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On a 'Collision Course': When ESG Efforts Result in Public Nuisance Litigation

ESG compliance and risk mitigation in relation to potential public nuisance litigation should be taken as seriously as financial reporting, lawyers suggest.

BY CHRISTINE SCHIFFNER

Welcome to The National Law Journal's Inadmissible feature, a regular Q&A series with Washington, D.C., legal professionals. The interviews take a short, to-the-point look at an issue at the intersection of law and politics and highlight the type of work being led by professionals in the nation's capital. If you are interested in being profiled, reach out to cschiffner@alm.com.

In this edition Weil, Gotshal & Manges co-head of the firm's complex commercial litigation practice Drew Tulumello and partner Arianna Scavetti discuss risk mitigation in relation to a growing number of public nuisance claims in the ESG arena.

Courtesy photos

Andrew "Drew" Tulumello, left, and Arianna Scavetti of Weil, Gotshal & Manges.

Considering the requirements for corporations to address ESG on the one hand, and a growing number of public nuisance claims on the other, what issues are you running into with your clients in this area?

AS: We are seeing that ESG is a critical business priority. Consumers care about it, shareholders care about it, politicians and regulators—everyone is expecting companies to be proactive in addressing ESG issues. They need to be thoughtful about how their operations are impacting people and the planet.

Companies are ambitious about goal setting and wanting to improve reporting on their progress against those goals.

The challenges within the ESG space are complex and there will be disagreement about how those issues should be tackled. We are seeing state and local governments, and even private plaintiffs turning to public nuisance litigation as a means of imposing their own views and their own preferences for how ESG issues should be addressed. These suits are addressing who should be responsible for ESG issues and what should be done, as well as

whether more should have been done sooner and how quickly these issues need to be addressed or solved.

We see it in climate change, plastic pollution, opioids, and guns, to name a few of the issues where companies are undertaking their own ESG efforts and where they may be running into public nuisance litigation.

DT: In ESG reporting, companies talk about the broader impact they are having on the communities they serve. Public nuisance litigation takes the same approach but flips it. Public nuisance litigation alleges that companies have a duty to the public at large and have breached it. You can see why these ESG reporting and public nuisance claims are probably on a collision course.

How do you advise clients on navigating that potential collision course?

DT: Companies need to be very thoughtful about ESG communication and reporting. Fifteen years ago, ESG reports were completely separate from financial reporting. Generally, they were produced by a sustainability office that typically was not fully integrated into legal and into public-facing financial reporting. Now companies talk sustainability initiatives on earnings calls. Financial reporting and ESG are much more closely integrated than ever before. Our core message to clients has been: you need to approach ESG reporting with the same rigor that you use for financial reporting.

AS: We are also encouraging companies to monitor how public nuisance litigation is developing around the country. The law is evolving in real time in the public nuisance space and understanding how courts are approaching issues like whether, and to what extent, you can hold a small group of defendants accountable for issues that are broader social challenges that capture a lot of different parties will be key.

Looking at how courts are approaching these issues—that is going to be really important to understanding how to move forward in this space. Particularly understanding how courts think about their role versus the role of policy makers.

Are you looking at risk mitigation in the context of ESG?

AS: Absolutely. Companies are committed to ESG—they are going to keep setting goals and they are going to keep reporting on them. It's really about doing it thoughtfully in order to mitigate the risks. That means making sure that the goals companies set are ambitious, but achievable—and when they share them, they need to talk about the fact that the goals are aspirational and forward looking, and provide context about the challenges that they may face along the way in achieving these goals. It also means making sure that the reporting is accurate.

DT: Nothing is wrong with ambitious goal-setting. At the same time, companies need to have a reasonable and credible basis for believing they can hit their published goals. And we do think companies need to be transparent about the challenges they will have in reaching those goals and when they need to revisit or reestablish previously announced goals. That can take courage.

These challenges will grow. ESG reporting is still largely voluntary. The SEC is already on a path toward requiring more ESG disclosures. The increasing regulation of ESG disclosures—shifting from voluntary statements to required disclosures—is on the horizon and should be on the radar of compliance and risk teams.

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