GROWING ESG RISKS: THE RISE OF LITIGATION

by David Hackett, Reagan Demas, Douglas Sanders, Jessica Wicha, and Aleesha Fowler

David Hackett is a principal in Baker McKenzie's Chicago office; previously, he was with the Environmental Enforcement Section of the U.S. Department of Justice. Reagan Demas is a principal in Baker McKenzie's Washington, D.C., office, and a member of the firm's North American Litigation and Government Enforcement Steering Committee. Douglas Sanders is a partner in Baker McKenzie's Chicago office. Jessica Wicha is a counsel in Baker McKenzie's Chicago office. Aleesha Fowler is an associate in Baker McKenzie's New York office.

SUMMARY

As companies increase their environmental, social, governance (ESG) reporting and statements in response to market and shareholder demands, plaintiffs have pursued with growing success legal challenges to company claims and disclosures related to ESG performance. Similarly, inventive theories are being put forward to directly attack companies for alleged ESG-related performance and operational deficiencies. In both arenas, there has been a recent growth in efforts to hold companies accountable for supplier misconduct. The expanding growing misstatement and performance litigation signals a rising need to carefully manage ESG programs, performance, and statements.

Companies historically have viewed sustainability performance and statements as a voluntary undertaking, largely devoid of legal or market risk. As a result, management and oversight of a company's environmental, social, and governance (ESG) (or sustainability, or corporate social responsibility (CSR)) programs and reports often operated free from legal department oversight or interference. However, recent years have witnessed a proliferation of voluntary frameworks that have given rise to growing pressure on companies to adopt and report on rapidly evolving and expanding ESG standards. Further complicating matters, governments have embraced various elements of those voluntary regimes, turning them into mandatory disclosure obligations.[1]

Over the past decade, those developments and a growing market appetite for greater ESG information have subjected company ESG performance and disclosure to greater scrutiny in the court of public opinion and spawned new litigation.[2] Those diverse and expanding legal actions fall broadly into two related categories: (1) claims challenging the veracity of ESG statements based largely on a company's ESG conduct; and (2) suits directly contesting the propriety of company activities and performance. In the latter category, legal challenges have predominated around alleged impacts or misconduct related to climate and human rights.

Notwithstanding the success of plaintiffs in *Massachusetts v. Environmental Protection Agency*[3] in establishing carbon dioxide and other greenhouse gases (GHGs) as air pollutants under the federal Clean Air Act (CAA),[4] subsequent efforts to tag individual companies with responsibility for climate damages have been singularly unsuccessful. Those failures, though, have not diminished the appetite to pursue such claims, instead propelling litigants to craft

1. A companion article to be published in a forthcoming *Environmental Law Reporter* will address the structuring and governance of ESG programs, policies, and processes to achieve high-level performance while minimizing the risk of litigation or controversy in the court of public opinion.
2. While this Article addresses the growth of ESG litigation, a company faces comparable or greater risk of reputational impairment in the marketplace stemming from perceived inaccurate ESG information or deficient performance. Stories attacking ESG performance have been particularly damaging for consumer, energy, and brand name companies. Foreshadowing the emerging trend in ESG litigation, those stories have often seized on supplier performance in criticizing company ESG performance. Further, the quickly widening range of ESG issues that is now giving rise to unflattering stories serves notice as to future avenues of potential ESG litigation attack. The recent COVID-19 and racial justice developments will only expand the breadth of ESG stories and, derivatively, litigation claims, challenging alleged performance failures and misstatements, including as to company suppliers.
3. 549 U.S. 497, 37 ELR 20075 (2007).
4. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.

refashioned and inventive theories in search of a viable pathway forward.

In contrast, while fewer in number, cases involving human rights objections have enjoyed greater support, in no small part due to the availability of statutory relief for certain types of claims. Increasingly, however, plaintiffs are also invoking common-law theories in an effort to hold companies responsible for alleged human rights violations by their suppliers. Notwithstanding the checkered outcomes to date in challenging company operations as to significant ESG matters, such actions are likely to not only increase but also expand into other ESG substantive areas given the escalating market and financial significance of ESG considerations.

At the same time, litigants have pursued even more aggressively allegations contending that company statements about their ESG performance are misleading, erroneous, or materially incomplete. As market pressure for more ESG information has grown, ESG reporting has been transformed into an important and demanding undertaking, often generating hundreds of pages of detailed information in a range of reports, statements, and filings. That prolific reporting has provided a fertile source for challenges testing the legality of ESG promises, performance, and commitments, typically by questioning the accuracy of product claims and performance statements found in company reports and statements.

As the scope and dimension of disclosure has expanded, so too have the theories of complainants covering a surprising breadth of theories: among them, securities, trade, and consumer fraud. While the viability of legal avenues for those theories remains fluid, it is clear that more cases will be pursued and more will be successful in subjecting companies to public embarrassment or unfavorable judgments. Plaintiffs have been increasingly adept at refashioning arguments and are now enjoying success overcoming motions to dismiss, enabling discovery, and increasingly achieving impactful outcomes.

This Article surveys these emerging litigation trends and developments arising from a company's ESG statements, as well as its ESG conduct. Across the spectrum of claims related to ESG statements, several trends are clear. Cases continue to mount, reflecting increasingly inventive theories with greater attention to factual detail. Affirmative statements pose greater risk than omissions, and commitments are demonstrably more problematic than aspirational goals. Further, statements and promises about supplier performance are increasingly vulnerable, creating particular challenges for companies to ensure for disclosure of accurate information. Similarly, expanding and creative theories underlie claims seeking direct liability for alleged objectionable ESG performance. Notably, as with misstatement cases, plaintiffs are now premising direct liability actions on supplier misconduct.

At their core, both categories of ESG claims are squarely focused on a company's ESG performance, with statement cases scrutinizing alleged disconnects between a company's conduct and its stated commitments, and conduct cases more directly challenging the conduct itself. As plaintiffs probe more extensively ESG performance and are increasingly able to undertake discovery to do so, there is a greater risk that misstatement actions may lead to direct liability litigation, and vice versa. Since the ultimate focal point of inquiry in both scenarios is a company's actual conduct, companies are well-advised to understand and manage their operational ESG performance to avert litigation risk.

This is increasingly important as plaintiffs are casting a wide net in their scrutiny of company ESG statements and operational performance. They are taking a hard look at company ESG reports and the full suite of company communications, as well as other publicly available resources, to buttress direct liability and misstatement actions and use company statements about their ESG performance against them. Further, the explosion of ESG-based funds and investments predicated on company statements about ESG performance will only amplify the litigation risks associated with incomplete or inaccurate information or failed performance. In short, the ESG path forward for companies will grow increasingly treacherous, intensifying pressure to ensure comprehensive programs that achieve high-level ESG performance accompanied by accurate, complete, and aligned ESG statements and communications.

I. Litigation Developments Related to ESG Misstatements and Omissions

A. Consumer Protection and Unfair Competition Claims

Due to the long-standing history of challenging product claims under state consumer protection laws, it is not surprising that they served as the vehicle for early efforts to contest sustainability performance. Such sustainability claims initially focused on product labeling, alleging the label contained false or misleading affirmative statements or omitted material information. However, recent cases reveal an expansion of these legal arguments, looking past a product's label to target alleged false or misleading statements in annual ESG or sustainability reports, on websites, or in other general marketing materials. While these claims have been largely unsuccessful to date in achieving significant changes in company ESG reporting, plaintiffs have made notable progress with a growing number of courts allowing cases to proceed beyond the motion to dismiss stage, where the threat of discovery has prompted settlements and course corrections.

1. Claims Regarding Misrepresentations on Product Labels

In light of its perceived consumer-friendly laws, California has been the predominant venue for consumer claims. These claims are generally based on one or more of the following three state consumer protection and unfair competition laws: the Consumer Legal Remedies Act (CLRA),[5] the Unfair Competition Law (UCL),[6] and the False Advertising Law (FAL).[7] These state statutes traditionally have been used by consumers to bring actions against companies for false or misleading statements on product labels, such as claims of "100% Natural" or "organic." To prevail, a plaintiff must show that the challenged statement is false or misleading, and that a reasonable consumer would have been deceived by the alleged false or misleading statement (i.e., the "reasonable consumer test").[8]

Among the major avenues of attack have been allegations that product labeling improperly suggests third-party endorsement or seal of approval of the product. These claims have seen mixed results. In Koh v. S.C. Johnson & Son, Inc., a California district court agreed with the plaintiff that the company's use of a label that referenced "Greenlist Ingredients" gave consumers the false impression that the product had been reviewed and approved by a third party, when in fact, the Greenlist was an index created by the defendants.[9]

By contrast, another California court dismissed a class action consumer claim that alleged that a green water droplet on Fiji bottled water represented a "seal of approval" due to its similar appearance to recognized environmental seals of approval.[10] The court found that a reasonable consumer would not view the water droplet as indicative of an environmental endorsement because the droplet did not bear the name or logo of any third-party group. The bottled water simply had a "green drop, the drop being the most logical icon for its particular product, water."[11]

More recently, plaintiffs have sought to expand the reach of these state-law claims to challenge product labeling that implies the company's operations are environmentally sound or safe. A trio of pending cases were filed in 2019 against Bumble Bee, Chicken of the Sea, and StarKist in the Northern District of California, alleging that the companies falsely mislabeled products as "dolphin safe," when in fact, they used fishing techniques that injure or kill dolphins.[12] In StarKist, plaintiffs argued that the company embarked on a pervasive advertising campaign to persuade consumers that it met a higher dolphin-safe standard than legally required, even though its fishing methods were known to kill dolphins. The court denied StarKist's motion to dismiss, allowing the state deceptive trade practices claims to proceed, challenging StarKist's dolphin-safe label.[13]

Similarly, consumer packaging goods companies have been targeted regarding the recyclability of their product packaging. In 2019, Keurig was sued under the UCL and CLRA for alleged misleading marketing that proclaimed its plastic coffee pods are "recyclable."[14] Plaintiffs asserted that, while the pods were made from polypropylene (#5) plastic—a material commonly accepted for recycling—in reality, domestic municipal recycling facilities are unable to separate materials as small as the pods from the general waste stream. Plaintiffs also took issue with Keurig's instructions booklet, which advised users that they did not have to remove the paper filter in the pods, which in fact hindered recycling of the product. In denying Keurig's motion to dismiss, the court referenced the Federal Trade Commission's (FTC's) Green Guides, discussed further in Section B below.[15] In particular, the Green Guides expressly state that a product should not be marketed as "recyclable" unless it can be collected, separated, or otherwise recovered through an established recycling program. The Green Guides also provide that if any component of the product limits its recyclability, including its shape, size, or some other attribute, then it should not be marketed as recyclable.

Most recently, in February 2020, the Earth Island Institute filed consumer claims against several consumer goods companies, alleging that the recycling symbol on their plastic packaging and their recycling assertions are deceptive in light of the ineffectiveness of plastics recycling as well as the alleged damage to marine life and the environment attributed to plastics.[16] By so doing, plaintiff seemingly seeks to challenge more broadly the sustainability strategies and practices of the plastics and packaging industry. The defendants have removed the case to federal court, and plaintiff's motion to remand the action back to state court is pending.

2. Claims Regarding Product Label Omissions

While cases alleging labeling misrepresentations have generally survived motions to dismiss, claims of ESG-related labeling omissions have been less successful. To date, these

5. The CLRA prohibits "methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." The statute includes enumerated unfair acts, including "representing that goods . . . have . . . characteristics . . . which they do not have," and "representing that goods . . . are of a particular standard." Cal. Civ. Code §1770(a) (2020).
6. The UCL prohibits any "unlawful, unfair, or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." *See* Cal. Bus. & Prof. Code §17200 (2020). An "unfair" business practice is one that "offends an established public policy," is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." South Bay Chevrolet v. General Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87 (Cal. Ct. App. 1999).
7. The FAL makes it unlawful for any person "to make or disseminate or cause to be made or disseminated before the public . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code §17500 (2020).
8. Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008).
9. No. 09-00027, 2010 U.S. Dist. LEXIS 654 (N.D. Cal. Jan. 6, 2010).
10. Hill v. Roll Int'l Corp., 128 Cal. Rptr. 3d 109 (Cal. Ct. App. 2011).
11. *Id*. at 116.
12. Gardner v. StarKist Co., No. 19-02561 (N.D. Cal. May 13, 2019); Duggan v. Tri-Union Seafoods LLC, No. 19-02562 (N.D. Cal. May 13, 2019); Duggan v. Bumble Bee Foods LLC, No. 19-02564 (N.D. Cal. May 13, 2019).
13. Gardner v. StarKist Co., 418 F. Supp. 3d 443, 457-58 (N.D. Cal. 2019).
14. Smith v. Keurig Green Mountain, Inc., 393 F. Supp. 3d 837 (N.D. Cal. 2019).
15. *Id*. at 845-46.
16. Earth Island Inst. v. Crystal Geyser Water Co., No. 20-1213 (Cal. Super. Ct. Feb. 26, 2020); Earth Island Inst. v. Crystal Geyser Water Co., No. 20-02212 (N.D. Cal. Apr. 1, 2020). [Editor's Note: Baker McKenzie is representing Mondelez in this case.]

cases have largely focused on agribusiness and food companies, alleging that labor and human rights deficiencies in the companies' supply chains should be disclosed on product labels. Courts have widely rejected efforts to compel such information, concluding companies have no legal obligation to do so.[17]

The U.S. Court of Appeals for the Ninth Circuit made clear the standard for considering such claims in Hodsdon v. Mars, which involved an action against Mars under the CLRA, UCL, and FAL, alleging that the company failed to disclose on its product packaging that its cacao suppliers employed child labor.[18] While the Mars website addressed company efforts to combat labor abuses in its supply chain, the plaintiff asserted that Mars also had a duty to disclose any poor labor practices associated with its supply chain on its product labels.

The Ninth Circuit found that, in order to be actionable, an omission "must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose."[19] According to the court, because child labor in the supply chain does not affect the central functionality of the chocolate or its quality, Mars had no duty to disclose such information on the product label, even if one were to assume that labor in a supply chain is material to consumers.[20] After Hodsdon was decided, the Ninth Circuit applied that ruling to six other label omission cases relating to undisclosed responsible sourcing information.[21]

In short, while courts have judged misleading claims or statements to be actionable, omission arguments have been found unconvincing unless the company had an obligation to disclose, which would occur only if the omission impinged on matters central to the function and purpose of the product. In that regard, plaintiffs are likely to reposition arguments in future actions to meet those pleading hurdles, and particularly seek to emphasize the materiality of the omission in light of the widespread market interest in ESG matters.

3. Claims Challenging ESG Statements in Company Reports, Websites, and Other Marketing Materials

While consumer claims most commonly challenge product labeling, plaintiffs have begun to extend the reach of these state consumer laws, setting their sights on company ESG statements made in various forms. Not coincidentally, these novel legal challenges have followed an increase in public access to information about companies' environmental performance, which can then be compared against their ESG statements and commitments.

When evaluating whether ESG statements violate consumer protection laws, courts have distinguished between aspirational statements and concrete commitments, effectively limiting claims to those reflective of actual commitments. For example, a court dismissed claims brought against Darigold, a dairy processing company, related to statements made in its annual CSR report.[22] In this case, plaintiffs argued that the CSR report contained misleading statements related to sustainable farming, animal well-being, and fair treatment of employees, which they relied upon when they chose to purchase Darigold products. According to plaintiffs, those CSR report statements were misleading in light of a wage and labor lawsuit against Darigold by workers at member dairies, and questions "about the treatment of workers and animals at Darigold member facilities."[23]

The court determined that the statements did not provide a basis for consumer claims. The court found that the challenged statements, when read in context, "reflect nuanced assessments of the current situation, are aspirational . . . or have not been shown to be false in any material respect."[24] The court viewed the statements as forward-looking and not reasonably interpreted, for example, as a "promise that Darigold already had in place measures to protect and enhance animal well-being or that such measures had been (or would be) 100% effective."[25] The court concluded that plaintiffs failed to identify any misrepresentation (or omission) of fact likely to deceive a reasonable consumer, and therefore dismissed plaintiffs' claims.

In contrast, where a company's statements are of "specific and verifiable facts" relating to its operations, then courts may allow actions to proceed.[26] For instance, in a case filed against Walmart and other nationwide retailers under the District of Columbia Consumer Protection Procedures Act (CPPA), the court dismissed allegations pertaining to statements about labor performance by suppliers, deeming them to be aspirational in nature.[27] But the court allowed other claims to proceed with respect to the retailers' auditing program because they went "beyond aspirational statements by listing detailed information

17. Dana v. Hershey Co., 180 F. Supp. 3d 652 (N.D. Cal. 2016) (without a legislatively declared policy requiring a duty to disclose, failure to disclose use of slave or child labor on product packaging does not count as a violation of consumer protection laws).
18. 891 F.3d 857, 859 (9th Cir. 2018).
19. *Id*. at 861.
20. *Id*. at 864-65.
21. Hughes v. Big Heart Pet Brands, 740 Fed. Appx. 876 (9th Cir. 2018); Wirth v. Mars, Inc., 730 Fed. Appx. 468 (9th Cir. 2018); De Rosa v. Tri-Union Seafoods, LLC, 730 Fed. Appx. 466 (9th Cir. 2018); Barber v. Nestlé USA, Inc., 730 Fed. Appx. 464 (9th Cir. 2018); McCoy v. Nestlé USA, Inc., 730 Fed. Appx. 462 (9th Cir. 2018); Dana v. Hershey Co., 730 Fed. Appx. 460 (9th Cir. 2018). A comparable case was brought in Massachusetts against Hershey and other food companies in related cases regarding child and slave labor in the company's supply chain. The court relied on similar logic as the *Hodsdon* court and dismissed the claim. Tomasella v. Hershey Co., No. 18-10360, 2019 U.S. Dist. LEXIS 14488 (D. Mass. Jan. 30, 2019), *aff'd*, Tomasella v. Nestlé USA, Inc., No. 19-1130, 2020 U.S. App. LEXIS 1885 (1st Cir. June 16, 2020).
22. Ruiz v. Darigold, Inc., No. 14-1283, 2014 U.S. Dist. LEXIS 155384, at *2 (W.D. Wash. Nov. 3, 2014).
23. *Id*. at *7.
24. *Id*. at *10.
25. *Id*. at *11.
26. National Consumers League v. Wal-Mart Stores, Inc., No. 2015-CA-007731, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016).
27. *Id*. at **10, 11.

regarding their auditing process."[28] It determined that the in-depth descriptions and detailed statistics provided about the auditing programs could influence a reasonable consumer's purchasing decision. If those audits were not done or the representations about the auditing process were inaccurate, then a consumer could be misled. The corporate statements regarding the audits were capable of being verified and established a basis for an action under the CPPA.[29]

Similarly, in a case against Chiquita, a Washington court denied the company's motion to dismiss related to statements on Chiquita's website about its environmentally safe business practices, including that it protects water sources by reforesting all affected natural watercourses, uses solid waste traps at all packaging stations to keep rivers and streams clean, and plants cover crops in all drainage ditches of banana farms rather than allowing chemical weed control.[30] Plaintiff alleged that these statements were false because the large-scale, monoculture banana activities of one of Chiquita's suppliers had contaminated the local community's drinking water.[31] The court determined that the company made very specific, factual statements on which the plaintiff had reasonably relied.

More recently, two consumer groups brought an action against Tyson Foods, Inc., alleging misrepresentations in the company's sustainability reports and marketing materials.[32] To contradict the public statements made by the company promoting its humane treatment of animals and environmental stewardship, plaintiffs cited extensive publicly available information regarding numerous alleged environmental law violations and incidents of animal cruelty and inhumane treatment. The plaintiffs claimed that Tyson "regularly fails to comply with environmental laws," is the second largest polluter in the United States, and regularly mistreats its animals. They argued that this pattern of noncompliance directly conflicts with videos posted on Tyson's website and YouTube channels that described Tyson as being "stewards of the land," characterized birds raised on Tyson farms as "happy" and free of injuries, emphasized Tyson's commitment to humane treatment of animals, and stated that Tyson companies were "stewards of the animals" they raised. The case was remanded back to state court in March 2020, and a briefing schedule has been set for Tyson to file a motion to dismiss.

In sum, consumer plaintiffs and nongovernmental organizations (NGOs) are increasingly focusing on ESG statements in company reports and marketing materials as a basis to bring claims under state consumer protection laws. When claims are based on aspirational and nuanced statements articulating a company's forward-looking ESG goals, then courts have dismissed them. In contrast, actions based on specific and verifiable ESG statements and commitments have enjoyed greater and growing success. Future plaintiffs, like those in *Tyson Foods*, are likely to scour company statements, websites, reports, and marketing materials, looking for assertions and commitments that appear at odds with actual performance. Companies would be well-served to review carefully the totality of ESG-related communications across the organization to ensure they are defensible in the face of expanding consumer claims.

B. Deceptive and Unfair Business Practices Claims

At the federal level, companies making ESG statements may face enforcement risk from the FTC, which regulates against anticompetitive, deceptive, and unfair business practices pursuant to the Federal Trade Commission Act (FTC Act).[33] Notably, in order for the FTC to find a company's conduct to be improperly deceptive, the company need not actually deceive or even intend to deceive a consumer.[34] An act or practice is considered to be "deceptive" if "there is a representation, omission, or practice that is *likely to mislead the consumer acting reasonably in the circumstances*, to the consumer's detriment."[35] With respect to unfair business practices, the FTC focuses on whether the company's conduct "injures consumers, violates established public policy or is unethical or unscrupulous."[36]

In addition to the statutory prohibitions in the FTC Act, companies making ESG claims need to be mindful of the FTC Green Guides, which are intended to help companies avoid making missteps with respect to their environmental or "green" claims.[37] Although the Green Guides provide helpful guidance to companies on a range of environmental terminology and concepts, the document has a somewhat narrow scope, focused primarily on a company's marketing of products (with claims made on product packaging and labeling and on a company's website) rather than on broader green claims related to a company's operations or compliance.[38] The Green Guides also do not specifically address "sustainability" claims.

Given the ultimate focus of the Green Guides, it is not surprising that FTC enforcement in this area has mainly targeted alleged corporate misrepresentations about product content or attributes. In 2017, the FTC settled an action against a company claiming to manufacture and sell "organic" baby mattresses when a substantial majority of the mattress was not organic.[39] The FTC also has pursued a number of paint companies regarding unsubstanti-

28. *Id.* at *15.
29. *Id.* at *16.
30. Water & Sanitation Health, Inc. v. Chiquita Brands Int'l, Inc., No. C14-10 RAJ, 2014 U.S. Dist. LEXIS 70673, **2-3 (W.D. Wash. May 22, 2014).
31. *Id.* at *3.
32. Food & Water Watch Inc. v. Tyson Foods Inc., No. 2019-CA-004547 (D.C. Super. Ct. July 10, 2019).
33. 15 U.S.C. §45(a)(1)-(2).
34. FTC, FTC Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf ("The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception." (citing Beneficial Corp. v. Federal Trade Comm'n, 542 F.2d 611, 617 (3d Cir. 1976))).
35. *Id.* (emphasis added).
36. FTC, FTC Policy Statement on Unfairness (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (last visited Aug. 5, 2020).
37. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122 (Oct. 11, 2012).
38. *See id.* The Green Guides provide definitions and examples on such terms as "recyclable," "ozone-safe," and "biodegradable," as well as guidance on claims related to carbon offsets and renewable energy, among other concepts.
39. Press Release, FTC, FTC Approves Final Consent Order in Moonlight Slumber, LLC Advertising Case (Dec. 12, 2017), https://www.

ated safety claims and improper claims that their paint was emission-free or zero-volatile organic compounds.[40] Similar enforcement has been pursued against Volkswagen and Audi related to their "clean diesel" advertising campaign following the exposure of the companies' emissions-cheating scandals.[41]

The FTC also has shown an interest in company statements regarding their supply chains. For instance, the agency investigated alleged misleading representations made by luxury apparel company Canada Goose, Inc., regarding the treatment of geese whose down is used in the company's apparel. While the FTC did not end up pursuing enforcement, it appears that decision was prompted by the fact that Canada Goose took corrective action, removing the problematic advertising claims, and clarified its business practices in marketing materials.[42]

Consequently, FTC enforcement is a potential risk for companies making ESG-related statements, especially as they relate to the content or attributes of consumer goods and products. While not comprehensive, the FTC Green Guides provide companies with guidance on appropriate usage of certain environmental-related terminology and concepts in marketing materials. Paying close attention to FTC guidance and enforcement practices is advisable as a growing number of companies seek to promote ESG-related attributes of their goods.

C. *Securities Fraud Claims*

Public companies that are reporting or sharing ESG information also should be mindful of potential liability under the Securities Exchange Act (Exchange Act).[43] Although litigation has been limited to date and securities claims can be difficult to prove in the ESG context, courts have kept alive securities fraud claims against public companies and, in at least two cases, against the company's individual officers and directors. This body of case law reveals an increasingly fine line between abstract and arguably aspirational ESG statements, which are not actionable under federal securities law, and material misrepresentations, which can serve as a basis for a securities claim.

While no ESG-related cases have been filed to date under §18 of the Exchange Act, which imposes liability for making false or misleading securities filings, public companies can face liability for statements made outside of formal U.S. Securities and Exchange Commission (SEC) filings. This raises concerns about voluntary public reporting of ESG issues. Section 10-b of the Exchange Act and SEC Rule 10b-5, which form the common legal bases to pursue a securities fraud claim, prohibit any false or misleading statement of material fact or omission of material fact, in each case, in connection with the purchase or sale of any security.[44] In addition to proving that the defendant made a material misrepresentation or omission with an intent to deceive, manipulate, or defraud (i.e., scienter), Rule 10b-5 claims require a heightened level of pleading under Rule 9(b) of the Federal Rules of Civil Procedure, since they are based in fraud.[45]

Most federal securities claims related to ESG reporting have arisen from significant incidents or accidents followed by a subsequent drop in a company's stock price. For example, a group of investors in Yum! Brands, which owns Taco Bell and KFC, filed suit against the company for a decrease in stock price after reports emerged that Yum! knew that certain of its chicken supplies had tested positive for antibiotic and drug residues.[46] The investor plaintiffs alleged that Yum! violated Rule 10b-5 by making public statements, including in the company's code of conduct and during an investor conference, regarding the company's commitment to food quality and safety and strict food safety standards and protocols, which conflicted with the company's exposed supply chain issues. The lower court disagreed, which was affirmed on appeal by the U.S. Court of Appeals for the Sixth Circuit.

In finding that the plaintiffs failed to establish a material misrepresentation, the Kentucky district court found that the statements were "too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision."[47] Additionally, the district court held that statements made concerning the company's food safety program in its code of conduct were "vague and subjective, evidencing only the opinion of management or derived from sources that are aspirational, rather than reliable."[48] The Sixth Circuit went further, stating that "to treat a corporate code of conduct as a statement of what a corporation will do, rather than what a corporation aspires to do, would turn the purpose of a code of conduct on its head."[49]

A New York district court came to a similar decision in a case involving Chipotle Mexican Grill, where plaintiff investors alleged that the company's failure to disclose details and risks of its produce-processing and food-safety procedures caused a decline in stock prices following a series of foodborne illness outbreaks at Chipotle restau-

---

ftc.gov/news-events/press-releases/2017/12/ftc-approves-final-consent-order-moonlight-slumber-llc.

40. Press Release, FTC, Paint Companies Settle FTC Charges That They Misled Consumers; Claimed Products Are Emission- and VOC-Free and Safe for Babies and Other Sensitive Populations (July 11, 2017), https://www.ftc.gov/news-events/press-releases/2017/07/paint-companies-settle-ftc-charges-they-misled-consumers-claimed.
41. Press Release, FTC, FTC Charges Volkswagen Deceived Consumers With Its "Clean Diesel" Campaign (Mar. 29, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/ftc-charges-volkswagen-deceived-consumers-its-clean-diesel.
42. Canada Goose, Inc., FTC Matter No. 182-3146 (June 17, 2019), https://www.ftc.gov/system/files/documents/closing_letters/nid/2019-06-17_canada_goose_closing_letter.pdf.
43. 15 U.S.C. §§78a et seq.
44. 17 C.F.R. §240.10b-5 (2020).
45. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008); In re Yum! Brands, Inc. SEC Litig., 73 F. Supp. 3d 846, 857 (W.D. Ky. 2014).
46. *In re Yum! Brands, Inc. SEC Litig.*, 73 F. Supp. 3d at 857.
47. *Id.* at 863 (quoting City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 671 (6th Cir. 2005)).
48. *Id.* at 864.
49. Bondali v. Yum! Brands Inc., 620 Fed. App'x 483, 490 (6th Cir. 2015).

rants.[50] The plaintiffs argued that Chipotle made a number of material misstatements in SEC filings and press releases, including related to quality assurance and the company's ability to trace ingredients through its supply chain.[51] The court disagreed, stating that any alleged deficiencies by the company did not conflict with its statements regarding the food safety programs and procedures that it has in place, but instead "merely quibble with Chipotle's execution of those programs and procedures."[52] This case was recently upheld on appeal.[53]

In contrast to the above cases, public companies are experiencing greater liability risk for corporate statements and commitments regarding their health and safety programs and operations. For instance, following the Deepwater Horizon incident in 2010, a number of investor plaintiffs brought actions against BP that were ultimately consolidated into a multidistrict action. Among the claims alleged is that BP made material misrepresentations about its safety reform efforts and ability to respond to deepwater oil spills in company sustainability reports, investor calls, and periodic corporate reporting.[54] The Texas district court agreed that certain of BP's statements were sufficiently concrete to support a 10(b) claim, and denied the company's motion to dismiss.[55] This litigation remains ongoing.

Likewise, Brazilian mining company Vale has been embroiled in securities fraud litigation for several years related to alleged misrepresentations in public filings and statements, including its sustainability reports, about the company's commitment to environmental, health, and safety compliance and sufficiency of corporate risk mitigation plans and procedures. Cases were brought following the 2015 collapse of its Fundão dam[56] and the 2019 dam collapse at the Córrego do Feijão mine.[57] In both cases, New York district courts parsed the cited public statements, finding that a number of Vale's public statements were representations of "present or historical facts" related to the affirmative steps that the company is taking or has taken with respect to environmental, health, and safety matters.[58] Making "specific representations about its then-existing practices for monitoring dam stability" can be the basis for a 10b-5 claim.[59] Following the 2017 decision regarding the Fundão dam, the parties agreed to a proposed settlement that would require Vale to pay $25 million to the settlement class. In June 2020, a court entered a judgment approving the settlement and the proposed plan of allocation.[60] The Córrego do Feijão litigation is ongoing against Vale and its corporate executives.

Another recent example is the ongoing litigation by investor plaintiffs against ExxonMobil Corporation related to its public statements regarding climate change risks.[61] At issue is a climate change report that Exxon publicly released, which included a proxy cost for climate change-related controls that the company factored into its business metrics and calculations.[62] However, internal documents made public through parallel litigation by the New York attorney general conflicted with Exxon's public statements and filings related to its carbon-accounting policies, suggesting the company used a substantially lower proxy cost than publicly stated.[63]

Plaintiffs alleged that this discrepancy resulted in a material overvaluation of company assets as oil and gas prices began to fall in 2014. The court agreed with the plaintiffs, denying Exxon's motion to dismiss in 2018.[64] Notably, the plaintiffs named both the company and individual officers and directors, including former Secretary of State Rex Tillerson, in their complaint, and the court has kept them in the case. In denying the motion to dismiss as to the individual defendants, the court focused on the officers' and directors' involvement in Exxon's Management Committee, which actively discussed business issues related to climate change and carbon proxy cost. As such, these individuals "must have had knowledge based on their executive positions within ExxonMobil."[65] This case is ongoing. A court-ordered mediation was conducted in July 2020 without resolution,[66] and ExxonMobil recently filed a motion for reconsideration of their motion to dismiss.[67]

In sum, while securities litigation related to ESG statements has, to date, been limited and difficult to prove, courts are willing to entertain these legal challenges related to public statements in sustainability reports or other materials to the extent they can be shown to be sufficiently specific or concrete rather than merely aspirational. And this risk extends beyond the corporate entity, potentially exposing individual officers and directors to direct liability for securities fraud related to ESG-related misstatements or omissions about which they knew or should have known.

These risks and concerns may be heightened by recent SEC activity—namely, guidance regarding nonfinancial metrics and a request for comment on the nomenclature in denominating ESG funds. First, the SEC's nonfinancial metrics guidance provides that any use of financial or nonfinancial metrics in the Management's Discussion and Analysis of Financial Condition and Results of Operations section must include a clear definition of the metric and

50. Ong v. Chipotle Mexican Grill, Inc., No. 1:2016cv-00141, 2018 U.S. Dist. LEXIS 198155 (S.D.N.Y. Nov. 20, 2018).
51. *Id*. at **46-47.
52. *Id*. at *54 (citing Ong v. Chipotle Mexican Grill, Inc., 204 F. Supp. 3d 199, 232 (S.D.N.Y. 2018)).
53. Metzler Inv. GmbH and Constr. Laborers Pension Tr. of Greater St. Louis v. Chipotle Mexican Grill, Inc., No. 18-3807, 2020 U.S. App. LEXIS 25522 (2d Cir. Aug. 12, 2020).
54. Alameda Cnty. Emps. Ret. Ass'n v. BP plc, No.10-md-2185; 4:12-cv-1256, 2013 U.S. Dist. LEXIS 171459, at *145 (S.D. Tex. Dec. 2, 2013).
55. *Id*. at *73.
56. In re Vale S.A. Sec. Litig., No. 1:15-cv-9539-GHW, 2017 U.S. Dist. LEXIS 42513 (S.D.N.Y. Mar. 23, 2017) (*Vale I*).
57. In re Vale S.A. Sec. Litig., No. 19-CV-526, 2020 U.S. Dist. LEXIS 91150 (E.D.N.Y. May 20, 2020) (*Vale II*).
58. *Id*. at **27, 31-33; *Vale I*, 2017 U.S. Dist. LEXIS 42513, at **68, 76.
59. *Vale II*, 2020 U.S. Dist. LEXIS 91150, at *27.
60. Vale S.A. Securities Litigation, *Home Page*, https://www.valesecuritieslitigation.com/ (last visited Aug. 5, 2020).
61. Ramirez v. Exxon Mobil Corp., 334 F. Supp. 832 (N.D. Tex. 2018).
62. *Id*. at 839-40.
63. *Id*. at 844.
64. *Id*. at 859.
65. *Id*. at 853.
66. Motion for Oral Argument Regarding Lead Plaintiff's Motion for Class Certification, Ramirez v. Exxon Mobil Corp., No. 3:16-cv-03111-K (July 31, 2020).
67. Motion for Reconsideration Regarding Motion to Dismiss and to Strike, Ramirez v. Exxon Mobil Corp., No. 3:16-cv-03111-K (July 31, 2020).

how it is calculated; a statement as to why the metric provides useful information to investors; and a statement indicating how management uses the metric in managing or monitoring the performance of the business.[68] "The company should also consider whether there are estimates or assumptions underlying the metric or its calculation, and whether disclosure of such items is necessary for the metric not to be materially misleading."[69] While not specifically focused on ESG disclosure, this guidance arguably calls for enhanced explanation and discussion of ESG metrics, since most companies use such metrics in their filings and/or ESG reports. In light of the litigation trends discussed above, such information (or its absence) could provide additional avenues to object to ESG statements.

Second, the SEC has invited comment as to whether it should look into ESG funds and the bases and legitimacy of the denomination of these funds as "ESG."[70] Regardless of whether the SEC proceeds with a rulemaking, the mere pronouncement of its interests is likely to occasion greater scrutiny by managers of such funds with respect to the completeness and accuracy of companies' publicly available ESG information, which forms a critical part of the consideration of which companies to include in those funds. Along with the SEC nonfinancial metrics guidance, the ESG funds issue will accentuate the growing imperative to provide accurate and complete ESG information to avert potentially difficult inquiries or litigation.

II. Litigation Developments Related to ESG Performance

A. *Claims Regarding Human Rights Violations in the Supply Chain*

Looking beyond ESG statements made by companies in their public reports and materials, companies can face liability risk in the United States for human rights violations committed abroad by entities in their supply chain. Two key federal legal regimes that provide for such liability are the Alien Tort Statute (ATS) and the Trafficking Victims Protection Act (TVPA).[71]

In addition, the California Transparency in Supply Chains Act (Supply Chains Act) requires that "large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains."[72] As the Supply Chains Act is a disclosure regime, there are no fines associated with a failure to comply, nor is there a private right-of-action. Nonetheless, the Supply Chains Act indirectly facilitates litigation under the ATS and the Trafficking Victims Protection Reauthorization Act (TVPRA), as it supplies potential plaintiffs with information that can be used to support claims.

1. ATS Litigation

The ATS provides U.S. federal courts with jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of international law or a U.S. treaty.[73] Courts have progressively narrowed the scope of the ATS in recent years, limiting its reach to specific violations of binding international law that "touch and concern" the United States, and that were committed by domestic corporations. Despite these limitations on ATS liability, multinational companies have been sued based on their suppliers' alleged human rights violations.

In 2004, the U.S. Supreme Court denied a plaintiff's ATS claim because the international instruments that were the basis for his claim were nonbinding and unenforceable.[74] The Court held that a violation of customary international law must be universal, well-defined, and obligatory.[75] In 2013, the Supreme Court held that the ATS did not apply to extraterritorial conduct—that is, conduct occurring abroad—and stated that in order to trigger liability under the ATS, the conduct must touch and concern the territory of the United States with sufficient force as to displace the presumption against extraterritorial application.[76] The Court noted that "mere corporate presence" in the United States would be insufficient to meet the "touch and concern" test.[77] Then, in 2018, the Supreme Court further limited the scope of ATS liability to domestic corporations.[78]

However, a recent decision by the Ninth Circuit may fuel concerns that companies' common engagement practices with their third-party suppliers—including auditing and financing arrangements—could give rise to ATS jurisdiction and liability stemming from supplier misconduct. Former child slaves have sued Nestlé, Cargill, and Archer Daniels Midland under the ATS for allegedly aiding and abetting child slave labor in Côte d'Ivoire.[79] Specifically, the plaintiffs alleged that defendants provided financial support and technical aid to farmers, even though the companies knew their acts would assist farmers who were

68. 85 Fed. Reg. 10568 (Feb. 25, 2020).
69. *Id*. at 10570.
70. 85 Fed. Reg. 13221 (Mar. 6, 2020).
71. The TVPA was originally passed in 2000. It has been reauthorized a number of times, including in 2003, 2008, and 2013. The 2008 reauthorization of the Act—which shall be referred to in this Article as the Trafficking Victims Protection Reauthorization Act (TVPRA)—expanded the language to include civil and criminal penalties for any person who "knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services" by means of force, threats or abuse, and for any person who acts in "reckless disregard" of this fact. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 100 Pub. L. No. 457, §1589. Accordingly, a corporation can be held directly liable for a financial benefit that was accrued from business associations if the corporation knew or was in reckless disregard of the fact that the other party employed trafficked labor.
72. Attorney General Xavier Becerra, State of California Department of Justice, *The California Transparency in Supply Chains Act*, https://oag.ca.gov/SB657 (last visited Aug. 5, 2020).
73. 28 U.S.C. §1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").
74. Sosa v. Alvarez-Machain, 542 U.S. 692, 757 (2004).
75. *Id*. at 732.
76. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25, 43 ELR 20083 (2013).
77. *Id*. at 123.
78. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1398 (2018).
79. Doe v. Nestlé, S.A., 906 F.3d 1120, 1122 (9th Cir. 2018).

using forced child labor, and knew their assistance would facilitate child slavery.[80]

The court dismissed the case against the foreign corporate defendants, but remanded the case and directed the plaintiffs to "amend their complaint to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case."[81] Specifically, the court identified three examples of conduct that could be sufficient to rebut the presumption against extraterritoriality: (1) defendants allegedly "funded child slavery practices in the Ivory Coast" in the form of "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier"; (2) defendants' employees "inspect[ed] operations in the Ivory Coast"; and (3) defendants made "financing decisions" in the United States.[82] In response to a request for rehearing en banc by the Ninth Circuit, the Ninth Circuit released a split opinion, affirming the previous decision and amending it in part dealing with the plaintiffs' standing and denying rehearing.[83] This has seemingly reopened the door to supply chain-related ATS claims against multinational corporations.[84]

A few months after the Ninth Circuit's decision, Nestlé filed a cert petition requesting review by the Supreme Court. In its petition, Nestlé argues that the conduct amounting to "aiding" (e.g., the above-mentioned financial support provided by defendants to the cocoa farms) is not enough to rebut the presumption against extraterritoriality. The Supreme Court granted Nestlé's cert petition on July 2, 2020. The Court's decision is likely to have a significant impact on the extent to which corporations (especially those with global supply chains) can be held liable for human rights violations committed abroad by their suppliers and third-party agents.

Although the risk of liability under the ATS remains generally low at the moment, lawsuits related to supply chain activity are increasing and may lead to more plaintiff-friendly interpretations of the statute. In addition, companies should be mindful of potential aiding and abetting liability under the ATS if they can be viewed as controlling, operating, or financing their suppliers.

2. TVPRA Litigation

The TVPA was originally passed in 2000 to provide a comprehensive federal regime against human trafficking.[85] The TVPA created a number of new federal crimes related to forced labor and trafficking and provided for restitution to victims. However, in the original statute, the TVPA only addressed the actions of those directly involved in human trafficking.

The TVPA has been reauthorized a number of times, including in 2003, 2008, and 2013.[86] The 2008 reauthorization of the Act (i.e., the TVPRA) expanded the language of the Act to include criminal and civil penalties for any person who "knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by means of force, threats, or abuse when the party knew or recklessly disregarded how the labor was obtained."[87] Thus, "a corporation can be held directly liable for financial benefit accrued from business associations where the corporation knew or was in reckless disregard of the fact that the other party employed trafficked labor."[88] Further, these provisions apply even if the labor-trafficking violation occurred abroad or was perpetrated in the supply chain of the corporation by a separate legal entity.[89] Violations under the law for benefitting from forced labor can result in a fine or up to 20 years in prison.[90] A civil action can be brought by "a victim of a violation" or the state attorney general.[91]

Most TVPRA cases to date have involved persons directly involved in the trafficking of persons. However, in at least three cases, the plaintiffs sought to apply the statute to more indirectly involved corporate actors. In the first case, the plaintiffs alleged that the defendants were members of a joint venture in the seafood industry that was engaged in and profited from human trafficking.[92] The defendants included two companies that ran the business in Thailand, a company that ensured order fulfillment and delivery, and the ultimate United States-based purchaser that then marketed and distributed the products.[93] Everyone but the United States-based purchaser was a foreign corporation. However, the order fulfillment company had an office in California and because of this U.S. presence, the court analyzed the claims against the order fulfillment company together with the claims against the United States-based purchaser.

Although the plaintiffs survived the motion to dismiss, the case was ultimately dismissed on summary judgment.[94] The court held that it did not have subject matter jurisdiction over the claims against the seafood producers because

80. *Id*. at 1123.
81. *Id*. at 1127.
82. *Id*. at 1126.
83. Doe v. Nestlé, S.A., No. 17-55435, 2019 U.S. App. LEXIS 20050, at **5-6 (9th Cir. June 7, 2018).
84. *Id*. at *6.
85. Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 Vand. L. Rev. 499, 501 (2016).
86. Polaris Project, *Current Federal Laws*, https://polarisproject.org/wp-content/uploads/2020/01/Polaris-TVPRA-2019-Analysis.pdf (last visited Apr. 26, 2019).
87. Ezell, *supra* note 85, at 502 (quoting 18 U.S.C. §§1589, 1595).
88. *Id*.
89. *Id*. (citing 18 U.S.C. §§1589, 1595-1596).
90. 18 U.S.C. §1589(d); *id*. §1593A:

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of this chapter, knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.

91. *Id*. §1596.
92. Ratha v. Phatthana Seafood Co., No. 2:16-cv-04271-JFW-AS (C.D. Cal. June 15, 2016).
93. *See id.* at ECF No. 56.
94. *See id.* at ECF No. 225, Order Granting S.S. Frozen Food Co., Ltd.'s Motion for Summary Judgment; ECF No. 226, Order Granting Rubicon Res., LLC and Wales & Co. Universe, Ltd.'s Motion for Summary Judgment; and ECF No. 227, Order Granting Phatthana Seafood Co., Ltd.'s Motion for Summary Judgment.

they were not present in the United States.[95] The court also held that the U.S. purchaser and the order fulfillment company did not have sufficient involvement in or knowledge of the human trafficking and thus cannot be held liable under the TVPRA.

According to the court, liability for knowingly benefitting from participation in a venture that engaged in any act violating the TVPRA required that the entity participate in trafficking rather than receive a passive benefit.[96] The court found there was no evidence to show that they took some action to operate or manage the human trafficking venture and therefore did not knowingly participate.[97] It also found that there was no evidence that the United States-based purchaser or the order fulfillment company knew or should have known that human trafficking was occurring.[98] Rather, the evidence showed that they "actively sought to source products from companies that did not exploit their workers" and "reasonably relied on industry and government audits and certifications to ensure that [the local factory] met industry standards relating to worker safety and welfare and was in compliance with the labor laws."[99]

In the second case, the plaintiffs brought suit against 36 defendants stemming from their time working at a facility owned by Tesla, Inc. in Fremont, California.[100] Defendant Eisenmann Corporation had hired the plaintiffs through subcontractors to complete equipment installations for manufacturing entities with which Eisenmann contracted for such work. Plaintiffs alleged that they were paid far below minimum wage, forced to work extreme hours, subjected to poor living conditions, and received a number of threats, such as to withhold pay, withhold visas and immigration status, and to withhold medical benefits if workers reported a job injury.

Importantly, in relation to the TVPRA claim, the court noted that civil liability extends beyond perpetrators to anyone who "knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known committed a violation of applicable trafficking and forced labor laws."[101] The court refused to dismiss the case against Eisenmann and Tesla even though neither company directly employed the defendants. Since ruling on the motion to dismiss, the case has been stayed, but the reasons and length of the stay are not publicly available.

Finally, in the third case, the plaintiffs brought a class action lawsuit in the District of Columbia against some of the most profitable tech and auto companies in the world, including Apple and Tesla.[102] The plaintiffs—all of whom mined cobalt in the Democratic Republic of Congo—allege that defendants aided and abetted the mines that forced them and other young children to labor under cruel conditions that led to deaths and crippling injuries.[103] The plaintiffs assert claims of forced labor in violation of the TVPRA and also seek relief under common-law claims of unjust enrichment, negligent supervision, and intentional infliction of emotional distress. The case is still pending, and the defendants filed their motions to dismiss on August 25, 2020.

As these cases show, companies are facing increased litigation risks under the TVPRA and other laws that prohibit the use of forced or child labor. While liability under the TVPRA is most likely to be found where a U.S. company was directly involved in trafficking or forced labor violations, aiding and abetting these violations or acting in reckless disregard of their presence in the supply chain could constitute a TVPRA violation, especially if a company has sufficient involvement in its supply chain sourcing-related activities or substantial information about a problematic supplier's manufacturing process.

B. *Common-Law Claims Regarding Supplier Activities and Harm*

U.S. companies also should be mindful of potential litigation for their suppliers' actions based on common-law tort and contract theories. Although such lawsuits are relatively uncommon, there have been examples where multinational companies were sued on negligence, third-party beneficiary, and unjust enrichment theories for poor supplier labor conditions and other related violations committed by their suppliers.

1. Negligence Claims

To succeed under a negligence theory, plaintiffs are required to prove (1) the existence of a legal duty owed to plaintiff by the defendant; (2) defendant's breach of that duty; (3) plaintiff's sufferance of an injury; and (4) proof that defendant's breach caused the injury.[104] Negligence was one of the theories utilized in a recent lawsuit against a number of U.S. retailers arising out of the collapse of the Rana Plaza factories in Bangladesh that resulted in the death of more than 1,000 factory workers and numerous injuries.[105] The plaintiffs, one of whom was a Rana Plaza worker injured during the collapse, filed suit in Delaware for common-law negligence and wrongful death against the retailers who purchased garments from Rana Plaza factories.[106] Plaintiffs alleged that the defendants acted

95. *See id.* at ECF No. 225, Order Granting S.S. Frozen Food Co., Ltd.'s Motion for Summary Judgment, at 5-6; Order Granting Phatthana Seafood Co., Ltd.'s Motion for Summary Judgment, at 5-6.
96. *See id.* at ECF No. 227, Order Granting Rubicon Res., LLC and Wales & Co. Universe, Ltd.'s Motion for Summary Judgment, at 5.
97. *Id.* at 5-6.
98. *Id.* at 6.
99. *Id.*
100. Lesnik v. Se, No. 5:16-cv-01120-LHK, 374 F. Supp. 3d 923 (N.D. Cal. Mar. 20, 2019).
101. *Id.* at *952.
102. *See* Doe 1 v. Apple Inc., No. 1:19-cv-03737 (D.D.C. Dec. 15, 2019).
103. *See id.* at ECF No. 1, Complaint.
104. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3 (2010).
105. Rahaman v. J.C. Penney Corp., No. N15C-07-174 MMJ, 2016 Del. Super. LEXIS 258, at **1-2 (Del. Super. Ct. May 4, 2016).
106. *Id.* at *2.

negligently in failing to secure safe and healthy working conditions at the factories.[107]

Upon the defendants' motion to dismiss, the court dismissed the plaintiffs' claims for, inter alia, failure to plead with any particularity that the defendants owed them a duty of care.[108] Plaintiffs alleged that defendants failed to implement standards and oversight mechanisms, failed to monitor the construction of Rana Plaza, and failed to inspect and oversee it to ensure workers' safety and health.[109] Applying Delaware law, the court held that in cases alleging nonfeasance, or an omission to act, there is no general duty to others absent a "special relationship," such as an employer-employee or business owner-patron relationship.[110] The court also dismissed the plaintiffs' argument that the defendants' ethical sourcing statements imposed on them a duty of care to ensure that the plaintiffs' workplace is safe because ethical sourcing statements do not, by themselves, create a duty of care to independent contractors.[111]

2. Third-Party Beneficiary Claims

In at least one case, supplier employees argued that they were third-party beneficiaries to the supply contract between the purchaser and the supplier and thus should be entitled to relief for breach of contract.[112] The plaintiffs alleged that Walmart breached the purchase of goods contracts with its foreign suppliers, which incorporated Walmart's Standards for Suppliers, by failing to adequately monitor the employment conditions in the foreign supplier factories or control the suppliers' conduct toward their employees.[113] The plaintiffs stated that they were entitled to relief as third-party beneficiaries of Walmart's promise to the suppliers to monitor the suppliers' compliance with the standards.[114]

The Ninth Circuit held that the language in Walmart's Standards for Suppliers did not create a duty on the part of Walmart to monitor the suppliers.[115] Relying on the *Restatement (Second) of Contracts*, the Ninth Circuit explained that the contract language on which plaintiffs relied showed that the retailer "reserved the right to inspect the suppliers," and thus "did not make a promise from which a duty would flow to plaintiffs."[116] Alternatively, plaintiffs argued that they were third-party beneficiaries of the suppliers' promises to maintain certain working conditions.[117] The court held that this argument failed because Walmart was the promisee vis-à-vis the suppliers' promise to abide by the standards, and a third-party beneficiary may recover only against the party that undertook a promise under the contract for the benefit of the beneficiary.[118]

3. Unjust Enrichment Claims

In the same case discussed immediately above, plaintiffs advanced an alternative liability theory arguing that Walmart was unjustly enriched and had to make restitution to plaintiffs on account of alleged substandard employment conditions maintained by foreign suppliers who sold goods to Walmart.[119] The Ninth Circuit held that the lack of any prior relationship between Walmart and the plaintiffs precluded the application of an unjust enrichment theory.[120] According to the court, unless there is an employee-employer relationship between the parties, there is no plausible basis for restitution by an employee of a manufacturer from the one who purchased goods from the manufacturer.[121]

Similarly, in a case against Nestlé, Cargill, and Archer Daniels Midland, the plaintiffs alleged that, as a result of forced labor practices utilized by farms from which the defendants sourced cocoa beans, defendants were able to purchase cocoa beans at significantly lower prices and thus were unjustly enriched.[122] However, the court disagreed, stating that the relationship between the plaintiffs and defendants was too attenuated and dismissed the unjust enrichment cause of action for failure to state a claim.[123] The fact that the defendants had an exclusive long-term relationship with the farmers was insufficient to support a successful unjust enrichment claim.[124]

In conclusion, although a company can be held liable under one of the common-law liability theories described above for conduct of its suppliers, the risk of liability under these theories remains relatively low. That said, the liability risk increases if the company's engagement with suppliers rises to the level of creating a joint employment relationship or a legal duty to the suppliers' workers. In addition, companies should be mindful that any statements, claims, or initiatives that suggest that they direct or control supplier worker activities could be used as evidence to support a common-law negligence, third-party beneficiary, or unjust enrichment claim.

C. *Climate Change Litigation*

Corporate reporting on GHG emissions and climate change commitments has been a mainstay of company sustainability profiles given the proliferation of voluntary reporting regimes like the CDP (formerly the Carbon Dis-

107. *Id.*
108. *Id.* at *30.
109. *Id.* at *21.
110. *Id.* at *22.
111. *Id.* at *25.
112. Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).
113. Doe v. Wal-Mart Stores, Inc., No. CV-05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *8 (C.D. Cal. Mar. 30, 2017).
114. *Id.*
115. *Doe I*, 572 F.3d at 682.
116. *Id.* at 681-82.
117. *Id.*
118. *Id.* at 682.
119. *Id.* at 684.
120. *Id.* at 685.
121. *Id.*
122. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1121 (C.D. Cal. 2010). Although on appeal the Ninth Circuit vacated the district court's decision, the Ninth Circuit's decision did not discuss state-law claims, and the second amended complaint filed by plaintiffs did not include an unjust enrichment cause of action.
123. *Id.* at 1122.
124. *Id.*

closure Project), as well as a growing number of mandatory reporting mechanisms. For multiple reasons, including the growing market demand for information about climate, increasingly companies are making specific, verifiable public commitments to switch to renewable energy sources and reduce their GHG emissions by specified amounts by dates certain. Considering the growing body of case law, outlined above, such ambitious corporate commitments may be the subject of future consumer litigation if companies fail to live up to them.[125]

But even before this future reckoning under state consumer protection laws, NGOs, state and local governments, and other individuals have been suing extractive resource companies for more than a decade, trying to hold them accountable for climate change.[126] These cases are in addition to the efforts to force public policy change by suing the federal government and states to regulate GHG emissions.[127] While climate change litigation has had mixed success, the cases have drawn public attention to the issue and have set the foundation and strategy for the most recent wave of cases brought by state and local governments against oil and gas companies.

The seminal climate change case is *Massachusetts v. Environmental Protection Agency*, where the Supreme Court agreed with a group of environmental organizations and state and local governments that the U.S. Environmental Protection Agency (EPA) had authority under the CAA to regulate GHGs.[128] In reaching this decision, the Court first addressed the standing hurdle that has frustrated many climate change plaintiffs, rejecting EPA's argument that individual standing is impossible given the widespread harm presented by GHGs.[129] The decision rested in part on Massachusetts' unique position as a state enforcing its quasi-sovereign interests in protecting its citizens and the clear procedural avenue to challenge EPA action or inaction through a petition. More importantly, the Court also recognized that the alleged harms associated with climate change, including rising sea levels and loss of or damage to coastal land, were a sufficient injury to support Article III standing.[130] Further, because EPA's regulation of GHG emissions from motor vehicles could address those injuries, even incrementally, there was redressability for the alleged harms.

On the merits, the Court "had little trouble" determining that EPA had authority to regulate GHGs under the CAA because the statute broadly defines "air pollutant," which on its face includes "all airborne compounds of whatever stripe."[131] The Court also rejected EPA's argument that it would be unwise to regulate GHGs at this time as contrary to the statutory text of the CAA.[132] Under the statutory language, EPA had to determine whether there was sufficient information to make an endangerment finding (i.e., whether GHGs cause or contribute to climate change).[133]

While *Massachusetts* set the table for regulatory action by EPA, it arguably dealt a blow to plaintiffs' federal common-law climate change-related claims against oil and gas companies. For instance, in *American Electric Power Co. v. Connecticut*, the Supreme Court subsequently determined that the CAA displaced any federal common-law claims attempting to limit GHG emissions because of their contribution to climate change.[134] The case also signaled that standing was far from resolved for climate change cases, as the Court split 4-4 as to whether there was Article III standing to bring the claims in the first instance, with the U.S. Court of Appeals for the Second Circuit's determination that there was standing carrying the day because of the split decision.[135] The Ninth Circuit followed suit in *Native Village of Kivalina v. Exxon Mobil Corp.*, rejecting an Alaskan village's lawsuit to hold several oil and gas companies accountable for climate change under federal common law because their claims were displaced by the CAA.[136]

Other cases brought by individual youth plaintiffs or youth organizations have attempted to use the public trust doctrine and constitutional claims to hold the federal and state governments accountable for policy decisions that have exacerbated impacts of climate change.[137] To date, those claims also have failed on jurisdictional or prudential grounds.

A key example is the recently decided *Juliana v. United States* case, which was filed by a group of youth plaintiffs alleging that, despite knowing of the hazards from increased carbon dioxide from burning fossil fuels for more than 50 years, several federal agencies continued policies and practices allowing the exploitation of fossil fuels.[138] The plaintiffs supported their allegations by individual and expert affidavits that the Ninth Circuit called "compelling evidence that climate change has brought [the eve of destruction] nearer."[139] The Ninth Circuit "reluctantly" concluded in a 2-1 decision that plaintiffs' "impressive case for redress must be presented to the political branches of government."[140]

According to the court, the plaintiffs had demonstrated, without substantial dispute from the government, that (1) climate change is occurring at an increasingly rapid

125. *See, e.g.*, Beyond Pesticides v. Exxon Mobil Corp., No. 2020 CA 2532 (D.C. Super. Ct. filed May 15, 2020) (complaint alleges that ExxonMobil's marketing regarding its engagement and investment in clean energy and environmentally beneficial technology is false and deceptive).
126. *See, e.g.*, American Elec. Power Co. v. Connecticut, 564 U.S. 410, 41 ELR 20210 (2011); Native Vill. of Kivalina v. Exxon Mobil Corp., 696 F.3d 849, 42 ELR 20195 (9th Cir. 2012).
127. Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 37 ELR 20075 (2007); Juliana v. United States, 947 F.3d 1159, 50 ELR 20025 (9th Cir. 2020).
128. 549 U.S. 497 at 528-29.
129. *Id*. at 517.
130. *Id*. at 522-23.
131. *Id*. at 528-29.
132. *Id*. at 532-33.
133. *Id*. at 534.
134. 564 U.S. 410, 424, 41 ELR 20210 (2011).
135. *Id*. at 420.
136. 696 F.3d 849, 858, 42 ELR 20195 (9th Cir. 2012).
137. *See* Juliana v. United States, 947 F.3d 1159, 50 ELR 20025 (9th Cir. 2020); Reynolds v. Florida, No. 18-CA-000819 (Fla. Cir. Ct. filed Apr. 16, 2018); Aji P. v. Washington, No. 18-2-4448-1 (Wash. Super. Ct. filed Feb. 16, 2018).
138. First Amended Complaint at 1, *Juliana*.
139. *See Juliana*, 947 F.3d at 1164.
140. *Id*.

rate; (2) the unprecedented rise of carbon levels in the atmosphere "stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked"; (3) the federal government has understood the risks of fossil fuel use and increasing GHG emissions since at least 1965; and (4) the government's contribution to climate change is not simply a result of inaction, but is a result of it affirmatively promoting fossil fuel use, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.[141] Despite recognizing this evidence presented in support of the plaintiffs' constitutional and public trust claims, the Ninth Circuit determined that they lacked Article III standing to pursue them. Although the court agreed with the district court that plaintiffs had met the first two prongs of the standing inquiry and demonstrated injury and causation, the court found that the claims were not redressable.[142]

In particular, the court struggled with how a federal court could implement the remedy that was sought: "[t]he crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions" and how a federal court could implement such a plan.[143] The court was skeptical that their claims were redressable because the climate change problem is global and based on both past and future emissions of GHGs, which would not be solved by a change in government policies. Even assuming that the claims were redressable because some relief could be provided, plaintiffs could not demonstrate that the relief was within the power of an Article III court.[144] The redressability question implicated separation of powers when there are no clear standards or metrics to measure relief and such a remedial plan could not be supervised or implemented by an Article III court.[145] Plaintiffs have filed a request for rehearing en banc.

Youth plaintiffs have filed claims in state courts based on similar state constitutional and public trust doctrines. While state courts generally do not have the same limited jurisdiction as federal courts, the trial courts that have considered these climate change-related claims have dismissed them for similar reasons as the court in *Juliana*. For example, the Washington Superior Court noted that anthropogenic climate change caused by increased GHG emissions poses severe threats to our environment and requires urgent governmental action, but dismissed the complaint in the *Aji P v. Washington* case because "the issues involved in this case are quintessentially political questions that must be addressed by the legislative and executive branches of government."[146] These cases are now being argued before higher courts and the trial court dismissals have not dissuaded youth coalitions from filing similar complaints in other states, especially where there is substantial fossil fuel activity.[147]

Recognizing that plaintiffs are foreclosed from addressing climate change under federal common law, several local governments and states have initiated a wave of state common-law claims against several oil and gas companies. Most of these cases have been filed in state court in the first instance and largely focus on states, likely in an attempt to maintain the cases in state court and avoid the deference federal courts afford to the legislative and executive branches. Beginning in July 2017, several California counties and cities brought lawsuits in state court against a number of oil and gas companies, seeking damages for the effects of rising sea levels and climate change on their infrastructure.[148] Other local governments across the country quickly followed, including New York City, the city of Boulder, King County, Washington, the state of Rhode Island, the city of Baltimore, and the city and county of Honolulu.[149] One private entity, the trade association for commercial fishermen on the West Coast, also filed similar claims on behalf of its members.[150]

These complaints follow a common theme and allege one or more state-law tort claims, including public nuisance, strict liability, private nuisance, negligence, and trespass claims against the defendants. The complaints focus on the argument that the defendants had knowledge, for decades, that unrestricted GHG emissions would warm the planet and change the climate. The complaints track typical consumer fraud claims and the approach used by plaintiffs in asbestos and tobacco litigation, alleging that the defendants engaged in a coordinated effort to attack the available science on climate change and raise doubts as to the reality and causes of climate change. The complaints further allege that the defendants profited from the extraction of oil, coal, and natural gas, which has caused a substantial and foreseeable increase in GHG emissions, which in turn have caused a range of climate-related effects, including global warming, rising atmospheric and ocean temperatures, ocean acidification, melting polar ice caps and glaciers, more extreme and alternative weather, and

141. *Id*. at 1166-67.
142. *Id*. at 1168-69.
143. *Id*. at 1170.
144. *Id*. at 1171.
145. *Id*. at 1173.
146. Opinion and Order at 3, Aji P. v. Washington, No. 18-2-4448-1, 48 ELR 20145 (Wash. Super. Ct. Aug. 14, 2018); *see also* Order, Sinnok v. Alaska, No. 3AN-17-09910, 48 ELR 20188 (Alaska Super. Ct. Oct. 30, 2018) (dismissing claims because they are political questions and nonjusticiable).
147. *See* Held v. Montana, No. CDV-2020-307 (Mont. Dist. Ct. filed Mar. 13, 2020) (complaint alleging violations of the Montana Constitution and public trust doctrine).
148. City of Richmond v. Chevron, No. 18CV00055 (Cal. Super. Ct. filed Jan. 22, 2018); City of Oakland v. BP p.l.c., No. RG17875889 (Cal. Super. Ct. filed Sept. 19, 2017); City of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. Super. Ct. filed Dec. 20, 2017); County of San Mateo v. Chevron Corp., No. 17CIV3222 (Cal. Super. Ct. filed July 17, 2017); City of Imperial Beach v. Chevron Corp., No. C17-01227 (Cal. Super. Ct. filed July 17, 2017); County of Marin v. Chevron Corp., No. CIV1702586 (Cal. Super. Ct. filed July 17, 2017).
149. City & County of Honolulu v. Sunoco LP, No. CCV-20-380 (Haw. Cir. Ct. filed Mar. 9, 2020); Mayor & City Council of Baltimore v. BP p.l.c., No. 24-C-18-4219 (Md. Cir. Ct. filed July 20, 2018); Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. filed July 2, 2018); King County v. BP p.l.c., No. 18-2-11859 (Wash. Super. Ct. filed May 9, 2018); Board of County Comm'rs of Boulder County v. Suncor Energy U.S.A., No. 2018CV20249 (Colo. Dist. Ct. filed Apr. 17, 2018); City of New York v. BP p.l.c., No. 18-cv-182 (S.D.N.Y. filed Jan. 9, 2018).
150. Pacific Coast Fed'n of Fisherman's Ass'ns, Inc. v. Chevron Corp., No. CGC-18-571285 (Cal. Super. Ct. filed Nov. 14, 2018).

sea-level rise—all to the detriment of plaintiffs' taxpayer residents and infrastructure.

For the most part, all of these climate cases have been embroiled in procedural motion practice and face an uncertain future. Nevertheless, the cases illustrate that plaintiffs will remain focused on the causes of and remedies for climate change, and companies that are connected to the extractive industries or make claims with respect to reducing GHG emissions are likely to remain in the crosshairs of these suits.

III. Conclusion

Notwithstanding distractions and disruptions caused by COVID-19, all signs point toward greater societal and market interest in ESG, with an accompanying growing appetite for enhanced company disclosure about ESG performance. Such disclosures will be met with intensifying scrutiny, including by the financial community, as well as expanding and inventive litigation attacking company ESG performance and products and their statements about them. While it is clear that aspirational ESG statements present less risk than company commitments, promises, statements, and metrics, the market is moving toward yet greater insistence on additional detailed data and specific commentary. Moreover, while allegations about omissions or incomplete information have been largely unavailing, elevated disclosure expectations will likely spawn additional theories about the misleading and material impact of deficient information.

That same careful examination of information will also fuel additional suits related to performance and operations that are deemed inconsistent with ESG standards and expectations. As the sphere of critical ESG issues continues to evolve and expand, so too will the reach of actions objecting to company performance. Further complicating ESG performance and effective disclosure strategies, an accelerating preoccupation with supply chain ESG implications lies on the horizon, creating troubling practical and risk realities.

In response, companies will be called upon to devote increasing attention and resources to their ESG performance and reporting and disclosure process—from determination of the ESG programmatic areas of moment to the gathering and disclosure of information about them, including with regard to their supply chains. Simply put, the ESG reporting and risk journey has only just begun, with the promise of rapidly emerging liabilities and opportunities ahead, which will necessitate continuing careful and precise management of ESG program performance and disclosure.