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Live Webinar
December 7, 2022
1:00 pm – 2:00 pm

D&O ISSUES IN ESG AND RECENT CASE LAW DEVELOPMENTS

Source: businessinsurance.com

Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

SPEAKER:

William G. Passannante, Esq.
Shareholder
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William G. Passannante is a nationally recognized authority on policyholder insurance recovery in D&O, E&O, asbestos, environmental, property, food-borne illness, and other insurance disputes, with an emphasis on insurance recovery for corporate policyholders and educational and governmental institutions.

According to clients quoted in Chambers USA, he is touted as, "A terrific policyholder lawyer" and "a tremendous tactician and an incredible trial lawyer." According to Chambers USA, he is the “go-to attorney for high-dollar insurance coverage litigation,” and “knows the industry inside-out.” "Mr. Passannante is well regarded for his client counseling and impressive advocacy, and has the perceptive ability to wade through legalese and identify the most salient and important issues. He relates to his clients with integrity, determination and devotion. He has a good sense of humor and is passionate about his work.“

Mr. Passannante is co-chair of Anderson Kill's Insurance Recovery group. He is also a member of Anderson Kill's Cyber Insurance Recovery group and the COVID Task group. He has represented policyholders in major precedent-setting cases argued in trial and appellate courts throughout the country. Law360 recognized Mr. Passannante as 2013 MVP in the Insurance category, and he has been recognized in Chambers USA in every year since 2006 as a leading insurance recovery attorney. The Legal 500 United States consistency includes him on their elite "Leading lawyers" list and he is recommended for Insurance - advice to policyholders. Since 2010, Mr. Passannante has been selected by his peers for listing in The Best Lawyers in America. He has also been rated "AV® Preeminent™ Peer Review Rated," the top rating, 5.0 out of 5.0, by his peers and was also designated a 2020 Top Rated Lawyer as listed in Martindale Hubbell.

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SPEAKER:

Diana Shafter Gliedman, Esq.
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Diana Shafter Gliedman, a shareholder with Anderson Kill's insurance recovery group, represents policyholders in multi-party, multi-issue insurance coverage litigations, with an emphasis on Comprehensive General Liability Insurance, Directors & Officers Liability Insurance, Employment Practices Liability Insurance and Errors & Omissions/Professional Liability Insurance.

As chair of Anderson Kill's Professional Liability Insurance Group, Diana represents lawyers and law firms, architectural and engineering firms, accountants and accounting firms, brokers, financial institutions and other professional entities seeking coverage under their Professional Liability/Errors & Omissions insurance policies. Working with Anderson Kill's founding partner, Eugene Anderson, Diana helped secure a client victory in the oft-cited case of Rosenberg & Estis v. Chicago Insurance Company. Diana is also a co-chair of the Professional Liability Subcommittee of the Insurance Coverage Litigation Committee of the ABA Section of Litigation, and a member of the Claims and Litigation Management Alliance Professional Liability subcommittee.

Diana is also co-chair of the firm's Hospitality Industry Practice Group, and frequently works with members of the hospitality industry, providing representation and counsel to hotels, casinos, restaurants, and other hospitality franchises. Diana is the editor of Anderson Kill's Hospitality Alert newsletter, which provides hospitality insiders with breaking news and industry information. She is also a member of the firm's COVID Task Group.

SPEAKER:

Raymond A. Mascia Jr., Esq.
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Raymond A. Mascia Jr. is a shareholder in Anderson Kill's New York office and a member of the firm's Insurance Recovery Group and COVID Task Group. Ray represents corporate and governmental policyholders in all types of insurance recovery matters, including matters involving D&O coverage, professional liability coverage, general liability coverage, environmental and asbestos claims, commercial crime insurance, and first-party property and business interruption losses arising from natural disasters and other perils. Over the course of his career, Ray has recovered hundreds of millions of dollars in insurance proceeds for policyholders.

In 2020, Law360 recognized Ray as a Rising Star in the practice area of Insurance, selecting Ray as 1 of 176 attorneys nationwide. The award recognizes those "attorneys under 40 whose legal accomplishments transcend their age." In addition, The Legal 500 USA recognized Ray as a Next Generation Partner in 2020 and as a Rising Star in 2019 while ranking Anderson Kill's Insurance Recovery Group as one the nation's top practices in the category of Insurance: Advice to Policyholders.

Ray regularly writes on insurance topics and is a frequent lecturer on insurance coverage issues nationwide, including at insurance conferences and meetings convened by the Risk and Insurance Management Society and the New York City Bar Association.

Ray also has made significant contributions to public service during his career. He left the firm briefly in 2013 to serve a two-year clerkship for the Honorable Joanna Seybert of the U.S. District Court for the Eastern District of New York. Prior to joining the firm, he served as a judicial intern to the Honorable A. Kathleen Tomlinson of the U.S. District Court for the Eastern District of New York and the Honorable Daniel A. Angiolillo of the New York Appellate Division, Second Department.

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SPEAKER:

Stacy Parker, Esq.
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Stacy Parker is an attorney in the Legal/Claims Group of Aon's Financial Services Group (FSG) in New York. The FSG group designs and negotiates insurance programs for a wide variety of commercial and financial institution clients. Lines of insurance coverage that Stacy specializes on include Directors and Officers Liability, Employment Practices Liability, Transactional Liability, including Representations and Warranties Insurance, Fiduciary Liability, Errors and Omissions Liability and Cyber Liability. Stacy's role focuses primarily on advising, and assisting brokers and clients on a variety of different issues relating to policy placements, wordings, risk management, corporate governance, trends, as well as claims process advocacy. Prior to joining Aon, Stacy was with an insurer in their staff counsel department and then held various senior legal /claims positions for two major insurers. Stacy has been a frequent speaker and published author on a number of legal and insurance topics in this area. She has also developed and presented a webinar and video training for FSG employees. Throughout her career, Stacy has been active in industry events and has also held a number of industry positions including being the former Co-Chair of the ABA, TIPS, Professional Officers and Directors Liability Law Committee. Stacy is admitted to practice law in New York and Connecticut. She earned her JD from Western New England, College of Law, was a visiting student at Hofstra Law, and earned her BA, cum laude, from The University at Albany.

SPEAKER:

R. Damian Brew
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R. Damian Brew is a Managing Director and Claims Advocate in Marsh FINPRO specializing in directors and officers, employment practices liability and professional liability claims and coverage issues. At Marsh & McLennan, Damian has consulted on professional liability claims, including employment practices liability, for a number of the firm's financial institution and commercial clients. He has also worked closely with advisory professionals on policy language and endorsements to obtain the broadest coverage afforded by the current insurance market. Damian joined Johnson & Higgins in 1995 after serving as Senior Claims Counsel at Continental Insurance Company where he specialized in commercial and financial institution directors and officers liability claims. His primary focus at Continental concerned class action claims brought under the federal securities laws. Prior to joining Continental in 1991, Damian was associated with the law firm of Chadbourne & Parke where his practice concentrated on corporate and litigation matters. Damian has spoken at a number of industry and client seminars on D&O claims handling issues and the role of the broker in resolving D&O claims. He also spoke at an ACI Seminar on On-Line Liability. Damian received his J.D. degree from the New York University School of Law in 1988 after earning his B.A. from Colgate University in 1984. He is admitted to practice law in New York.

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2022 UPDATE - D&O LIABILITY INSURANCE FOR ESG LIABILITIES

1. Liability Landscape – The SEC
2. SEC – Number of Potential Cases
3. SEC – Protecting Whistleblowers
4. Social – DEI Shareholder Derivative Actions
5. Social – DEI Derivative Actions Against Boards
6. Social – ESG Disclosures
7. Environment – Climate Change
8. Environment – ESG Disclosures
9. Social – Securities Class Action -- Cost To Shareholders?
10. ESG – Backlash -- Restricting ESG Activities

1. LIABILITY LANDSCAPE: 2022 SEC

The SEC announced on November 15, 2022, that for FY 2022:

- The SEC filed 760 enforcement actions and recovered a record $6.4 billion in penalties and disgorgement, as compared to $3.8 billion in FY 2021.
- Enforcement actions a 9% increase over the prior year.
- 462 new, or “stand-alone," enforcement actions, a 6.5 percent increase.
- 129 actions against issuers allegedly delinquent in required filings with the SEC.
- 169 "follow-on" administrative proceedings seeking to bar or suspend individuals.

Enforcement Actions Filed in Fiscal Years 2017 to 2022

	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
Standalone Enforcement Actions	**462**	434	405	526	490	446
Follow-On Admin. Proceedings	**169**	143	180	210	210	196
Delinquent Filings	**129**	120	130	126	121	112
Total Actions	**760**	**697**	**715**	**862**	**821**	**754**

Standalone Enforcement Actions is a combined count of Civil Actions and Standalone APs.

https://www.sec.gov/files/fy22-enforcement-statistics.pdf

2. SEC – NUMBER OF POTENTIAL CASES

SEC's Office of the Whistleblower

- FY 2022, the SEC issued approximately $229 million in 103 awards, the second highest year
- 12,300 whistleblower tips - The Whistleblower Program received a record number of whistleblower tips alleging wrongdoing in fiscal year 2022.

Source: blog.newscred.com

3. SEC PROTECTS WHISTLEBLOWERS

- SEC charged and penalized a company for requiring certain employees to sign confidentiality agreements and impeding employees from communicating with SEC regarding potential misconduct.
- Separately, the SEC *was* granted summary judgment in matter charging that defendants had illegally conditioned return of investor money on investors' signing agreements that prohibited them from reporting potential securities-law violations. *SEC v. Collector's Coffee*, 19 Civ. 4355 (VM), 2021 U.S. Dist. LEXIS 22216, 2021 WL 5360440 (S.D.N.Y. Nov. 17, 2021).

https://www.sec.gov/news/press-release/2022-206

4. SOCIAL - DIVERSITY (DEI) SHAREHOLDER DERIVATIVE ACTIONS

- *ESG Securities Lawsuit against Wells Fargo*
  - Complaint alleges commitment to diversity
  - But alleges "fake job interviews."
  - Alleges conduct caused government enforcement.
  - Thus, materially false financial statements.
  - SEC and DOJ have undertaken inquiries (https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/sec-filings/2022/third-quarter-10q.pdf)
- *Workplace diversity*
- *Impact*
  - Companies adopting Diversity, Equity and Inclusion (DEI) programs will face scrutiny relating to investor disclosures.
  - Implementation issues or failures.

https://www.nytimes.com/2022/05/19/business/wells-fargo-fake-interviews.html

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5. SOCIAL – DEI DERIVATIVE ACTIONS AGAINST BOARDS

- Theories – Boards have no diverse members, and public statements about diversity goals and initiatives are contrary to practice violating either fiduciary duty or the duty of candor.

- Cases – NortonLifeLock, OPKO Healthcare, Facebook, Oracle, and Danaher

- Status – Virtually all of the (less than a dozen) cases appear to have been dismissed.
  - In a number of these matters the bylaws of the corporation contain a Delaware Chancery Court forum selection clause, which would result in state law claims being dismissed in favor of the Delaware Chancery Court.
  - Similarly, several of the cases hold that the 'demand futility' prong of a derivative action was not met and that therefore the complaint should be dismissed.

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6. SOCIAL - ESG DISCLOSURES

- SEC formed an ESG Task Force in March 2021.

- SEC asserted "materially misleading statements and omissions about its consideration of ESG principles" in making investment decisions for certain mutual funds.

- "Investors are increasingly focused on ESG considerations when making investment decisions," and the SEC "will hold investment advisers accountable when they do not accurately describe their incorporation of ESG factors into their investment selection process." - Adam S. Anderton, Co-Chief of the SEC Enforcement Division's Asset Management Unit.
  (https://www.sec.gov/news/press-release/2022-86)

- **Representations Regarding Compliance with Religious Law.** SEC determined that a robo-advisor "marketed itself as providing advisory services compliant with Islamic, or Shari'ah law… Despite these representations, the order finds that [they] did not adopt and implement written policies and procedures addressing how it would assure Shari'ah compliance on an ongoing basis."
  (https://www.sec.gov/news/press-release/2022-24)

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7. ENVIRONMENT – CLIMATE CHANGE

- *Exxon Mobil*

Engine No. 1, which owns a tiny fraction of Exxon's stock, elected three independent directors to Exxon Mobil's board. Sought commitment to carbon neutrality, aimed at "sustainable value creation" and effectively bringing its emissions to zero. They control a quarter of Exxon's 12-person board.

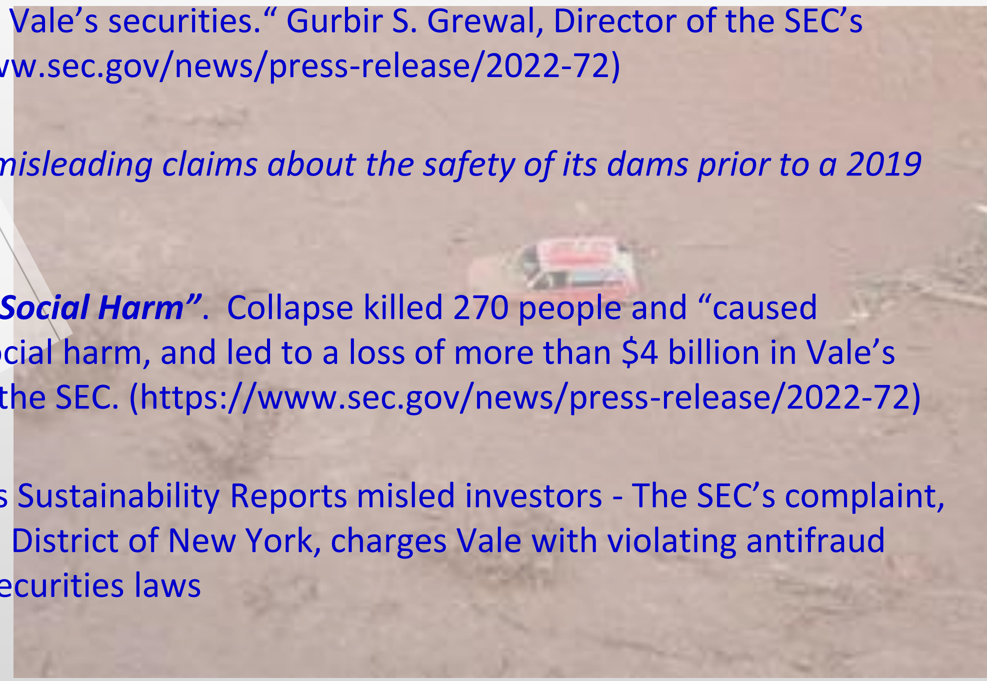
"Activist Likely to Gain Third Seat on Exxon Board," Cynthia Williams & Alex Cooper, Fiduciary Duties and Climate Change in the United States, Sarah Barker, (Commonwealth Climate and Law Initiative, October 2021) available at https://ccli.ubc.ca/wp-content/uploads/2021/10/Fiduciary-duties-and-climate-change-in-hte-United-States.pdf

(https://engine1.com/transforming/articles/exxon-mobil-one-year-later/)

The SEC and DOL also update guidance related to climate risk. Department of Labor provided rule guidance to ERISA Plan Fiduciaries regarding their ability to select ESG investments without breaching their fiduciary duty. (Press Release, DOL, Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (Nov. 22, 2022), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.)

8. ENVIRONMENT -- ESG DISCLOSURES

- *On April 28, 2022 SEC charges Brazilian Mining Concern*
  - Misleading investors on ESG disclosures prior to dam collapse alleged
  - ***Investors Rely On ESG Disclosures.*** "Many investors rely on ESG disclosures like those contained in Vale's annual Sustainability Reports and other public filings to make informed investment decisions," and "By allegedly manipulating those disclosures, Vale compounded the social and environmental harm caused by the Brumadinho dam's tragic collapse and undermined investors' ability to evaluate the risks posed by Vale's securities." Gurbir S. Grewal, Director of the SEC's Division of Enforcement. (https://www.sec.gov/news/press-release/2022-72)
- *Vale SA alleged to have made false and misleading claims about the safety of its dams prior to a 2019 collapse*
  - ***"Immeasurable Environmental And Social Harm"***. Collapse killed 270 people and "caused immeasurable environmental and social harm, and led to a loss of more than $4 billion in Vale's market capitalization," according to the SEC. (https://www.sec.gov/news/press-release/2022-72)
- SEC alleged that ESG disclosures in Vale's Sustainability Reports misled investors - The SEC's complaint, filed in U.S. District Court for the Eastern District of New York, charges Vale with violating antifraud and reporting provisions of the federal securities laws
  - Complaint filed in E.D.N.Y.



Source: washingtonpost.com

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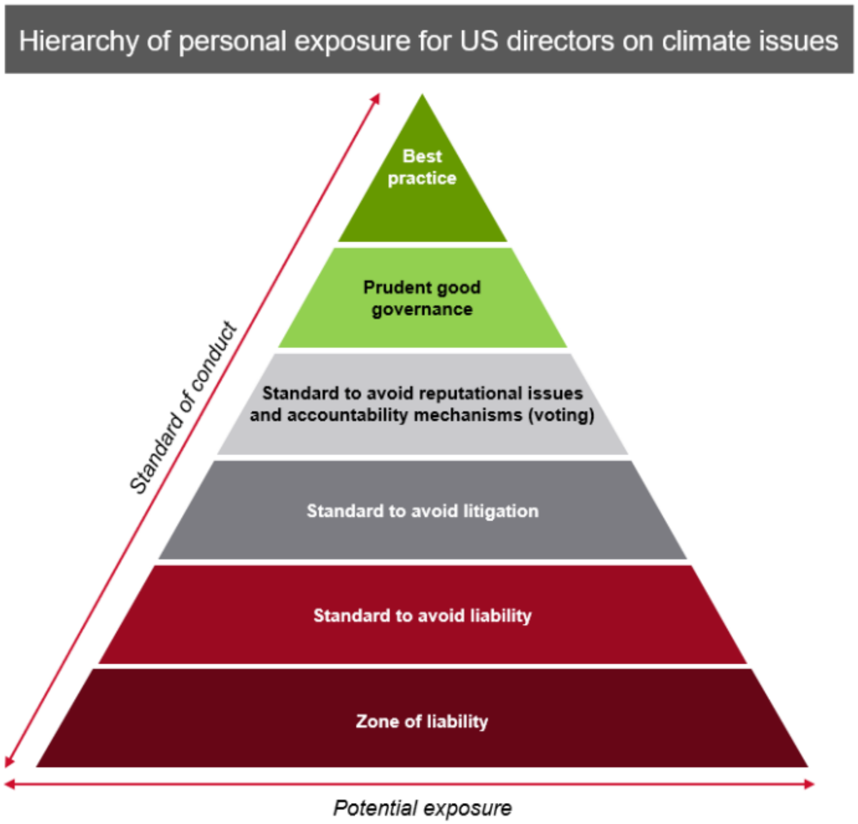
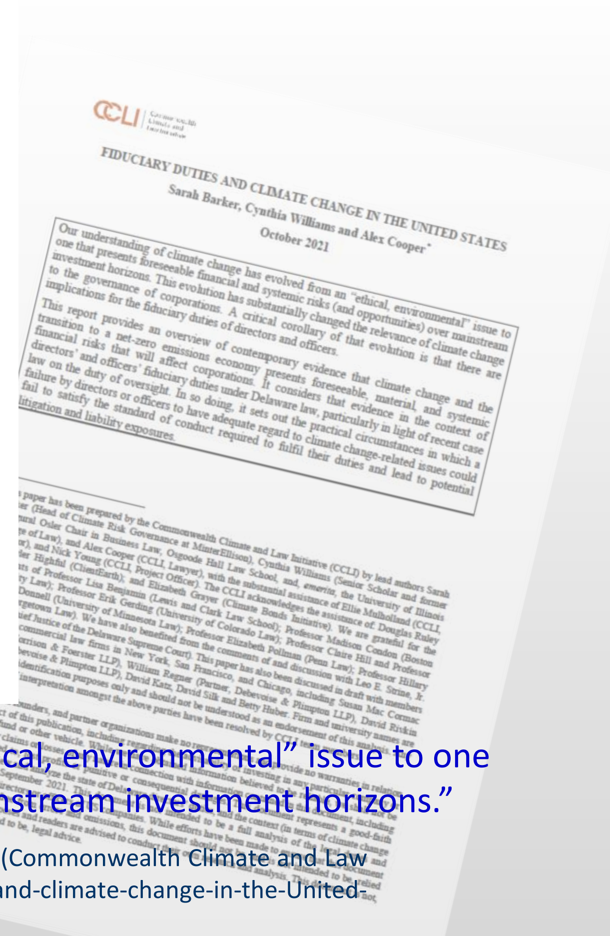
8. ENVIRONMENT – CLIMATE CHANGE (CONTINUED)




FIDUCIARY DUTIES AND CLIMATE CHANGE IN THE UNITED STATES

Sarah Barker, Cynthia Williams and Alex Cooper*

October 2021

Our understanding of climate change has evolved from an "ethical, environmental" issue to one that presents foreseeable financial and systemic risks (and opportunities) over mainstream investment horizons. This evolution has substantially changed the relevance of climate change to the governance of corporations. A critical corollary of that evolution is that there are implications for the fiduciary duties of directors and officers.

This report provides an overview of contemporary evidence that climate change and the transition to a net-zero emissions economy presents foreseeable, material, and systemic financial risks that will affect corporations. It considers that evidence in the context of directors' and officers' fiduciary duties under Delaware law, particularly in light of recent case law on the duty of oversight. In so doing, it sets out the practical circumstances in which a failure by directors or officers to have adequate regard to climate change-related issues could fail to satisfy the standard of conduct required to fulfil their duties and lead to potential litigation and liability exposures.

CCLI Report notes, "Our understanding of climate change has evolved from an "ethical, environmental" issue to one that presents foreseeable financial and systemic risks (and opportunities) over mainstream investment horizons."

Source: Cynthia Williams & Alex Cooper, *Fiduciary Duties and Climate Change in the United States*, Sarah Barker, (Commonwealth Climate and Law Initiative, October 2021) available at https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States_Summary.pdf

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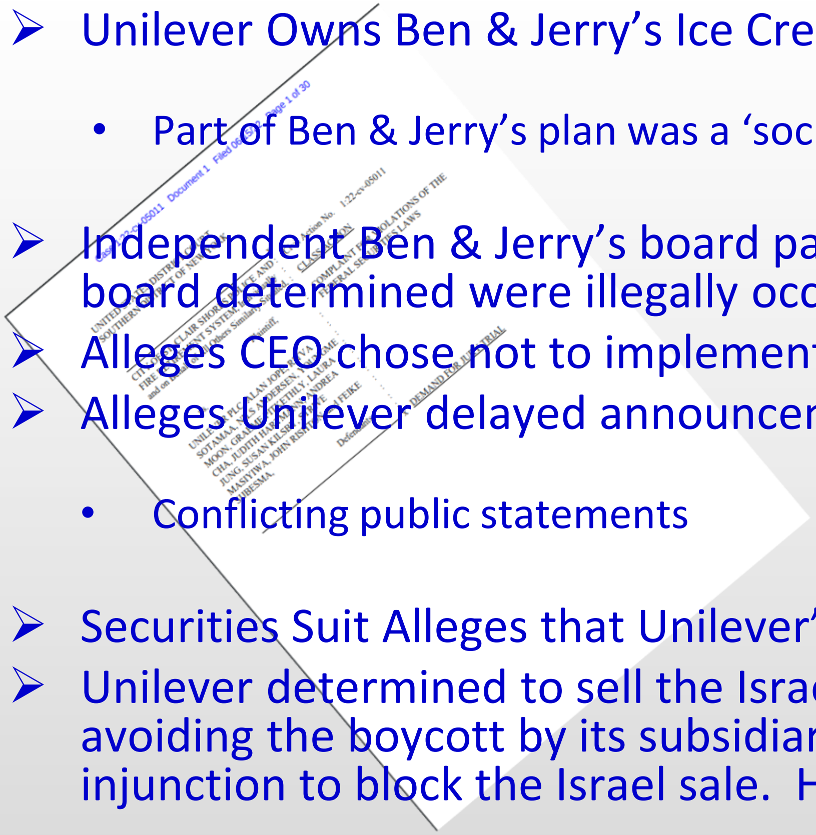
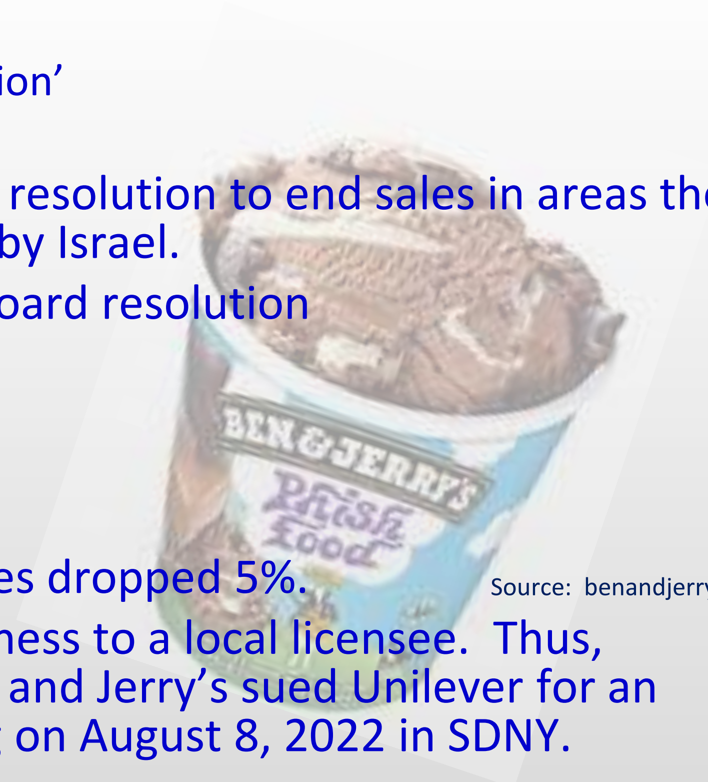
9. SOCIAL -- SECURITIES CLASS ACTION COST TO SHAREHOLDERS?





- Unilever Owns Ben & Jerry's Ice Cream
  - Part of Ben & Jerry's plan was a 'social mission'
- Independent Ben & Jerry's board passed a resolution to end sales in areas the board determined were illegally occupied by Israel.
- Alleges CEO chose not to implement the board resolution
- Alleges Unilever delayed announcement
  - Conflicting public statements
- Securities Suit Alleges that Unilever's shares dropped 5%.
- Unilever determined to sell the Israel business to a local licensee. Thus, avoiding the boycott by its subsidiary. Ben and Jerry's sued Unilever for an injunction to block the Israel sale. Hearing on August 8, 2022 in SDNY.

Source: benandjerrys.pt

https://news.bloomberglaw.com/esg/ben-jerrys-israel-fight-carries-esg-lesson-for-deal-makers'

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10. ESG – BACKLASH
RESTRICTING ESG ACTIVITIES

- FL Pulls $2 Billion out of Blackrock. Follows LA.
- 17 States, 22 pieces of legislation proposed or enacted
- Limit ability of state government and state retirement plans to do business with entities “boycotting” industries based on ESG criteria.
- AZ, FL, ID, IN, KY, LA, MI, MN, ND, OH, OK, PA, SC, SD, TX, UT, WY, WV
- One LA position statement opines that ESG is contrary to state law on fiduciary duty.
- For example, TX prohibits investment in companies that boycott fossil-fuel and the firearms and ammunition industries. TX has divestment guidelines for “listed companies.”

Source: alpha-sense.com

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- WHAT IS ESG RISK?
- WHY IS ESG IMPORTANT IN A D&O CONTEXT?

Source: esgriskguard.com

WHAT IS THE CURRENT U.S. AND GLOBAL REGULATORY FRAMEWORK FOR MAKING ESG DISCLOSURES?

Source: privatefundsco.com

➢ HOW HAS THE CURRENT ESG LANDSCAPE AFFECTED THE DIRECTORS & OFFICERS INSURANCE MARKET?

Source: creatingfutureus.org

Source: hroresources.com

WHAT ARE THE SPECIFIC RISKS FACING DIRECTORS AND OFFICERS OF PUBLIC COMPANIES WITH REGARDS TO ESG INITIATIVES AND ANTI-ESG BACKLASH?

Source: corporatecomplianceinsights.com

- WHAT SHOULD COMPANIES BE AWARE OF WHEN PURCHASING D&O INSURANCE?
- ARE THERE SPECIFIC EXCLUSIONS, CONDITIONS, DEFINITIONS OR INSURING AGREEMENTS THAT MAY HAVE AN IMPACT ON COVERAGE FOR ESG-RELATED CLAIMS?

Source: youtube.com

➢ IN ADDITION TO D&O INSURANCE, WHAT OTHER TYPES OF POLICIES MAY PROVIDE PROTECTION FOR ESG-RELATED CLAIMS?

Source: wink24news.com

QUESTIONS?

THANK YOU.

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