



**2023 Litigation
Statistics Series:**

ESG Litigation

Introduction

Drawing from Bloomberg Law's comprehensive access to federal court dockets across the country, this Litigation Statistics Series report provides data-driven analysis of claims filed in federal district courts that draw upon emerging ESG (environmental, social, and governance) legal and compliance issues.

Section 1 provides an overview of the body of **ESG-related federal litigation** filed in 2022 and in the first quarter of 2023, and identifies the four main categories of lawsuits brought by plaintiffs during this time period.

Section 2 focuses on one of the largest single flashpoints in ESG, **environmental justice**, and contains data on the laws that are being invoked, the defendant types that are facing lawsuits, and the courts that are seeing the most cases.

Section 3 quantifies **product advertising** as a source of risk, in the form of lawsuits alleging that marketing claims touting "green products," environmental consciousness, and social responsibility are false, misleading, or deceptive.

Section 4 provides insight into **employment- and DEI-related** lawsuits, many of which have been brought by shareholders. Case types analyzed include those involving DEI (diversity, equity, and inclusion) in both the workplace and the boardroom.

Section 5 looks at the many ways that **corporate representations** about ESG issues can create legal risk, particularly when organizations' commitments or assessments of their impact on the environment are subjected to public scrutiny.

Section 6 shifts the focus to just one case, concerning the issue of **ESG investments**, that provides a possible preview of state and federal enforcement battles to come, leaving corporations uncomfortably in the middle.

Many sections also include special **spotlights on lawsuits** filed during this time period. These case studies provide additional insight into the current state of ESG litigation.

Methodology

The information in this report comes primarily from customized searches of **Bloomberg Law Dockets** by a team of Bloomberg Law legal analysts.

For each of the five main topics covered in the report, we crafted a keyword search to locate and identify federal court filings from Jan. 1, 2022, to March 31, 2023. The specific terms used for each docket search are available by clicking on the hyperlinks embedded throughout the report. (Bloomberg Law subscription is required.)

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

Each keyword search was tailored to address a singular ESG-related topic, such as recyclable products or corporate representations about renewable energy. If a complaint included claims under more than one ESG-related risk category or topic addressed therein, it was included under both.

The results of each search were cleaned to remove cases that did not cover ESG-related topics.

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

Section 1

Overview of ESG-Related Filings

ESG issues are discussed and debated everywhere, from corporate boardrooms to political campaigns.

But once ESG reaches the courtroom, it graduates from an intangible group of concepts to a concrete, measurable field of legal practice—one that is forming rapidly with each new lawsuit.

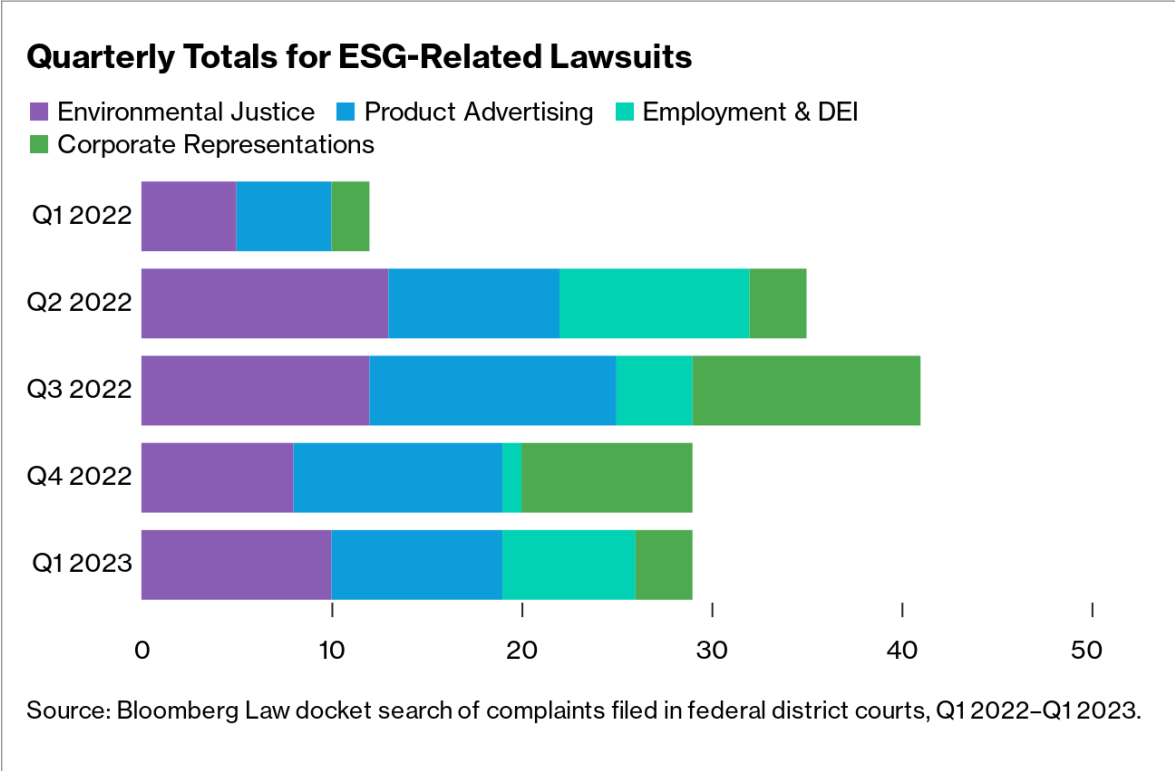
While law firms and corporate legal departments continue to wait for regulatory action to identify the most important ESG risks to watch out for, the courts are already pointing the way.

Since the beginning of 2022, federal ESG-related lawsuits have largely focused on four emerging categories of ESG risk:

- Environmental justice
- Product advertising
- Employment & DEI
- Corporate representations

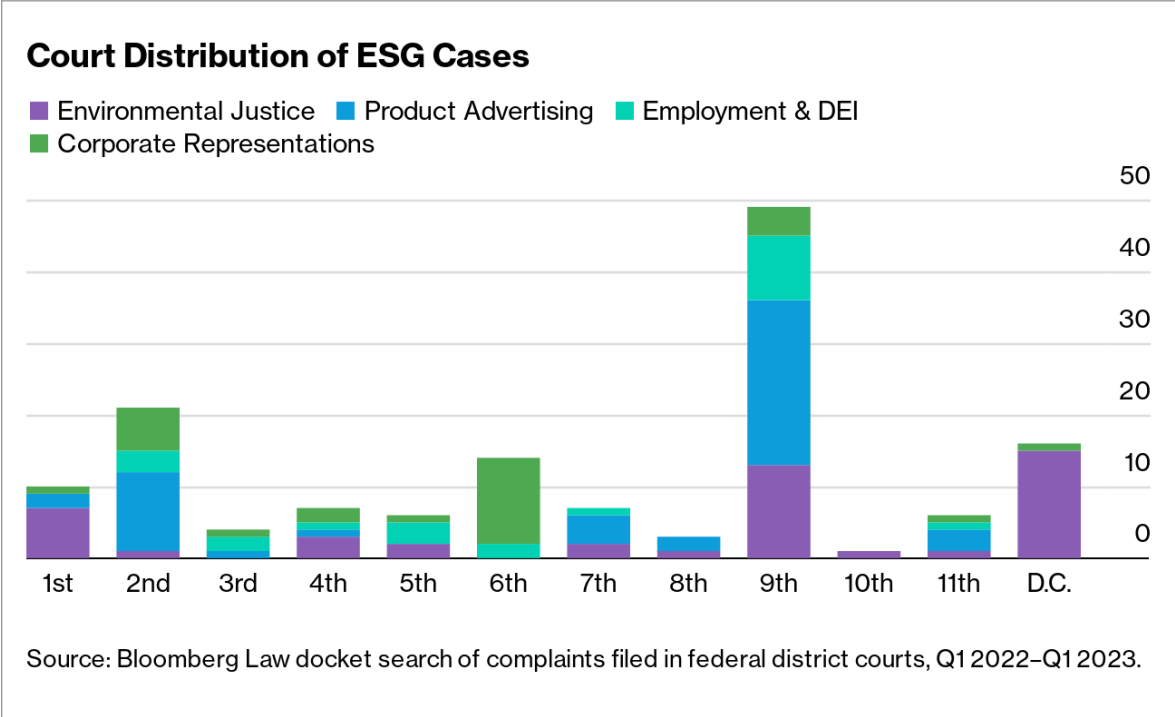
A fifth category, involving ESG investment practices, has been involved in few lawsuits so far, but it has been singled out as an area to watch in the future.

The scope of the litigation involved isn't huge. All told, fewer than 150 complaints in the past five quarters have touched on at least one of these four main areas, based on extensive research of [Bloomberg Law's federal dockets](#).



Despite its modest size, this vanguard of cases carries a rich trove of benchmarking information regarding how plaintiffs are approaching ESG litigation—and which types of organizations appear to be at the greatest risk.

For example, a key factor that differentiates these lawsuits is the venue in which plaintiffs are filing their complaints. District courts in some circuits have barely seen any ESG lawsuit action yet. But for others, the ESG litigation wave is already here.



Court distribution is one defining factor in this emerging practice area. Others include:

- the types of ESG claims that are being brought, and under which laws;
- the industries and organizational types of the most common defendants; and
- the potential for plaintiffs’ claims to gain class action status.

The following sections of this report provide a first-of-its-kind statistical assessment of these factors within the main categories of ESG litigation.

Section 2

Environmental Justice

A key ESG risk making its presence felt on the federal dockets is environmental justice. The Environmental Protection Agency **defines** environmental justice as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

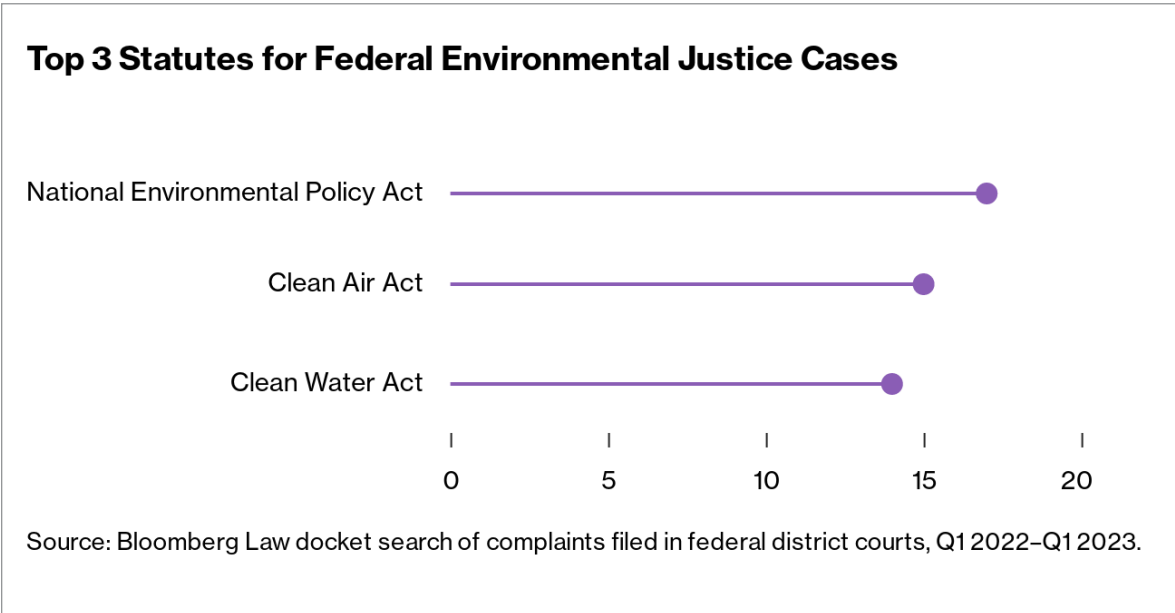
Environmental justice seeks to ensure that minority, low-income, or tribal communities (collectively known as environmental justice communities) do not suffer disproportionate human health and environmental impacts, such as pollution, toxins, or emissions.

Claims in environmental justice lawsuits can take many forms, but at the most fundamental level, those that involve company behavior often allege that company operations, facilities, or business processes cause environmental conditions that have an unequal impact on environmental justice communities.

Key Environmental Justice Statutes

From Q1 2022 through Q1 2023, a total of 48 environmental justice complaints were filed in federal court, according to an analysis of **Bloomberg Law Dockets**.

Environmental justice claims included in this analysis were primarily filed under three key statutes: the **National Environmental Policy Act** (NEPA), the **Clean Air Act**, and the **Clean Water Act**. Of the 48 environmental justice cases filed, 90% included a claim under at least one of these laws.



In addition to these substantive environmental justice claims, claims were also brought under the **Administrative Procedure Act** in eight of the 48 lawsuits. No other statute appeared in more than two.

National Environmental Policy Act Lawsuits

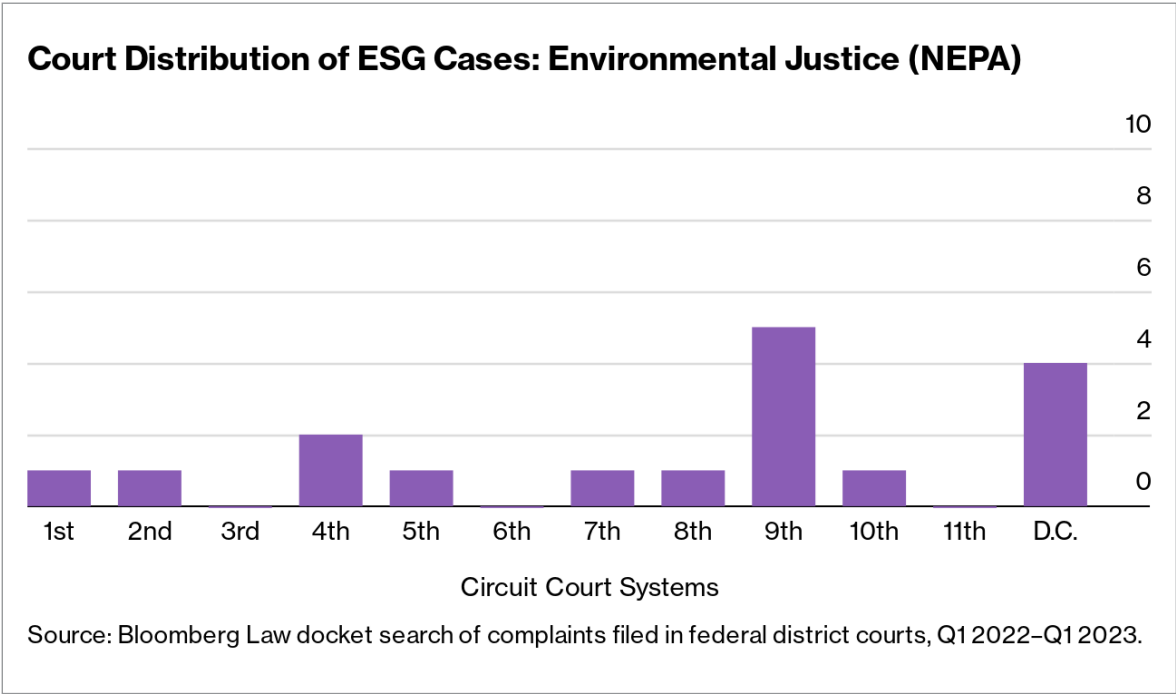
Environmental justice claims are not always against the companies themselves. If agency action is required, environmental justice claims linked to company behavior may be filed against agencies under NEPA.

NEPA requires that federal agencies assess the environmental impacts of their proposed actions before they take those actions. The law was an early codification of environmental justice that followed President Clinton’s 1994 [executive order](#) on the topic.

Although NEPA applies only to agency action, it can play a pivotal role in mitigating the environmental justice impacts of company behavior. Many company operations require federal agency action, which would require the applicable agency to conduct an environmental justice review.

For example, before granting a permit to a company in the extractives sector, a federal agency would need to conduct an environmental justice review. If the agency fails to conduct an environmental justice review regarding a company’s permit, affected communities may file suit against the agency. Even if the company itself is not a named defendant in the lawsuit, company operations may require governmental action.

Of the 17 environmental justice cases brought under the National Environmental Policy Act in 2022 and Q1 2023, 11 were filed in federal district courts in the Ninth, D.C., and Fourth circuits. The remaining six cases filed during this period were scattered among six different jurisdictions (the First, Second, Fifth, Seventh, Eighth, and Tenth circuit courts).



The most frequently targeted agency in NEPA claims was the US Department of Interior, which was a named defendant in six of the 17 environmental justice NEPA complaints filed in 2022 and Q1 2023. (See below for overall defendant counts among EJ-related cases.)

CASE SPOTLIGHT: National Environmental Policy Act
State of California et al. v. United States Postal Service et al. (N.D. Cal.)

On April 28, 2022, 16 states (later **amended** to include Colorado), the District of Columbia, New York City, and a California-based environmental group sued the US Postal Service and Postmaster General Louis DeJoy, claiming that the agency's program to replace older vehicles was deficient under the National Environmental Policy Act.

The Next Generation Delivery Vehicle Acquisition program seeks to evaluate, test, and purchase new vehicles to replace older vehicles in the USPS system.

The complaint alleges that contract terms for the program required companies to be able to support electric vehicle powertrains. However, the USPS awarded a contract under this program to Oshkosh Defense, LLC—a company that allegedly did not manufacture any electric vehicles at the time. Oshkosh Defense is also a named defendant in the case.

Among other environmental impact deficiencies, the plaintiffs allege that the program's final Environmental Impact Statement (EIS) failed to fully evaluate the environmental justice impacts of the program.

The complaint asserts that environmental justice communities are exposed to disproportionate emissions from USPS delivery vehicles and the use of electric vehicles would help "alleviate pollution in overburdened communities and help tackle the climate crisis."

The defendants have not filed an answer yet in this case.

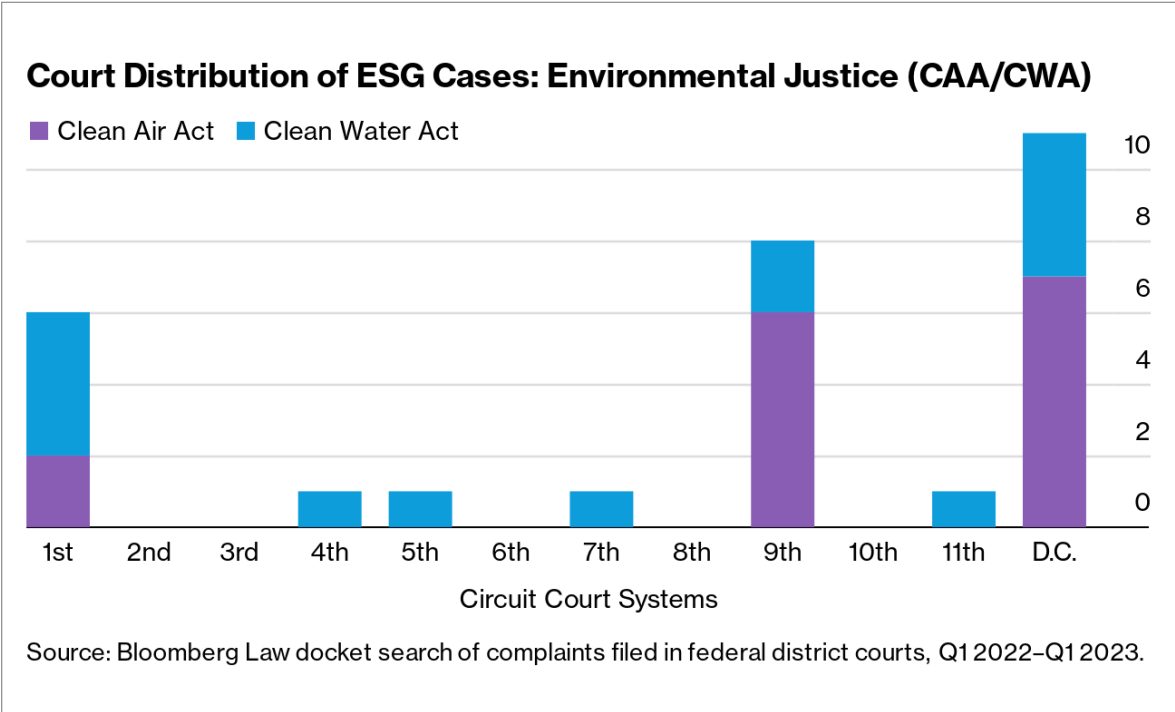
- Judge: **Araceli Martinez-Olguin**
- Plaintiff's Counsel: State Attorney Generals; NYC Law Dept.; Bay Area Air Quality Management District
- Defendant's Counsel: **Mayer Brown LLP**
- Case No.: **3:22-cv-02583**

Clean Air Act and Clean Water Act Lawsuits

Emissions and pollution are substantive environmental justice issues that pose serious concerns for environmental justice communities, so it is no surprise that after the NEPA, the Clean Air Act and Clean Water Act follow as top statutes for federal environmental justice cases. These statutes were included in 15 and 14 complaints, respectively.

From Q1 2022 through Q1 2023, the 15 environmental justice cases brought under the Clean Air Act were filed in only three circuit court systems: the Ninth, First, and D.C. circuits. As for the 14 environmental justice cases brought under the Clean Water Act, most were filed in the same circuit court systems as Clean Air Act claims, with the Ninth, First, and D.C. circuits serving as the most popular jurisdictions.

However, there was also a sprinkling of cases across four other jurisdictions. District courts in the Fourth, Fifth, Seventh, and Eleventh Circuit systems each saw a single environmental justice case filed during this time.



Ten of the 15 cases brought under the Clean Air Act named the EPA or EPA Administrator Michael S. Regan as a defendant.

Unlike NEPA and Clean Air Act claims, lawsuits filed under the Clean Water Act had a more dispersed array of defendants and did not appear to be mostly filed against one agency or agency head.

CASE SPOTLIGHT: Clean Water Act
Commonwealth of Massachusetts v. Chet’s Wrecking & Auto Parts Co. Inc. (D. Mass)

On February 1, 2023, the Commonwealth of Massachusetts brought suit alleging that a Springfield company was improperly discharging industrial stormwater from its facilities into a river in an area designated by the Commonwealth and the EPA as an environmental justice community.

Massachusetts alleged that the environmental justice community incurred these harms because Chet’s Wrecking & Auto Parts Company Inc. not only violated the federal Clean Water Act but failed to adhere to the requirements of the EPA’s general stormwater permit.

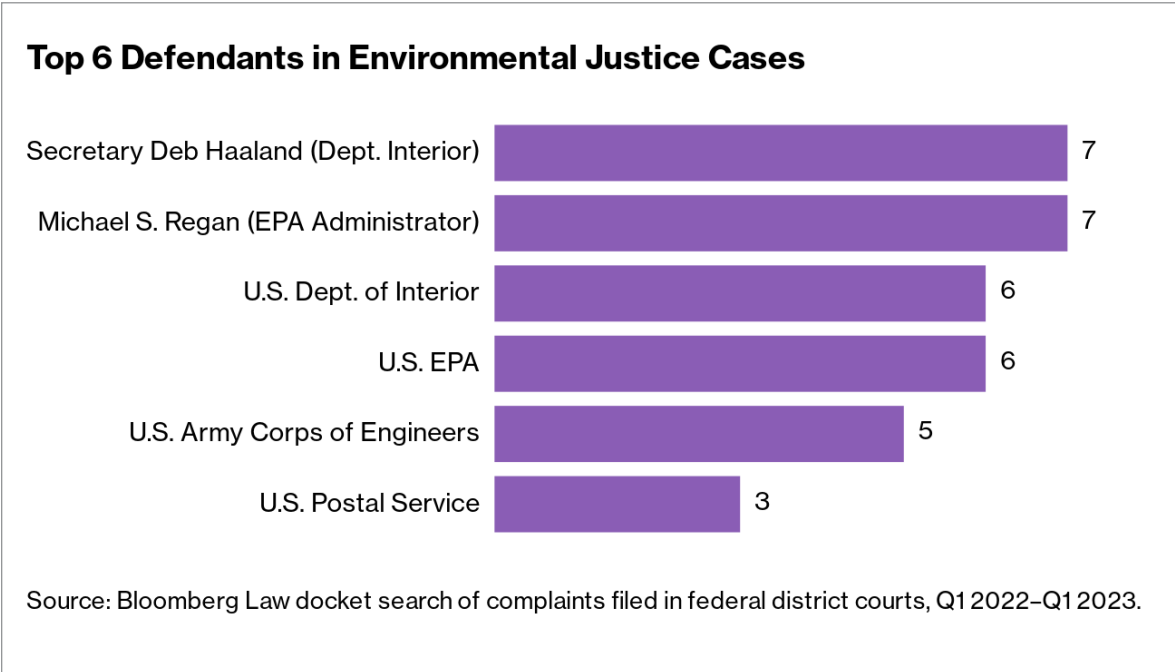
Chet’s operations include a salvage yard and metal recycling facility that involves large, uncovered piles of industrial materials outside its facilities. The complaint alleges that these operations allow polluted water to run off the industrial materials at Chet’s facilities in the event of any rain, snowfall, or other precipitation, through the municipal storm sewer system, and into the environmental justice community at Bircham Bend Brook, a tributary of the Chicopee River.

A consent decree was entered by the court on April 11, 2023.

- Judge: [Mark G. Mastroianni](#)
- Plaintiff’s Counsel: Attorney General
- Defendant’s Counsel: [Wiggin & Dana LLP](#)
- Case No.: [3:23-cv-10263](#).

Defendants in Environmental Justice Cases

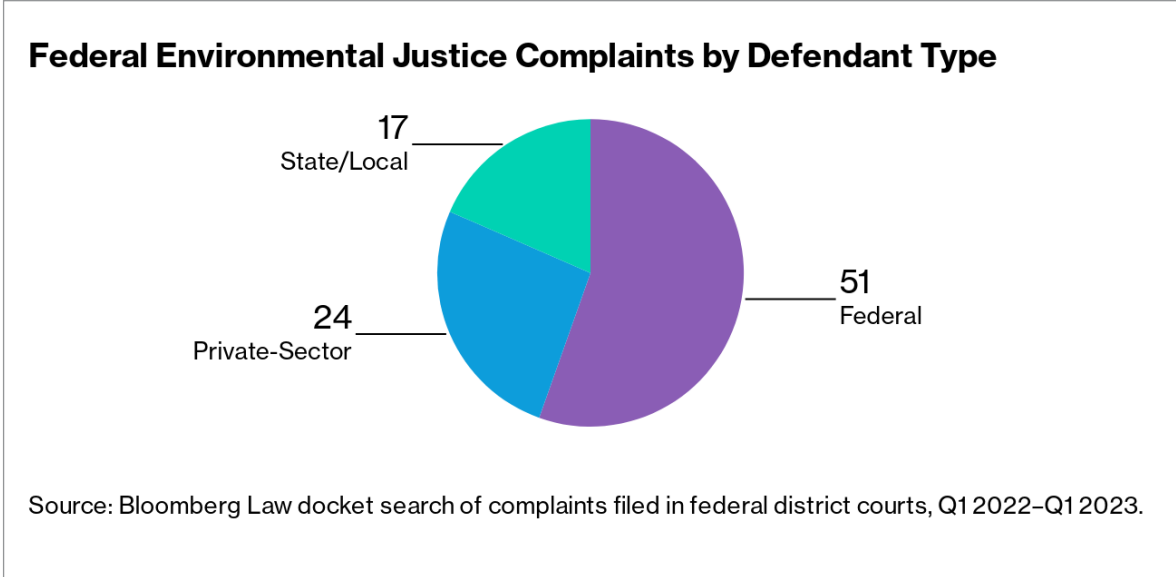
Because NEPA is the single most popular statute in this set of analyzed environmental justice cases, it follows that across all 48 analyzed environmental justice cases filed in 2022 and Q1 2023, the top six defendants were federal agencies or the heads of agencies.



Plaintiffs overall were more likely to sue agency heads than the agencies themselves. Deb Haaland and Michael S. Regan, the heads of the Department and Interior and EPA respectively, were each named seven times as defendants in environmental justice cases.

A total of four agencies were named defendants on multiple environmental justice cases: the Department of Interior, the EPA, the Army Corps of Engineers, and the US Postal Service. No other-named defendants appeared in more than two lawsuits.

All told, the 48 environmental justice lawsuits filed in 2022 and Q1 2023 named 92 defendants. More than two-thirds (68) of those defendants were federal or state government entities, with federal entities bearing the brunt of the complaints.



Although government entities are the main target in environmental justice lawsuits, companies should be aware that the environmental justice concerns related to their business operations may cause them to be directly named as a defendant themselves.

Plaintiffs named private-sector entities (including both companies and trade associations) as defendants in their environmental justice complaints 24 times in 2022 and Q1 2023. And more than one-third of the 48 environmental justice cases filed during that time involved at least one private-sector defendant.

Additional Bloomberg Law resources:

- [Environmental Justice Policy](#)
- [Environmental Justice Considerations](#)
- [Establishing Environmental Justice Procedures](#)

Section 3

Product Advertising

Adding environmentally friendly or socially responsible elements to advertising claims can give a competitive advantage to companies looking to set their products or services apart to consumers attuned to ESG considerations. But product claims that include environmental or social components can leave companies at risk of litigation if they are perceived by consumers to be false, misleading, or deceptive.

These cases are typically brought under state unfair competition and business statutes, many of which make it to the federal district courts.

The Federal Trade Commission also has enforcement authority under [Section 5](#) of the FTC Act, which prevents companies from “using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”

The FTC is currently in the process of revisiting and updating its [Green Guides](#), which provide guidance on the environmental marketing claims that may be considered deceptive to consumers under Section 5. These updates may change the nature of many such claims in the future.

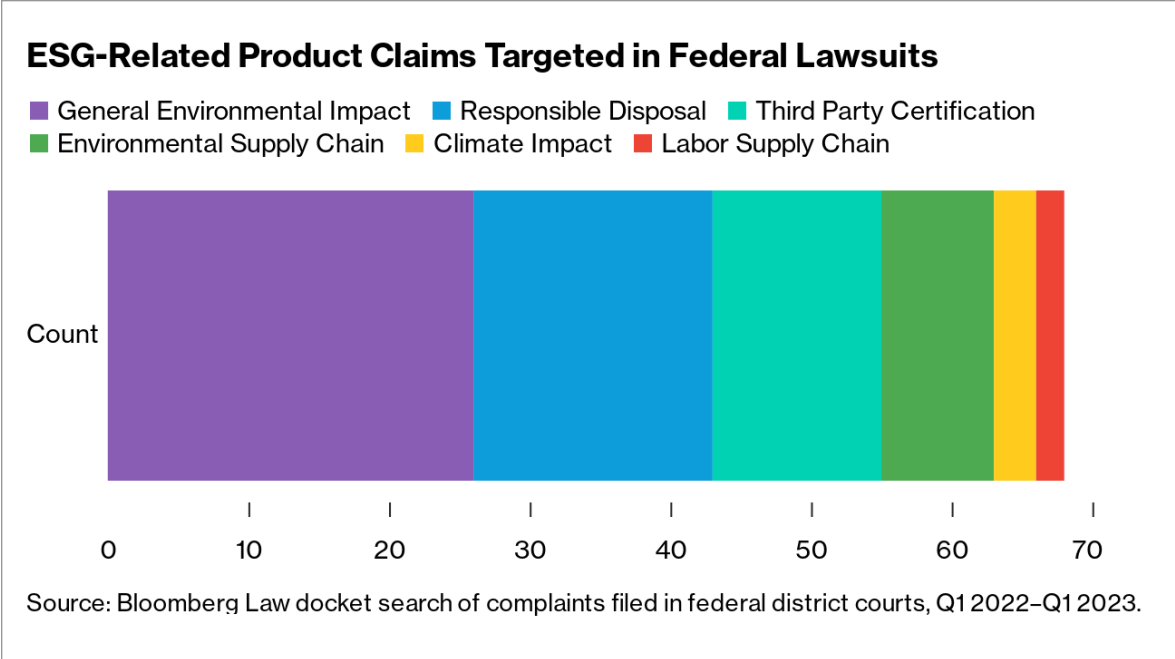
But in the meantime, a review of Bloomberg Law’s dockets shows that consumers, not regulators, present the more pressing litigation risk to companies in this area.

In 2022 and Q1 2023, 47 complaints were filed in federal courts against companies for deceptive environmental (often referred to as “green product”) claims or social responsibility claims. The FTC, meanwhile, has [publicly disclosed](#) only one enforcement action—against Walmart and Kohl’s—under the Green Guides during this same time frame.

Key Product Advertising Case Types

An analysis of these 47 cases found a total of 68 allegations of false, misleading, or deceptive practices in a variety of product advertising claims and other marketing statements:

- **General environmental** claims include broad statements about the eco-friendliness or sustainability of a product.
- **Responsible disposal** claims include assurances about the recyclability, compostability, or biodegradability of a product.
- **Third-party certifications** claims involve products that purport to meet certain third-party certifier standards, such as Fair Trade Certified.
- **Environmental supply chain** claims include assurances about the environmental impacts of a company’s supply chain.
- **Climate impact claims** include assurances about climate impacts of products, such as carbon neutrality.
- **Labor supply chain** claims include those that make assurances about the labor standards under which the products were produced, like maintaining that a product was not produced by forced labor.



General environmental marketing claims made by companies were the most frequently challenged in lawsuits, appearing in 26 of the 68 total allegations.

The second most targeted claims, drawing a total of 17 complaints, were those involving the marketing, advertising, or labeling of products as having the ability to be disposed of responsibly.

CASE SPOTLIGHT: Climate Impact Claims
Lizama et al v. H&M Hennes & Mauritz LP (S.D. Mo.)

On Nov. 3, 2022, lead plaintiffs Abraham Lizama and Marc Doten filed a class complaint against H&M, alleging that the clothing retailer’s “Conscious Choice” collection is a deceptive attempt to “greenwash” environmentally damaging practices.

The collection included items made from recycled and organic materials that were marketed as “more sustainable.” However, the plaintiffs alleged that H&M’s clothing was not sustainable because the synthetic materials in the collection actually had a negative environmental impact.

The plaintiffs’ seven-count complaint alleged violations of California’s Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law; and Missouri’s Merchandising Practices Act, among others, and sought to certify both California and Missouri subclasses of plaintiffs.

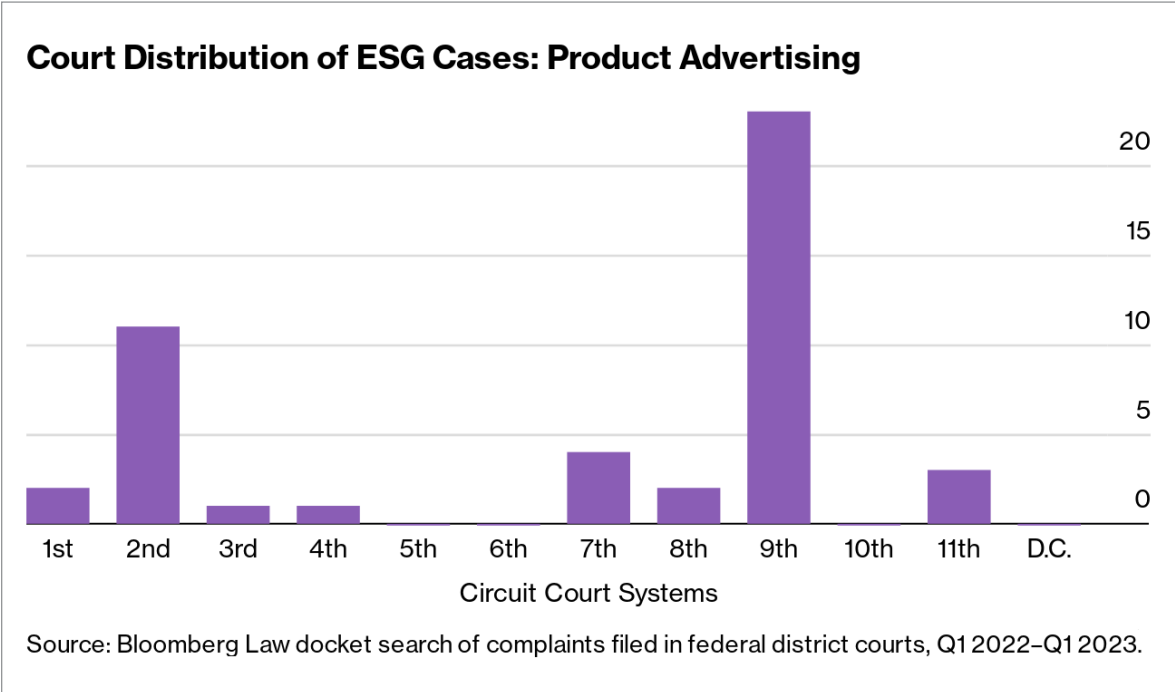
The defendant moved to dismiss, arguing that the plaintiffs lacked personal jurisdiction and failed to state their claims. The Southern District of Missouri sided with H&M, granting its motion to dismiss on May 12, 2023.

In its order, the court explained that it had no personal jurisdiction over the California law claims because there was an insufficient connection to Missouri courts. But it dismissed the Missouri law claims because it found H&M’s alleged statements regarding sustainability were not misleading as a matter of law. In fact, the court noted, H&M disclosed the composition of its clothing to consumers and explained the environmental impacts of certain materials on its website.

- Judge: [Rodney W. Sippel](#)
- Plaintiffs’ counsel: Law Office of A.M. Goffstein; Orlosky Law LLC
- Defendant’s counsel: Hein Schneider PC; [Nixon Peabody LLP](#)
- Case No.: [4:22-cv-01170](#)

Where Product Advertising Cases Are Filed

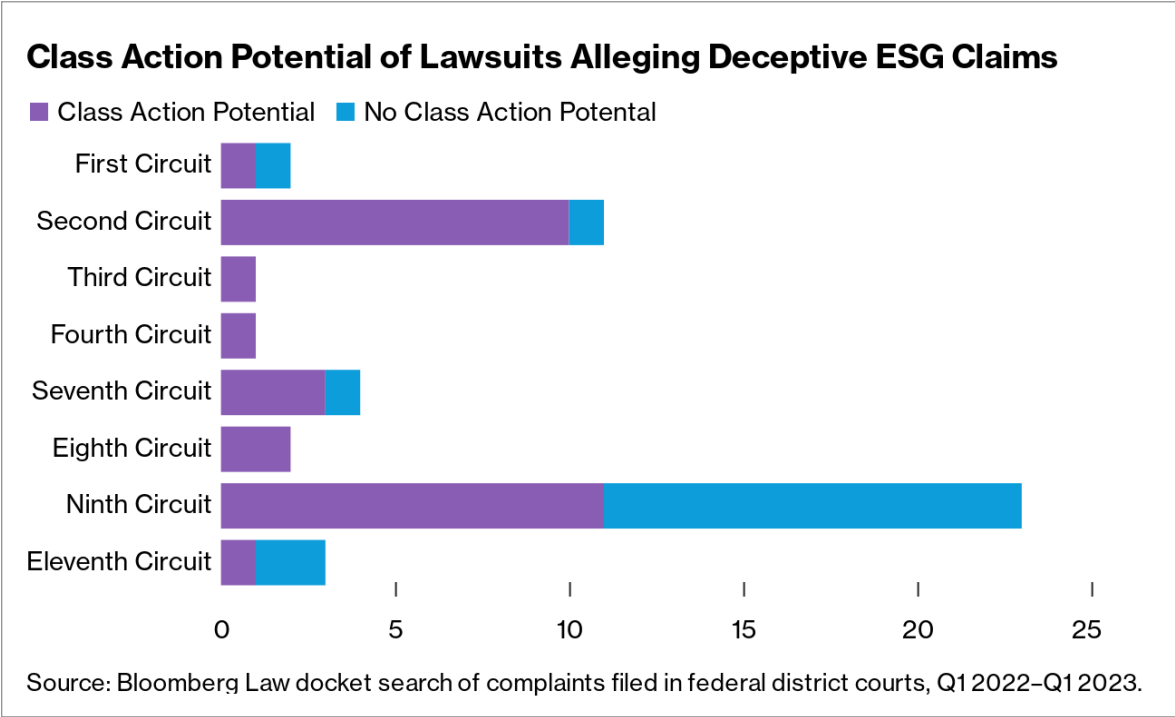
Nearly half of the 47 product-claim lawsuits filed from Q1 2022 through Q1 2023 were filed in Ninth Circuit courts. And all but two of those complaints were filed in California federal district courts. Many of these cases were brought under the [California Unfair Competition Law](#) and the [California False Advertising Law](#), which includes [specific provisions](#) for environmental marketing claims. (The other two Ninth Circuit cases were filed in Washington federal district courts.)



The not-so-close runner up for environmental and social product claims was the Second Circuit, whose district courts received 11 complaints containing allegations on these issues.

Class Action Potential in Product Advertising Cases

Based on this sample at least, the Second Circuit appears to be perceived by plaintiffs as friendly to class actions on environmental and social marketing claims. In 10 of the 11 lawsuits filed in the circuit’s district courts, plaintiffs indicated that their lawsuit had potential for a class action.



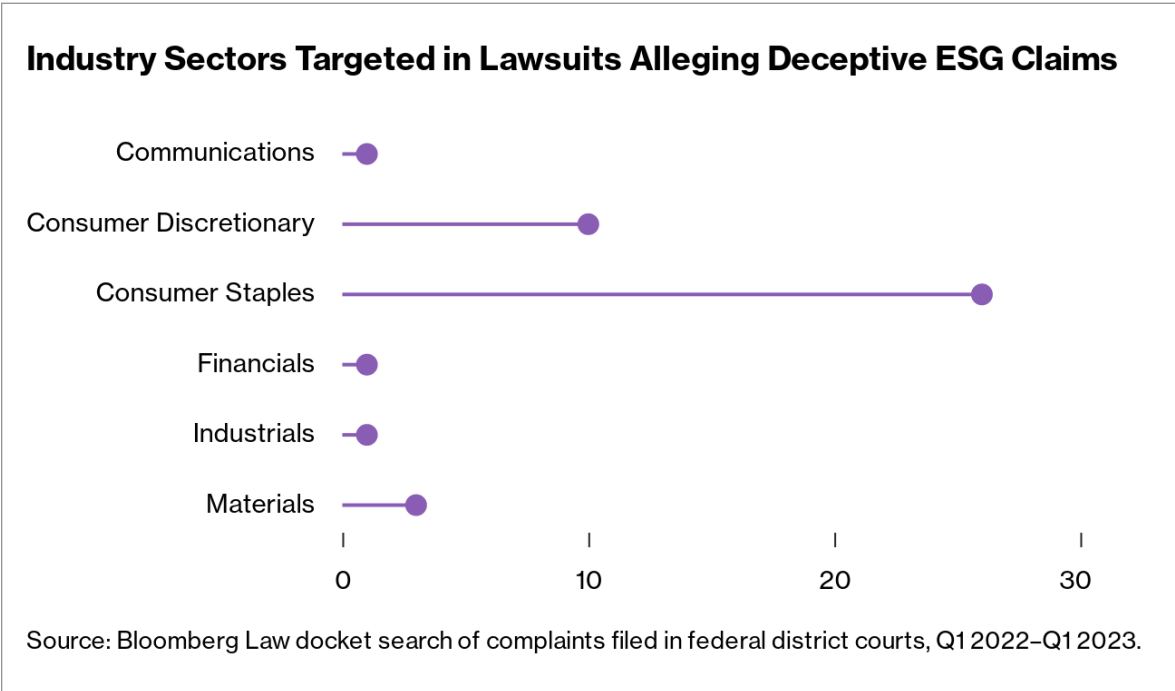
The Ninth Circuit actually saw more lawsuits with class action potential than the Second Circuit did. But because so many complaints were filed in the Ninth Circuit, those with class action potential amounted to less than half of the total case count.

All circuits in which a product advertising complaint was filed saw at least one case with class action potential. Only in the Ninth and Eleventh Circuits did potential class actions account for the minority of the caseload.

Defendants in Product Advertising Cases

The environmental and social marketing claims that drew the most lawsuits were made by manufacturers of consumer staples, particularly household products.

More than six out of 10 (62%) lawsuits were against companies in the consumer staples sector, as classified by Bloomberg’s Industry Classification System (BICS). The consumer staples sector is comprised of the food, beverage, household product, retail, tobacco and cannabis, and wholesale industries.



Nearly a quarter (24%) of the lawsuits targeted environmental and social marketing claims made by companies in another consumer products sector: consumer discretionary. The consumer discretionary sector is comprised of the apparel and textiles, automotive, consumer services, e-commerce, home construction, home and office products, leisure facilities and services, leisure products, retail, and wholesale industries.

Looking at the industries themselves, the popularity of targets in the consumer discretionary and consumer staple sectors appears to be largely attributed to a few key product types.

Of lawsuits filed in 2022 and Q1 2023, companies marketing household products were the most frequent defendants. This makes sense, considering that consumers interact with these products on a daily basis, need to replenish them often, and may weigh environmental or social claims when choosing one product over another.



Retail companies (both staples and discretionary), which often stock a wide array of products on their shelves, were the next most common groups of defendants in the industry breakdown.

Although there were only 47 lawsuits filed from Q1 2022 through the end of Q1 2023, six companies found themselves defending against multiple allegations of deceptive environmental or social claims.

Defendants Named in Multiple Product Advertising Cases, 2022–Q1 2023

1. [Whole Foods Market Group Inc.](#) 3
2. [WaterWipes \(USA\) Inc.](#) 3
3. [The Clorox Company](#) 3
4. [Reynolds Consumer Products](#) 3
5. [H&M Hennes & Mauritz LP](#) 2
6. [Recreational Equipment Inc.](#) 2

Five of the companies facing multiple lawsuits are in either the consumer staples or consumer discretionary industry sectors. The sixth, WaterWipes (USA) Inc., is a private company not classified by BICS.

CASE SPOTLIGHT: Labor Supply Chain Claims
Tyrnauer v. Ben & Jerry's Homemade, Inc. (S.D.N.Y.)

On March 3, 2023, lead plaintiff Dovid Tyrnauer filed a consumer class action lawsuit against **Ben & Jerry's Homemade Inc.** after news reports that the ice cream maker sourced dairy from facilities employing migrant child laborers.

The complaint, filed in the Southern District of New York, alleged that the company's marketing touts supposedly ethical supply chains, but relies on child labor from some of its suppliers. Furthermore, Ben & Jerry's allegedly misrepresented their reliance on child labor in disclosures to become a certified B Corporation. By purportedly failing to disclose its reliance on child labor in supply chains, Ben & Jerry's misrepresented the unethical sourcing of its products to consumers. Causes of action in the plaintiffs' latest complaint include breach of express warranty and violations of California, Illinois, and New York laws on unfair business practices, consumer protection, and false advertising.

Ben & Jerry's has denied any wrongdoing and sought to file a motion to dismiss. In a letter to the court, defendant's counsel argued that the complaint is defective because the plaintiff failed to allege an injury in fact and thus lacks standing. Counsel also argued that Ben & Jerry's statements are "generalized statements of corporate values," contained no misleading statements about migrant child labor, and are not actionable.

In turn, the plaintiffs filed an amended complaint on June 12. The case is still pending as of this publication.

- Judge: **Nelson S. Román**
- Plaintiff's counsel: Israel David LLC
- Defendant's counsel: **King & Spalding**
- Case No.: **7:23-cv-01877-NSR**

Additional Bloomberg Law resources:

- **Retail Industry ESG Toolkit**
- **Overview - Greenwashing Issues for Retail Companies**
- **Checklist - Preventing Greenwashing for Retail Companies (Ann.)**

Section 4

Employment & DEI

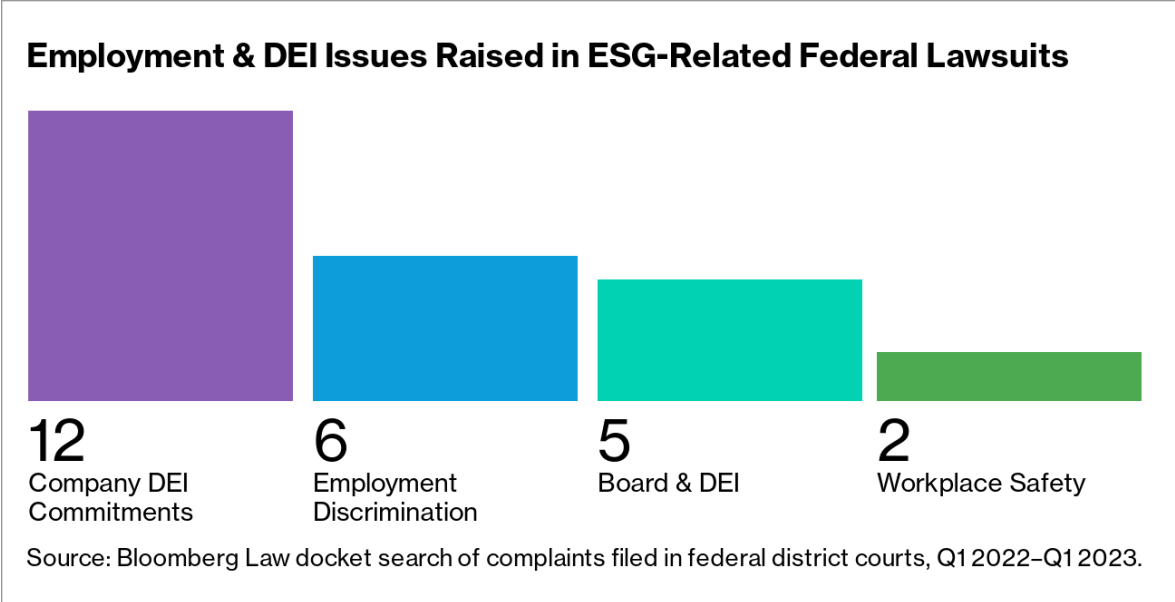
The social prong of ESG represents a broad, multifaceted set of risks for employers as they navigate not only the legal and regulatory environment but also the demands of shareholders, stakeholders, and customers.

An analysis of Bloomberg Law dockets found 22 ESG-related complaints focusing on company DEI commitments, board-related DEI issues, employment discrimination, and workplace safety that were filed in federal courts in 2022 and first-quarter 2023.

Key Employment & DEI-Related Case Types

To avoid the huge numbers of employee-initiated discrimination and safety cases that are not ESG-related, the analysis was limited to lawsuits regarding board-related DEI, employment discrimination, and workplace safety that were brought by company shareholders. All complaints for corporate DEI commitments were analyzed, regardless of plaintiff.

- **Corporate DEI commitment** lawsuits involve corporate stakeholders alleging that companies have failed to live up to their DEI policies or practices.
- **Board and DEI** lawsuits target a variety of board actions related to DEI, including board duties related to DEI, board compensation and DEI, and board composition and DEI. Shareholder-initiated lawsuits in this category allege that the board has failed regarding its DEI policies or practices.
- **Employment discrimination** lawsuits from shareholder plaintiffs are related to alleged breaches of fiduciary duty that are tied to a corporation's alleged instances of, patterns of, and/or insufficient methods of addressing employment discrimination that harmed not only the underlying individuals who were allegedly discriminated against but company shareholders as well.
- Shareholder-initiated **workplace safety** lawsuits stem from alleged violations of workplace safety standards that result in employee injuries, shareholder losses, reputational damage, or other adverse consequences.



Twelve of the 22 lawsuits analyzed alleged the breach of a company’s general DEI commitments, such as promoting DEI through business activities like recruitment and retention.

More and more companies are making DEI commitments that communicate their company values. But if these stated commitments are perceived by shareholders or other parties as contrary to actual company behavior, they can expose companies to litigation risks.

Five lawsuits were filed by shareholders addressing board-related DEI issues. (None of the 22 lawsuits contained causes of action involving both company and board DEI.)

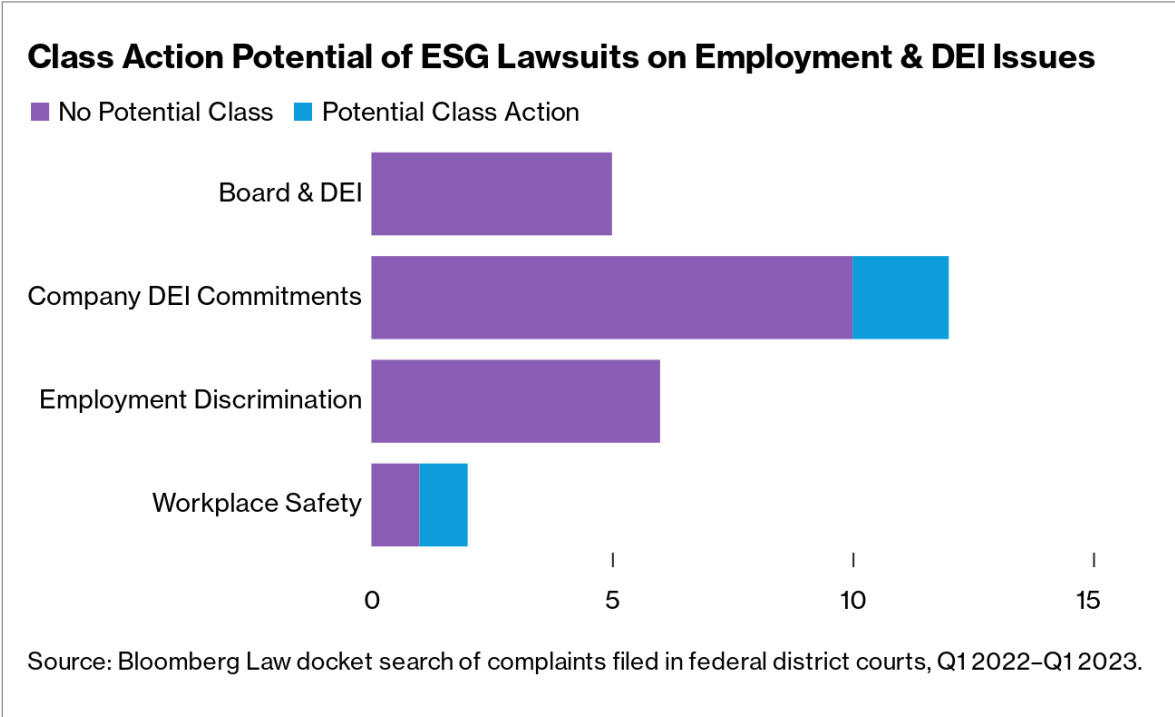
Employment discrimination and workplace safety shareholder lawsuits often involve suing corporations for alleged violations that impact the corporation’s brand and potentially its bottom line, in turn damaging the value of the company and resulting in a breach of fiduciary duty.

Unlike the plaintiffs in traditional workplace bias or safety-related cases, those in shareholders’ filings are not usually a party to the alleged employer behavior in question. Instead, they are suing to show that such alleged behavior violated the employer’s fiduciary (or other) duty to their shareholders.

However, the underlying discrimination and workplace safety claims in shareholder-initiated lawsuits are usually still rooted in federal antidiscrimination law, such as [Title VII of the Civil Rights Act](#), or workplace safety law, such as the [Occupational Safety and Health Act](#).

Class Action Potential of Employment & DEI Cases

Employers may face a broad range of ESG-related claims, but an analysis of the claims covered by this report showed that few of these claims exposed employers to class action lawsuits.



The lower probability of a class action suit may provide employers with some relief related to employment shareholder suits, but the risk of facing a class action still exists.

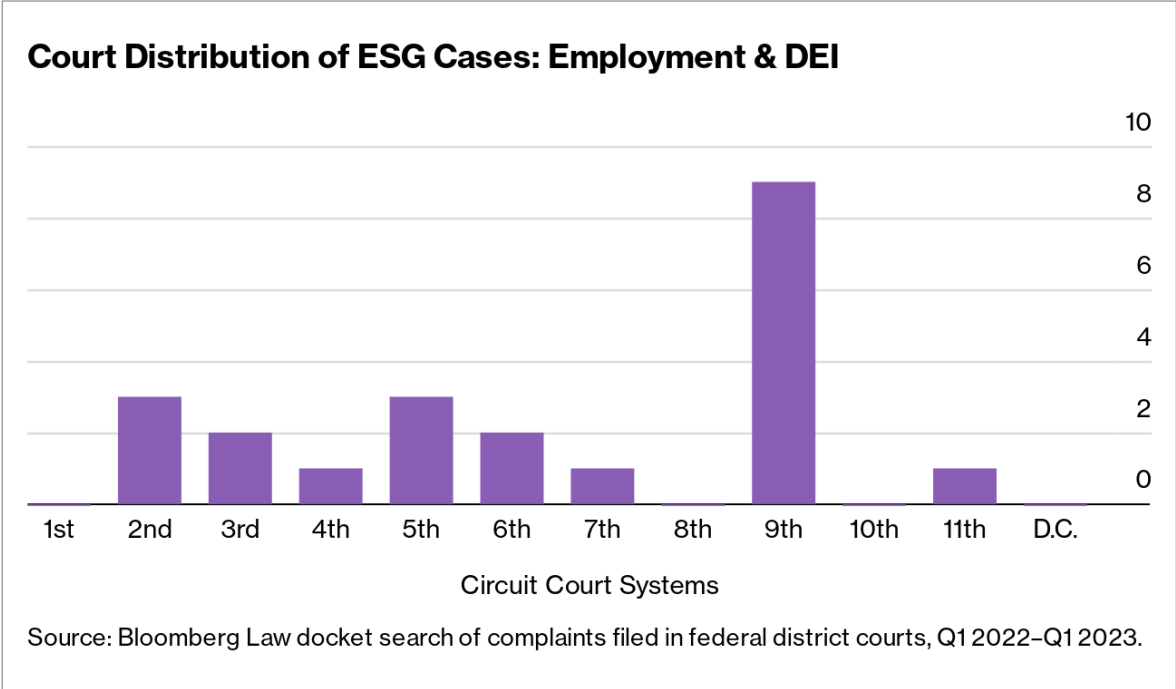
Class action lawsuits are not as common for shareholder-initiated ESG claims related to employment as they are for lawsuits related to product claims, potentially because shareholders are using derivative lawsuits rather than class actions in these cases for strategic purpose of changing policies rather than recovering damages.

A derivative lawsuit targets the board of directors and leadership of an organization rather than the company itself, insulating the organization from economic harm yet still furthering the goal of the plaintiff.

Shareholders are most likely driven by the fact that class actions directly sue the company and can result in harming the bottom line, thus potentially economically harming shareholders—including those filing the lawsuit.

Where Employment & DEI Cases Are Filed

Among the lawsuits analyzed, one-third were filed in federal district courts within the Ninth Circuit.



All but one of the cases that landed in the Ninth Circuit—and half of those filed in the other circuits—were filed in their respective locations because one or all of the corporate defendants were headquartered, incorporated, or had offices within the district court’s jurisdiction.

The remaining six cases ended up in their respective district courts and circuits because either the plaintiff experienced harm within the district court’s jurisdiction due to the defendant, the defendant engaged in business or had other substantial contacts there, and/or for other related reasons.

Defendants in Employment & DEI Cases

Among the 22 lawsuits filed against companies related to DEI, employment discrimination, and workplace safety in this analysis, there were three companies with multiple lawsuits filed against them.

Defendants Named in Multiple Employment & DEI-Related Cases, 2022-Q1 2023

1. [Wells Fargo & Co.](#) 3
2. [Amazon.com Inc.](#) (tie) 2
3. [Tesla Inc.](#) (tie) 2

[Wells Fargo & Co.](#) had not only the most lawsuits filed against it but also the most types of claims, including claims related to company DEI commitments, board & DEI claims, and employment discrimination claims.

Amazon.com Inc. and **Tesla Inc.** faced the same amount of lawsuits, but each only had one type of claim: company DEI commitments for Amazon, and employment discrimination for Tesla.

CASE SPOTLIGHT: Worker Safety

Bucks County Employees Retirement System v. Norfolk Southern Corporation et al (S.D. Ohio)

On March 16, 2023, lead plaintiff Bucks County Employees Retirement System filed a securities class action against railway **Norfolk Southern Corp.** and three of its corporate managers alleging that the defendants misrepresented the company's worker safety practices in the leadup to a major chemical train derailment in East Palestine, Ohio.

The complaint, filed on behalf of a class of Norfolk Southern common stock purchasers, alleges that the defendants committed to safety as a "core value" in their public statements and SEC filings, but in reality prioritized more lucrative practices at the expense of safety, such as longer and heavier trains and lower rail worker headcounts.

The plaintiff claimed that this "culture of increased risk-taking" made Norfolk Southern more vulnerable to train derailments with severe consequences prior to the Feb. 3, 2023 derailment and chemical spill.

By mischaracterizing and hiding its poor safety practices, Norfolk Southern defrauded investors who purchased company stock at inflated levels, according to the complaint, which lists two causes of action under sections 10(b) and 20(A) of the Securities Exchange Act of 1934.

The defendants have yet to file a response to these allegations, although a motion to change venue to another division within the Southern District of Ohio is currently pending.

- Judge: **Michael H. Watson**
- Plaintiff's counsel: **Murray Murphy Moul + Basil LLP**
- Defendants' counsel: **Dickie McComey & Chilcote P.C.; Wilmer Cutler Pickering Hale and Dorr LLP**
- Case No.: **2:23-cv-00982**

Additional Bloomberg Law resources:

- **Practical Guidance: ESG Social Considerations**

Section 5

Corporate Representations

Companies active in the ESG space may be subject to litigation alleging that they have been misleading, false, or deceptive to consumers or shareholders in either their ESG-related commitments or their assessments of the environmental impact of their own practices.

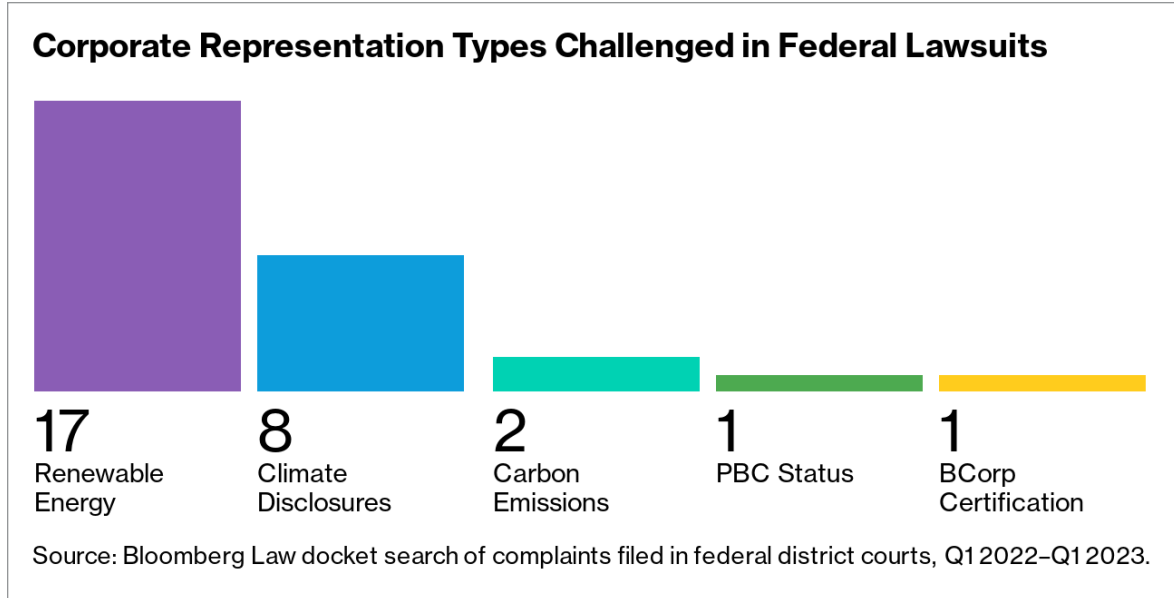
Government agencies that take on ESG corporate representation matters may also face lawsuits alleging that they allegedly lack the authority to create regulation or implement practices.

Key Corporate Representation Case Types

An analysis of Bloomberg Law dockets found 29 lawsuits in 2022 and Q1 2023 involving organizations that allegedly misrepresented themselves to shareholders or consumers, either by giving misleading statements about environmental impacts or by failing to meet one or more of these ESG-related commitments:

- **Renewable energy** representations assert certain promises about renewable energy capacity or usage. In these cases, the plaintiff alleges that those claims are false, misleading, or deceptive.
- **Climate disclosure** representations include statements about climate in SEC filings or sustainability reports. In these cases, the plaintiff alleges that public statements about a company's climate impacts are false, misleading, or deceptive.
- **Carbon emissions** representations assert that the company has particular carbon or CO2 impacts, such as net-zero operations. In these cases, the plaintiff alleges that these carbon commitments are false, misleading, or deceptive.
- Attaining **B Corporation certification** requires that companies meet certain environmental and social performance standards. In these cases, the plaintiff alleges that BCorp certified companies to do not fulfill the assurances of a BCorp certification.
- Gaining legal **Public Benefit Corporation status** under state business law requires the companies serve a **public benefit**, such as making a positive impact through activities of a charitable nature. In these cases, the plaintiff alleges that the corporation failed to meet its public benefit.

The most numerous complaints of alleged misrepresentation centered on renewable energy commitments, which accounted for 17 of the 29 cases analyzed.

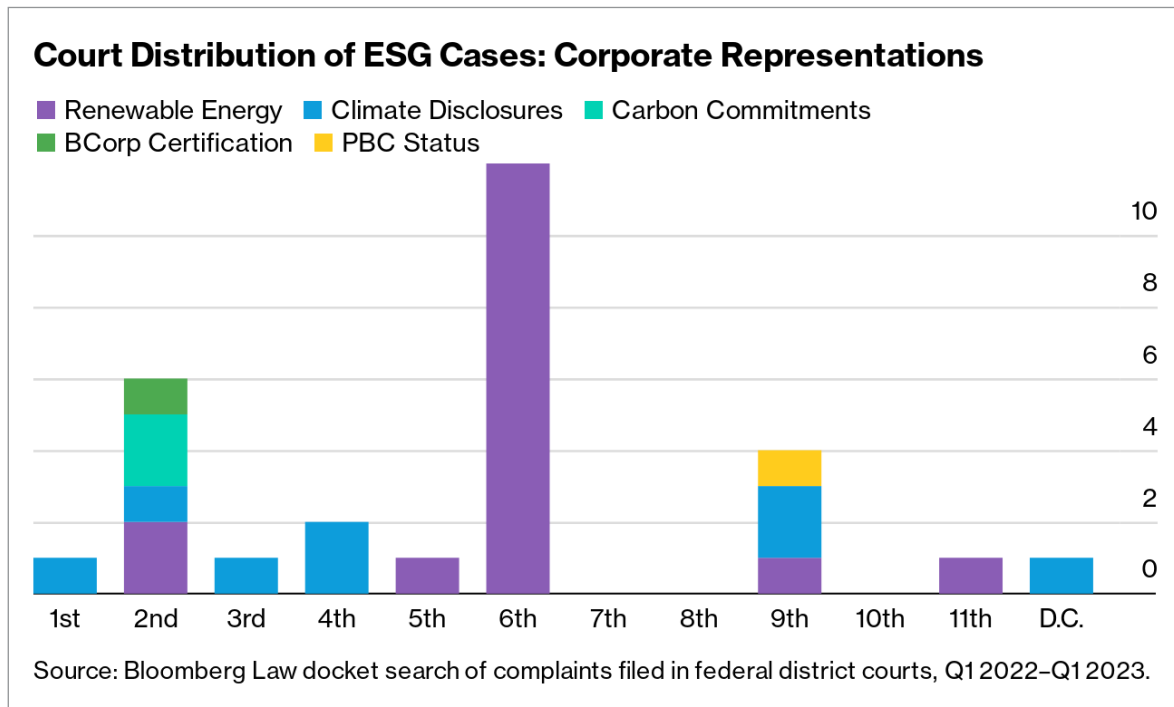


Nine of the 17 renewable energy-related cases were filed against a single company, Ohio-based **Power Home Solar, LLC**, for allegedly misrepresenting the cost- and energy-reduction potential of the company’s solar-based business model.

Where Corporate Representation Cases Are Filed

Power Home Solar was also the reason why the Sixth Circuit is at the top of the list of federal circuits receiving lawsuits involving ESG commitments.

Complaints against Power Home Solar are responsible for nine of the 12 cases filed in the circuit during this time, and the other three also involved renewable energy claims. So this is not necessarily indicative of a broader geographic trend—at least not yet.



The runners-up should come as no shock, based on the other issues covered in this report: the Second and Ninth circuit court systems. Six complaints were filed in the Second Circuit during this time—and those complaints spanned a variety of issues, including renewable energy, climate disclosures, carbon commitments, and BCorp status.

The lack of any clear consolidation of issues in the Second Circuit may indicate that courts in the circuit are amenable to a variety of ESG commitment claims, making it a circuit to watch going forward.

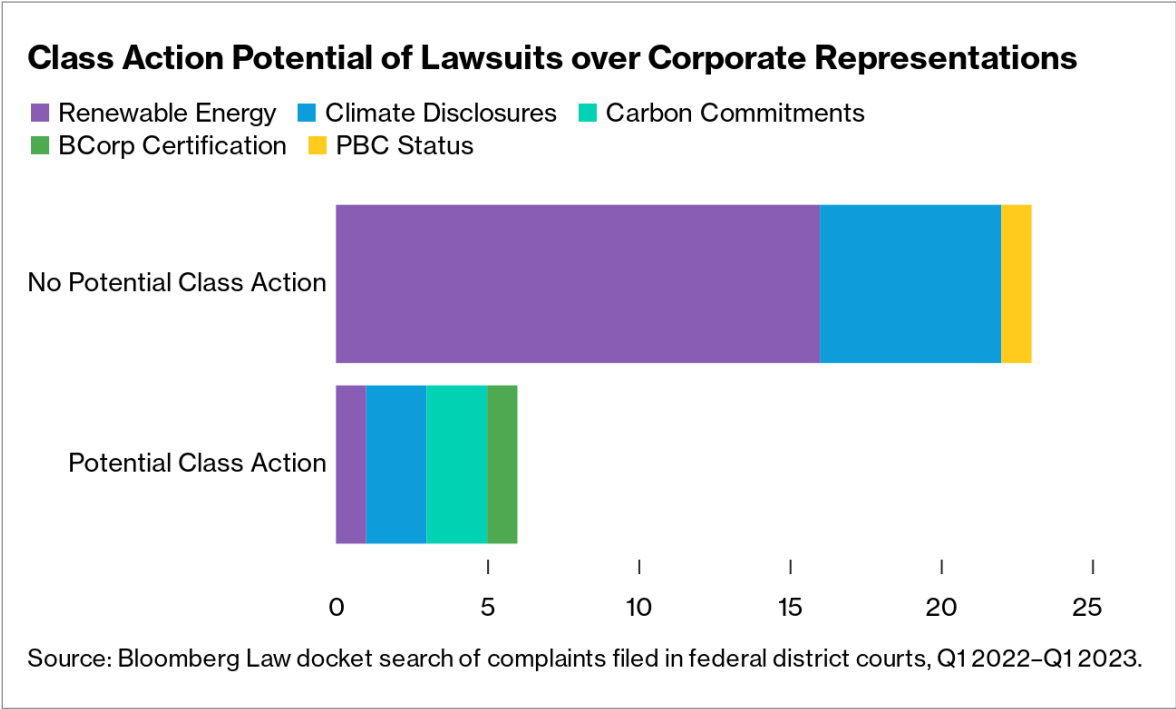
Four complaints on environmental commitments were filed in the Ninth Circuit, with a similar span of issues as the Second, including renewable energy, climate disclosures, and PBC status.

Although renewable energy commitments were targeted the most by plaintiffs overall, it was climate disclosure that saw challenges in the greater number of federal circuits: six, to renewable energy’s five. The geographic distribution of climate litigation across many courts may signal that forecasts of litigation stemming from the SEC’s long-awaited finalization of the climate-related disclosure rule will not be borne by any one court.

Class Action Potential of Corporate Representation Cases

Due to the public nature of environmental and ESG commitments and other statements—as well as the potential to impact shareholder value—companies should be aware that some of these plaintiffs have the potential to form a class, which would require significant company resources to address.

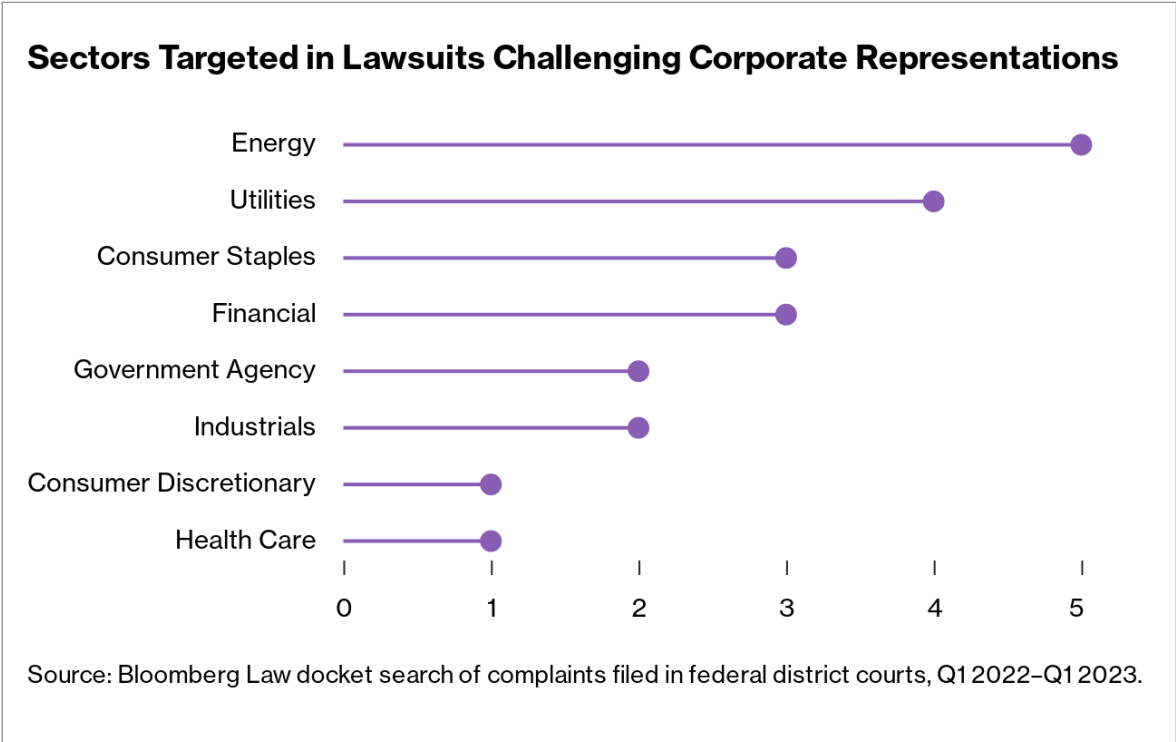
In only about one-fifth of complaints analyzed, plaintiffs indicated that their case had class action potential.



Two carbon commitment lawsuits (100% of the cases on this issue during this time) indicated that the cases had the potential for a class certification. At the other end of the spectrum, potential for class action was declared in only one of the 17 renewable energy cases.

Defendants in Corporate Representation Cases

The most common defendants in these court cases were those in the energy sector, with a total of five unique cases. Utilities were named in four unique cases. (Several of the cases involving utility Power Home Solar were not counted as unique because the lists of defendants were identical from case to case.) Consumer staples and financial industry sectors each saw three unique lawsuits.



Drilling down to more specific industries, there appears to be a clear link between the most common case types of renewable energy and climate and the most common industries among the defendants.



Industries that typically require a lot of resources and enjoy high levels of consumer use, such as utilities and energy, have multiple defendants named among these 29 complaints. And those with complex supply chains (which would make tracking such claims difficult), such as food industries, also have plaintiffs questioning the certainty of company ESG claims.

The nature of a business, such as selling renewable energy products, may itself pose inherent ESG risks to a company and its operations. However, public policies, practices, and commitments on ESG matters may also put the company at risk for scrutiny from shareholders, consumers, and other stakeholders. Future government regulations may even require companies to make tweaks to their course of disclosure.

CASE SPOTLIGHT: Climate Impact Representations
Municipality of Bayamon et al v. Exxon Mobil Corporation et al (D.P.R.)

On Nov. 22, 2022, 16 Puerto Rican municipalities filed a class action lawsuit against 10 energy companies for climate change-related damages caused by the “production, promotion, refining, marketing, and sale of fossil fuel-based consumer products.”

According to the complaint, defendants’ fossil fuel products have accelerated climate change, which in turn intensified storms that have impacted Puerto Rico in recent years. The plaintiffs further alleged that the defendants concealed their climate change impacts and continued to market carbon-intensive products and denied their harmful consequences. As a result, according to the complaint, Puerto Rico has been ravaged by catastrophic storms resulting in widespread death and destruction of property.

The 247-page complaint alleges 14 causes of action for consumer fraud, conspiracy, misleading practices and advertisements, racketeering, and others.

In April 2023, the plaintiffs voluntarily dismissed their claims against two of the defendants, Arch Resources Inc. and Peabody Energy Corp. The case remains ongoing, and as of this publication, the remaining eight defendants have not responded to the complaint.

- Judge: Silvia L. Carreno-Coll
- Plaintiffs’ counsel: Smouse & Mason LLC
- Defendant **Exxon Mobil’s** counsel: Pietrantoni Mendez & Alvarez LLC
- Defendant **Chevron’s** counsel: **McConnell Valdes LLC**
- Defendant **Motiva Enterprises** LLC’s counsel: Estrella LLC; **King & Spalding LLP**
- (As of this publication, counsel for the remaining defendants have not yet appeared.)
- Case No.: **3:22-cv-01550**

Additional Bloomberg Law resources:

- **Practical Guidance: Sustainable Business Operations**

Section 6

Area To Watch: ESG Investments

Companies should be aware that the legal landscape for ESG is changing. Federal and state governments are playing an active role in shaping ESG legislation and regulation—especially with regard to ESG-based investment decisions.

Sometimes, these developments can turn federal and state authorities into opposing roles.

Many states have **proposed** (and in some cases **enacted**) state-level ESG regulations, which complicates the regulatory scheme for companies operating in multiple jurisdictions. The role of ESG in investment decisions has seen substantial legislative activity, and the issue highlights the complicated intersection between federal and state laws.

Many of these investment-centric laws prohibit, mandate, or manage the way certain ESG factors, such as the economic impacts of climate change, may be weighed into a fiduciary's decision-making without violating its fiduciary duties. These laws may have widespread impacts on company operations, companies' status as investment plan administrators, and even employee satisfaction with their plans.

Utah v. Walsh

These laws might also clash with federal initiatives, leading to wide-ranging litigation, as a recent lawsuit illustrates.

In **Utah et al v. Walsh et al**, a group of plaintiffs comprised of attorneys general in 25 states, three plan sponsors, and a plan participant (later amended to include an additional state and plan participant) filed a complaint Jan. 26, 2023, in the Northern District of Texas against the Department of Labor and then-Labor Secretary Martin J. Walsh, alleging that DOL's 2022 **Investment Duties Rule** exceeded the DOL's statutory authority under ERISA.

The Investment Duties Rule clarifies that the fiduciary duty of prudence must stem from factors relevant to the fiduciary's "risk and return" analysis, which may include the economic effects of ESG considerations on the investment. (The rule further modifies the language around shareholder rights and voting.)

The complaint filed by the plaintiffs alleges that the rule is incompatible with ERISA's mandate for plan assets to be held in trust for "the exclusive purpose of providing benefits to participants." The complaint further alleges that the revised rule would allow fiduciaries to choose investments based on interests not exclusively tied to plan participant benefits—and do so with less transparency due to the removal of recordkeeping and disclosure requirements. The complaint also challenged the proxy provisions on the Investment Duties Rule. Litigation is still ongoing in this case.

Utah v. Walsh demonstrates the substantial state-level interest in the role of ESG in investment decisions. Although ESG investment lawsuits do not yet have a large presence on federal dockets, with the rise in state-level legislative activity, similar lawsuits over how (and whether) to weigh environmental, social, and governance factors in investment determinations are likely to make a greater appearance on federal dockets in the near future.

Additional Bloomberg Law resources:

- [In Focus: ESG Investing Principles Under ERISA](#)

About The Authors

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Noah Jennings is a Legal Analyst focusing on employment and litigation. Previously he was an associate at Goodwin in San Francisco, where his practice included litigating a variety of cases, counseling clients on employment issues, and supporting corporate transactions. Noah received his BA from the University of San Francisco and his JD from the University of California, Davis. He is admitted to practice law in California and Washington state.



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