IN FOCUS LITIGATION FINANCE

The Rising Tide of ESG Litigation Finance

Companies now face liability and ESG litigation from all sides

By Steven Andersen

JUMP TO

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As a result of many high-profile forces, the adoption of corporate ESG policies has grown exponentially in recent years. But these policies have opened a new front of liability, and a new frontier of litigation.

One way to track the arc of a concept is to plot its language usage over time. According to the Google Ngram Viewer, a tool that tracks use of words and terms over the past 500 years, the term "corporate social responsibility (https://books.google.com/ngrams/graph?content=corporate+social+responsibility&year_start=1800&year_end=2019&corpus=26&smoothing=3&direct_url=t1 emerged around 1970, but remained obscure until the turn of the century. It's been riding a rocket ever since.

Similarly, the term "environmental, social, [and corporate] governance (https://books.google.com/ngrams/graph?content=Environmental+Social+Governance&year_start=1800&year_end=2019&corpus=26&smoothing=3&direct_ur emerged in about 2005 and has seen an even sharper uptick in usage. As concepts, neither CSR

or ESG are anything new. They trace their origins back to organized labor movements in the mid-20th century, the Vietnam War, and the apartheid era. But they've gained incredible traction over the past decade, with proportionate significance for corporations.

"In the last five years it's gone from 'what is ESG?' to 'why should we care about ESG?' to 'do you have ESG?' to 'why don't you have ESG?'"

Joe Siprut
Founder and CEO
Kerberos Capital Management

A Recent History of ESG Litigation

Historically, most prominent ESG cases were environmental actions brought against large energy companies. No more. With the confluence of social justice movements, the climate crisis, and the global pandemic in recent years, ESG is top of mind for every board of directors. Companies have been held to task to create effective CSR and ESG programs, and most have tried to do so — more than 95% of Fortune 50 companies have formal ESG policies.

But that means they face risk not only for actively perpetrating environmental or social damage, but for not living up the commitments promised in the programs they've built. All of this will lead to more litigation, on everything from labor, to health care, to diversity, to supply-chain disruption — in addition to the long-established environmental litigation exposure.

As a result, litigation finance in the ESG space is widely expected to grow considerably and consistently in the years to come. It would be wrong to call it a trend, as the environmental and social changes that led to reforms and new policies are here to stay. It can, however, seem to some like a case of strange bedfellows.

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"Litigation finance is often thought of as having anti-ESG properties," says Joe Siprut, founder and CEO of Kerberos Capital Management. "My response to that is 'says who?' Fundamentally, that's a misconception. In fact, the opposite is true."

The Positive Power of Litigation Finance

The familiar narrative, Siprut says, is that litigation finance leads to more and more litigation, which is often seen as an inherently bad societal outcome. But, he counters, empowering consumers, injured parties, and other plaintiffs to pursue justice is a demonstrably positive outcome.

"Examples of that would be cases on behalf of victims of gender discrimination, racial discrimination, discrimination based on disabilities, and of course, environmental cases," he says. "Cases on behalf of victims of sexual abuse. Cases on behalf of veterans. Those are all directly and concretely ESG-advancing."

Social benefits aside, the space is rapidly advancing.

"In the last five years," he says, "it's gone from 'what is ESG?' to 'why should we care about ESG?' to 'do you have ESG?' to 'why don't you have ESG?'"

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Business Opportunity Meets Social Good

One of Siprut's goals is to incentivize law firms to pursue ESG cases they otherwise might not.

After 18 years as a practicing lawyer — the time equally split between corporate and plaintiffs' work — he founded Kerberos with a focus on funding law firms that have quality litigation portfolios. From personal experience, he saw that a lot of law firms are focused more on winning cases and attracting clients than on the nuances of how all the financial pieces fit together. He saw the opportunity not only to provide capital, but to provide support with financial adjustments that can help ensure a litigation practice is profitable over time. Part of that, he says, is the types of cases a firm takes on. In that respect, ESG litigation is ascending.

"Ultimately, it has to be a good case," he says. "We're running a business here and we are investing capital. It's not like we're going to make a bad bet because we like the ESG attributes. It has to meet the metrics of any good investment. But to the extent that we can do that and then also capture these ESG outcomes, that's really important."

This, perhaps, is what makes ESG litigation financing a bit of an outlier. Business is business, as it should be. But rarely do pecuniary objectives align with the greater good. Now, and for the foreseeable future, that may just be the case in this space.

"Each one of us — individually as human beings or as a company — we can all only do so much," Siprut says. "But if we all do that much, it adds up to a lot. This is one way in which we're trying to do that and maybe encourage others to do the same." He's pragmatic about the effort, consistently noting that at the end of the day, it comes down to what's most advantageous for

investors.

“As a manager, it’s important to recognize that our investors and clients have constituents they report to who are interested in the ESG properties of their allocations,” he says. “By investing in ESG and providing detailed metrics in our reporting, we empower our investors to build those metrics into their own reporting. I think we’re providing a valuable service as well.”

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