. Missouri and Kentucky are two states facing pending lawsuits for their efforts to gather more information on how financial institutions are using ESG factors in their jurisdictions.

In 2022, the attorney general of Kentucky issued civil investigative demands (CIDs) to financial institutions regarding their lending practices, particularly their consideration of ESG factors. A 2022 lawsuit filed by Hope of Kentucky **alleges** that the attorney general issued the demands in excess of his authority, and in violation of the First Amendment and KRS § 41.470, a state law that covers divestment from financial companies engaged in energy boycotts.

Hope of Kentucky asked the court to declare that the attorney general violated his authority when he issued the CIDs and to enjoin him—or parties associated with him—from taking further steps to enforce the CIDs.

On Sept. 29, 2023, Kentucky's motion to dismiss was **granted** by the Eastern District of Kentucky as to the First Amendment claims for lack of standing, and denied as to state law claims because supplemental jurisdiction was no longer appropriate. The case was remanded to **Franklin Circuit Court**, where it is still pending. *Hope of Kentucky v. Cameron:* **Docket No. 3:22-cv-00062**.

In June 2023, Missouri enacted a rule **requiring** financial firms to disclose whether they incorporate social or financial objectives into their investment decisions and to obtain their client's consent for them to consider these objectives.

In August 2023, the **Securities Industry and Financial Markets Association Inc.** (SIFMA), a trade organization for broker-dealers, investment banks, and asset managers, filed for an **injunction** in response to Missouri's enactment of the rule. The Western District of Missouri case alleges that Missouri's rules violate the **National Securities Markets Improvement Act** (NSMIA) by imposing prohibited recordkeeping requirements for ESG investments and restricting "non-financial" objectives.

The plaintiff seeks a declaratory judgment that the rules are invalid, unconstitutional, and void, and seeks to permanently enjoin the defendants from enforcing the rules.

Missouri's motion to dismiss was denied on Jan. 5, 2024. This case is still ongoing. *SIFMA v. Ashcroft:* **Docket No. 2:23-cv-04154**.

A decision from the court in this case would require a determination on whether states may impose additional requirements on financial institutions that weigh ESG criteria.

Section 4

ESG and Sustainability Reports

ESG reports and sustainability reports are tools that companies can use to share their ESG-related efforts with interested stakeholders. Although these reports are voluntary, they are often linked to in SEC filings and used by plaintiffs to bolster claims that companies have violated securities law.

Regulatory Pressure

Statements made in ESG and sustainability reports come with potential legal challenges from stakeholders. One such stakeholder is the SEC, the agency tasked with protecting investors. In one recent example, the SEC leveraged both voluntary and mandatory ESG disclosures in its enforcement action against **Vale**.

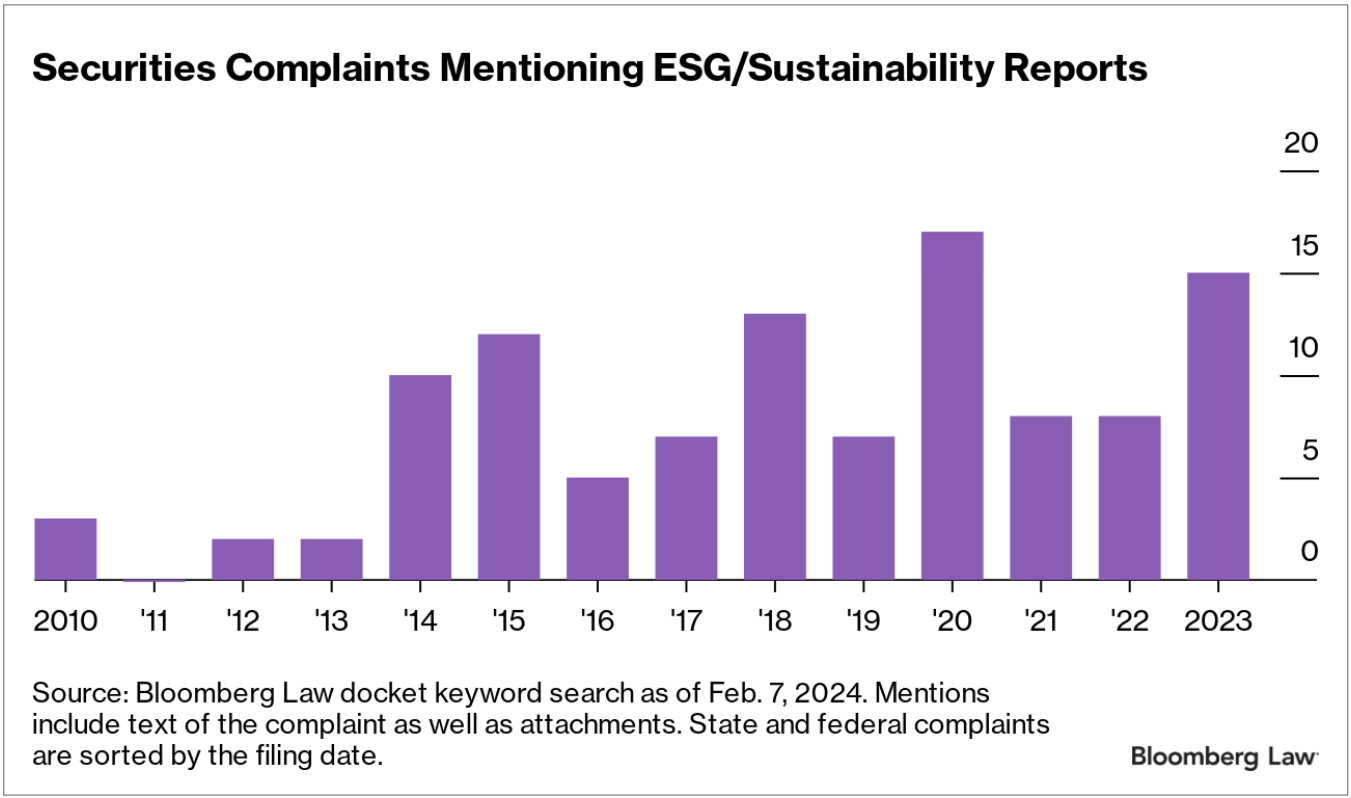
In January 2019, Brazil's Brumadinho dam collapsed, killing 270 people and poisoning the Paraopeba River in Brazil. Prior to that collapse, the Brazil-based owner, Vale, represented the safety of the dam and detailed a number of safety audits it had undergone in mandatory SEC filings and its voluntary sustainability reports.

In April 2022, the SEC charged Vale with making inaccurate safety declarations and **misleading stakeholders** as to the safety of the dam in its mandatory filings and voluntary reporting. Vale's publication of inaccurate safety representations allegedly violated **Exchange Act Section 10(b)**, among other securities laws. In 2023, Vale **agreed** to settle the charges and pay $55.9 million.

Green- and social-washing, in mandatory as well as voluntary reports, can negatively impact company value as shareholders look to ensure that the companies they invest in make accurate ESG representations. For that reason, shareholders are also closely examining company representations in voluntary ESG and sustainability reports when challenging a company's compliance with securities laws.

Litigation Efforts

From 2010 to 2023, ESG and sustainability reports were mentioned in or attached to more than 100 state and federal court securities **complaints**, according to a keyword search of Bloomberg Law's dockets.



Despite all of this activity to date, ESG or sustainability reports have been mentioned in only **one state or federal court opinion** citing **Exchange Act Section 10(b)** which prohibits manipulative and deceptive devices, according to Bloomberg Law Smart Code. And **SEC Rule 10b-5**, which was promulgated under Section 10(b) and prohibits companies from making materially false or misleading statements or omitting material facts in disclosures, has been cited in **no opinions** that also mention ESG or sustainability reports.

The one opinion mentioning these voluntary reports was a 2013 **order** granting in part and denying in part a motion to dismiss against **BP PLC** for its Deepwater Horizon spill. The motion to dismiss was granted as to claims based on the company's 2006 and 2009 sustainability reports.

The number of complaints these reports are mentioned in or attached to has increased every year since 2016—expect for this last 2022-2023 year, which was likely due to uncertainty around the future of mandatory ESG reporting requirements.

But three pending shareholder lawsuits may give courts a chance to weigh in further how voluntary ESG and sustainability reports are used to bolster alleged securities violations under Rule 10b-5.

Pending Cases

In September 2023, a shareholder of **Lumen Technologies Inc.** (formerly Century Link) filed a potential class action **complaint** against the company in the Western District of Louisiana for its disclosures of the environmental and human health and safety impacts of the company's operations.

Specifically, the shareholder alleges that the disclosures that the company included in its voluntary ESG reports and Form 10-Ks about its controls for hazardous conditions and environmental management system were misleading because the company owns thousands of miles of lead-wrapped cables, which are detrimental to human and environmental health. The shareholder alleges that these misrepresentations are violations of Exchange Act Section 10(b) and SEC Rule 10b-5, among other securities violations.

The plaintiff seeks damages for themselves as well as for the class. This case is still ongoing. *In re: Lumen:* Docket No. 3:23-cv-01290.

In December 2023, a shareholder of Verizon Communications Inc. filed a similar complaint against the company in the District of New Jersey for its disclosures on the human health and safety and environmental impact of its buried telephone cables. The shareholder alleges that company disclosures in its Form 10-Ks and ESG Reports were false because they failed to disclose that company cables were coated in lead and asserted false environmental and social benefits of the company's operations. These representations allegedly meant that the director defendants breached their fiduciary duties, violated Exchange Act Section 10(b), SEC Rule 10b-5, and constituted other securities and common law violations.

The plaintiff seeks compensatory and punitive damages as well as a directive for Verizon to take necessary actions to improve internal controls and corporate governance. *Moore v. Westberg:* Docket No. 3:23-cv-2307.

In September 2022, a shareholder of Wells Fargo & Co. filed a complaint against the company for allegedly misrepresenting its DEI initiatives. The shareholder alleges that Wells Fargo included statements about DEI commitments—including those related to hiring practices—in its ESG reports, proxy statements, and Form 10-Ks that were false because the company conducted fake interviews to satisfy hiring requirements and the company omitted material information from these reports.

These misrepresentations allegedly meant that directors breached their fiduciary duties, were unjustly enriched, and violated Exchange Act Section 10(b), and committed other securities violations. The plaintiff also seeks indemnification as well as declaratory relief. This case is still ongoing in the Northern District of California. *In re Wells Fargo:* Docket No. 3:22-cv-05173.

In each of these three cases, the court could potentially consider the statements made in voluntary ESG and sustainability reports, as well as whether those representations contribute to the alleged violations of Rule 10b-5. The courts could potentially weigh in on the key issue of whether general safety, environmental, and DEI representations made in voluntary reports can be deemed misleading in light of company operations.

About the Author

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Abigail Gampher Takacs is a Legal Analyst focusing on environmental, social, and governance (ESG) and investor activism matters. Abigail is licensed to practice law in the District of Columbia and is a Fundamentals of Sustainability Accounting Credential holder. In prior roles, she served as Editor-in-Chief to her law review and worked at D.C. Superior Court, in crime victim legal services, and international election law. She received her B.A. in International Relations from Hendrix College and J.D. from American University, Washington College of Law. United States Code or state codes. For this research, relevant statutes were identified from pending lawsuits, and Smart Code was used to identify opinions that cite that statute. As court dockets may be updated, courts may have issued opinions after the data collection for this report.

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