UNDERSTANDING SECURITIES CLASS ACTIONS:

Promoting Good ESG

goal

UNDERSTANDING SECURITIES CLASS ACTIONS: PROMOTING GOOD ESG

Welcome and thank you for downloading our guide to understanding the impact of class actions on corporate ESG behaviour! In this guide we hope to give you some background information and pointers on navigating your way through how to approach class actions by providing a brief history and commentary on specific cases.

The roots of ESG investment

It may come as a surprise in today's corporate world that environmental, social and governance-led investment, far from being a 21st century catchphrase, has roots going back hundreds of years. The fact that business transactions can be a genuine catalyst for change certainly isn't a modern concept.

In 1833 the Slavery Abolition Act banned the buying and selling of slaves in the UK, with compensation awarded for the loss of these 'business assets'. However, as early as 1080, William the Conqueror acted to ban the slave trade running between Bristol and Ireland, and by 1102, the ecclesiastical Council of London decreed 'let no-one dare hereafter to engage in the infamous business . . . of selling men like animals.'

In 1887 Lever Brothers bought 56 acres of land in Cheshire for a new factory for its soap-making business, and at the same time built a village for the factory workers which became Port Sunlight, a model for industrial housing. It included a cottage hospital, schools, concert hall and art gallery, and the company also introduced welfare schemes and pension plans. The ethic was that rather than profit sharing, workers were given decent housing and amenities to provide security and comfort. However, workers at foreign subsidiaries of the company were not extended the same privileges.

In 1921, a scion of the Rowntree confectionery company published 'The Human Factor in Business' which recommended industrial regulations, pensions schemes and employee education. Joseph Rowntree's premise was that workers 'should never be merely regarded as cogs in an industrial machine, but rather as fellow workers in a great industry.'

Fast forward to the 1960s and '70s and influential movements begin to hit the headlines, including the rights of indigenous peoples and minorities such as women and people of colour, as well as the Green Power Movement; all of these have grown into lobbying groups which have powerful influence across the globe. The worldwide revulsion at the South African apartheid regime led to one of the first instances of collective withdrawal from investment for ethical reasons.

ESG and the corporate landscape

The specific term ESG is believed to have been first used in a 2004 report entitled 'Who Cares Wins' which was produced jointly by financial institutions at the behest of the United Nations. In the ensuing twenty years, ESG-led investment has grown exponentially. Alongside this has grown the incidence of class action lawsuits, as stakeholders become aware they have the authority to hold even the most powerful organisations to account and effect genuine change. Businesses are waking up to the importance of adopting corporate ESG policies, and the power of social media and instant knowledge-sharing means these have to be totally transparent and accountable or run the risk of incurring a class action.

Class action lawsuits are civil lawsuits undertaken by a group of people who have suffered a common loss or injury. This collective power, where plaintiffs can share knowledge, experiences and finances, is a highly effective way of holding previously untouchable companies to account. Class actions can address illegal business transactions, financial mismanagement or any aspect of fraudulent practices, but lately the spotlight has been turned to ESG policies, with a particular focus on sustainability issues.

Major class actions

The number of internationally known companies which have been the subject of ESG-related class actions is growing rapidly. In 2022, CBS Corporation agreed to pay out $14.7 million to end claims from investors that allegations of sexual misconduct surrounding its CEO had caused its stock price to plummet. Google has had a class action filed for data privacy breaches, and Danske Bank for money laundering. Opioid producer Depomed underwent class actions by investors seeking to recover damages caused by defendants' violations of the Securities Exchange Act 1934.

The number of opioid addiction class actions like these is also increasing. Right at the end of 2023, the US consulting firm, McKinsey & Co, agreed to a settlement of $78 million following a class action by health benefit plans and insurers. It was alleged that the spiralling drug crisis was exacerbated by deceitful marketing strategies created by McKinsey; these assisted drug manufacturers like Purdue Pharma, which makes OxyContin, to increase the sales of painkillers. Insurers claimed these tactics forced them to pay for prescription opioids, instead of non-addictive drugs which were safer and cost less, such as over-the-counter medication, and that subsequently they had to pay for resulting addiction rehabilitation.

This case illustrates why businesses must examine every single aspect of their ESG policies. The standards to which they aspire must apply not only to them, but to organisations with which they work, such as marketing companies, accountants and other financial services, lawyers, IT providers and all members of the supply chain and onward sales process. Thorough scrutiny of these should be as much a part of company policy as price and quality assessments.

The dramatic rise in investment over the last few years in artificial intelligence, cryptocurrencies and other cyber advancements has brought its own challenges to the business investment sector. Its subsequent decline during 2022 has contributed to a corresponding increase in the filing of securities class actions, typically launched by investors who allege they were encouraged to purchase digital assets by unsubstantiated claims about their algorithmic stability and the returns which were guaranteed.

Major class actions continued...

Environmentally driven class actions are arguably the fastest-growing category. These include those challenging unfair business practices and unsubstantiated advertising claims such as ‘greenwashing’, the term used when a company misrepresents its environmental policies, environmental regulation implications, and irregularities concerning emission reductions, human rights abuse, clean technology, stewardship responsibilities, corporate sustainability and energy conservation. Institutions keen to demonstrate that they invest responsibly will resort to a securities class action to defend their own reputations if problematic information subsequently comes to light.

In 2021, the UK published the Green Claims Code which was designed to enable UK businesses to check whether their environmental claims stood up under British law. It states that such claims must be substantiated, truthful and accurate, clear and unambiguous, lay out all the relevant information with no omissions, ensure comparisons are fair and meaningful, and consider the full life cycle. The latter point emphasises the fact that consumers are interested not just in the sustainability of the finished product, but in every stage of the supply chain and subsequent production; the sourcing and purchase of raw materials, treatment of indigenous peoples and local residents, manufacturing methods, reuse and recycling strategies and working conditions for employees.

The value of transparency

The driving force behind every corporate ESG policy is the necessity for complete honesty and transparency. In this age of instant global communication, the rapid exchange of information and ideas has undoubtedly made filing class actions easier; on the environmental front, worldwide activism on climate change and a host of global inequalities means that plaintiffs are highly knowledgeable on their subjects. A company's ESG policies can no longer pay lip service to ideals while being a smokescreen for inaction.

A major securities class action was launched against the Star Entertainment Group in Australia over its purported failure to disclose money laundering links to organised crime; the casino company was subsequently deemed unsuitable to hold a licence to operate a casino in New South Wales and Queensland. It's alleged that this disclosure caused the company's stock price to plummet; the class action alleges that Star made misleading representations as well as failing to comply with its continuous disclosure obligations as an ASX-listed company, breaching relevant provisions of the Corporations Act 2001 and contrary to the interests of shareholders.

Lack of transparency also led to a securities class action filed against Home Point Capital Inc, alleging violations of the Securities Act 1933, specifically that the offering documents associated with a public share offering in 2021 included statements that Home Point's wholesale mortgage lending operations were low cost and efficient, and misleadingly omitting to state the company's expectation that interest rates would increase and affect wholesale margins. Consequently, when the 2021 Q1 results were announced, Home Point's stock price fell nearly 18%, resulting in financial loses to the class members.

A class action against Docusign alleges that defendants made false and misleading statements which failed to disclose that the Covid-19 pandemic actually had a positive effect on its business as opposed to a negative one, and downplayed the impact that a return to 'normal' post-pandemic business would have on its growth. It is alleged that the defendants' public statements were materially false and/or misleading at all relevant times. Docusign's share price fell by more than 42%, causing significant losses for investors.

The value of accountability

This accountability is a genuinely positive course of action, enabling businesses to build trust with investors and stakeholders, make informed decisions and spur continuous improvement. A lack of clarity on ESG issues could indicate poor management and increased risk, with the subsequent negative effect on share value and reputation.

There is also increasing regulatory compliance with stricter rules about divulgence. Bodies such as the Sustainability Accounting Standards Board (SASB) provide clearly defined guidelines for different industries to assist in the disclosure of finance-relevant ESG information. The Global Reporting Initiative (GRI) offers sustainability reporting standards which cover topics including biodiversity, tax, waste, emissions, diversity and health and safety, designed to help businesses, investors, and policymakers arrive at decisions which support sustainable development. GRI was set up in the same year as the Kyoto Protocol was signed, when 192 countries pledged to 'commit industrialised countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets'.

Company ESG ratings are becoming a useful source of information and provide reassurance to investors that responsible corporate governance is high on the agenda. It's a point of pride for a reputable company, and the flipside is that a securities class action is quite rightly no longer seen as a stigma for the parties involved in bringing the lawsuit. Previously it could be a reputational gamble, but now it's seen as a principled undertaking to hold an organisation to account for the benefit of everyone involved.

What does this mean for investors?

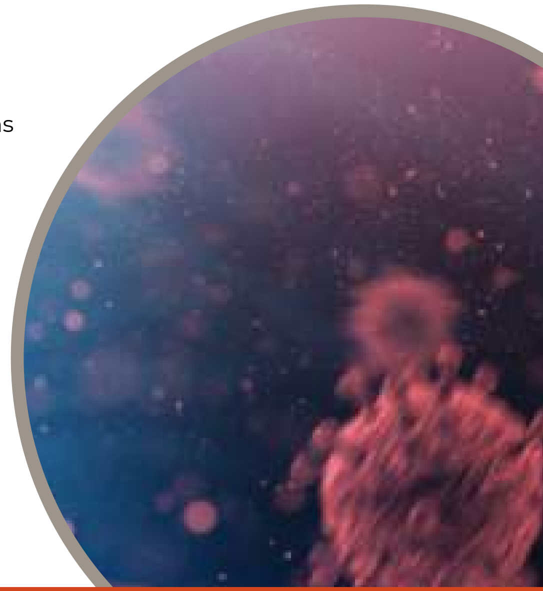
Organisations now know their people and working practices will be held under a microscope by stakeholders and campaigners, and the threat of a class action lawsuit is forcing companies to scrutinise their behaviour and ensure their ESG policies are met consistently and across the board.

However, a thorough initial examination of the business while ESG targets are identified and worked towards will no longer suffice; the resulting data must be monitored continually to ensure it's up to date and constantly being reviewed and improved. In addition, due diligence should obviously be carried out for the organisation and its suppliers, but this must exhaustive. Failure to disclose accurate and truthful information about ESG policies could lead to financial penalties as well as a damaged reputation. The excuse that a supplier didn't tell the truth about the provenance of its merchandise will carry no weight in a resulting class action.

Businesses which have a good relationship with suppliers and an open and mutually communicative way of working are more likely to have compatible ESG goals. Research has shown that close examination of ESG data can be helpful in recognising a supplier which may prove to be an unreliable and inappropriate partner, not only in terms of ESG goals but also in general business practices. Ethical investing has become the norm rather than the exception as fund managers prioritise ESG in their investment strategies, both as a practical business decision and at the request of their clients.

The COVID-19 pandemic created a sea change in employees' rights and working conditions. The resulting tsunami of job losses and revisions in working conditions has placed increased emphasis on companies to acknowledge responsibility for workers' rights, employee health, mental health and job security.

A substantial amount of class action lawsuits subsequently launched, following the lifting of restrictions, relating to alleged safety violations and dereliction of duty during the pandemic. The lack of transparency about PPE availability and effectiveness is a particular issue.



What does this mean for investors?

Securities class actions have been launched by stakeholders who have come to realise the extent of possibly negligent decisions taken by businesses during the pandemic; the sectors which appear to have been hit hardest are healthcare, care, public sector, hospitality and retail.

The number of class actions post-COVID has also been a wake-up call to organisations to accept greater responsibility for the wellbeing of their employees, to offer a range of more flexible working options such as working from home or hybrid working, and to ensure these improvements are enshrined in ESG policies and made available for institutional investors to monitor.

The effects of these policies and the resulting spectre of a class action lawsuit on global investment can't be underestimated and continue to gather momentum.

Here at Goal Group, our securities class action recovery service helps to reclaim financial losses from owning shares in a company where there has been mismanagement or unlawful behaviour. As a result, we see every day the damaging results of non-compliance with ESG policies and, conversely, the positive effects that genuine commitment to them can provide.

5 steps to claiming your rightful returns

Identifying opportunity

There are thousands of sources which provide information on established and upcoming class actions.

However, the challenge is knowing which sources are going to be the most valuable. Most of these will focus on country specific actions and therefore do not provide a global overview.

When dealing with other markets, further difficulties present themselves in that most of the information will only be available in the local language and require translation along with an element of legal expertise to understand the processes, filing requirements and market nuances.

Identifying eligibility – sounds simple right?

You've found a security you invest in, with a class action against it and want to participate. What do you do next? The next stage is to uncover the formula, detailed in the class period information which will calculate a recognised loss of how much you are owed. You would expect it to be a simple formula of Y x Z = winning.

However, most calculations are lengthy and complex (imagine Sheldon's whiteboard from The Big Bang Theory) and also take into account other elements such as buys, sells, trades, swaps and holding periods. Other considerations include establishing whether you are comfortable, depending on the case type. For example, settled class actions are much simpler than lead plaintiff as the case has been settled and the settlement will be distributed pro-rata to those who enter into the claim for the relevant class period.

Understanding market processes

Class actions are handled differently in every market, so understanding the filing process and other nuances is critical to ensuring successful claims.

The case documents will need to be studied to understand the process, filing method and expectation of payment timeframes. In this process, deadlines will often change as settlements can take years to be reached, by which time, you may well have forgotten you even filed.

Making the decision to file

You know you're eligible, you know the process to file and have determined you are comfortable proceeding with the case type and have procured the relevant data to back the claim. All that needs to be done now is to complete the forms and file the claim via the appropriate channels - usually a claims administrator. Sometimes, there may be competing cases where two separate law firms are presenting the case for settlement, in which case it is important to understand the process with all parties to ensure you make the right decision.

Show me the money

Once the claim has been filed, all you need to do is answer any potential follow up queries, be prepared to provide supporting evidence to prove eligibility (not always needed but can happen occasionally) and sit back and wait for the payment to be made. As mentioned previously, it is worth considering that settlements can take months, even years to pay out, so make sure you have a note in the diary to follow up if you haven't heard anything. Pre-covid, claims would take up to 18-21 months to settle, but post-Covid, timeframes have increased and, in some cases, almost doubled.

The Goal Group difference

A recent finalist in the ESG Initiative category at the Asset Servicing Times Industry Excellence Awards, Goal has been a pioneer in ESG action. We are committed to the UN Principles for Responsible Investment and our company governance policy conforms to ISO 27001; we were one of the first firms to receive this and we have maintained it for nearly ten years.

As part of our ESG engagement, we recently undertook a major survey of businesses to discover the challenges they are facing in relation to ESG policy. We were excited to support an industry-wide initiative in cooperation with ISSA, FIS and Proxymity – 'Proxy voting and class actions: today's ESG challenge' – designed to provide detailed, statistical clarity on how and where we can scale together to support increased shareholder stewardship. The survey allowed participants to benchmark their own strategy with their peers, helping to leverage insights from across the globe, provide fresh data on progress to date, the key drivers and disruptors, and perspectives on future trends and challenges.

The key findings included robust metrics on the effectiveness of the industry's ability to foster shareholder engagement, including automation of processes, timelines and costs of communications, and ensuring responses to proxy proposals and class action from shareholders. Shareholder governance emerges as a crucial part of investment management decision-making.

Securities class action recovery services

Our securities class action recovery service involves constant interaction with company shareholders, and we recommend unambiguous information-sharing with them as a key part of ESG strategy.

Shareholders are major drivers of ESG policy, and we consistently recommend to clients that good governance involves the responsible harnessing of proxy voting power. We work closely with lawyers acting on behalf of asset managers, pension funds, hedge funds, investment banks, private banks, and prime brokers, and we manage the entire process from the initial stages to the recovery of claims.

It's particularly important for institutional investors, who have collective influence and authority, to participate in securities class actions. Fund managers have a fiduciary duty to manage risk and maximise the value of their client's assets which can only be done if the companies in which they invest are financially and ethically transparent. Embarking on a class action shows a fund's investors that their manager is willing to safeguard their finances by challenging unscrupulous behaviour which has led, or could lead, to monetary loss.

The process of embarking on a class action is a complex and lengthy one, requiring a high level of expertise. Why not contact us and find out how we can help?

Scan to connect with our

CRO

Vicky Dean

Sources

CBS:
CBS Settles Investor Class Action for $14.7M - Top Class Actions

Google:
Lloyd v Google LLC - data protection class action claims | DLA Piper

Depomed:
Goldberg Law PC Announces the Filing of a Securities Class Action Lawsuit against Depomed, Inc. -August 18, 2017 at 11:16 pm EDT | MarketScreener

McKinsey:
McKinsey to pay $78 million in US opioid settlement with health plans | Reuters

Star Entertainment:
Star Entertainment Group Limited Class Action | Slater and Gordon (slatergordon.com.au)

Home Point Capital:
Home Point Securities Settlement

Docusign:
ALERT: DocuSign, Inc. Investors with Substantial Losses Have Opportunity to Lead Class Action Lawsuit - DOCU | Business Wire