

Is ESG Litigation the New Tool to Rein in Corporations?

As ESG litigation is gathering momentum, lawyers are wondering if they are seeing the crest of a new wave of public nuisance claims.

BY CHRISTINE SCHIFFNER

The National Law Journal has launched Inadmissible, a regular Q&A series with Washington, D.C., legal professionals. The interviews will 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

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This week, Covington & Burling partner Laura Flahive Wu discusses a growing trend of public nuisance claims in the environmental, social and corporate governance space. She believes that plaintiffs firms and consumer advocacy groups increasingly push for litigation over a variety of ESG matters.

When talking about a new wave of public nuisance claims related to environmental, social and governance matters, what issues do you see?

ESG litigation has gathered a lot of momentum and attention, and it's blurring the lines

between regulatory and budgetary policy, on the one hand, and civil tort claims, on the other. Plaintiffs deploying novel claims to attack businesses for their alleged ESG-related

deficiencies, and also seeking redress for purported harms to so-called public rights. And I've been thinking about this from the litigation trenches and I wondered whether ESG litigation—as turned up recently—is truly a trend or whether it is the crest of this [public] nuisance wave.

State attorneys general, public interest groups, and consumer advocates have given renewed attention to public nuisance claims. While many of these claims have been unsuccessful over the last several decades, they have been rightly noted for the significant risk they



Laura Flahive Wu, a partner at Covington & Burling.

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pose for a wide variety of litigation targets.

In your advisory role with clients — what do you recommend, what kind of public nuisance claims should they be aware of and how should they prepare to mitigate risks?

Many Covington clients have faced novel [public] nuisance claims, and we have focused on aggressive and creative litigation strategy to show both the legal and the factual faults in the claims our clients have faced.

One of the series of cases that we've been involved in has been the opioid litigation. In opioid litigation, plaintiffs have brought nuisance claims against a number of our clients. One of our clients is a wholesale distributor of a variety of medications including prescription opioids. Plaintiffs brought novel claims that the wholesale distribution of a federally regulated product, which had to be prescribed by licensed doctors and dispensed by licensed pharmacies, constituted a public nuisance.

Our team tried a case last summer in the Southern District of West Virginia and we're headed back there at the end of next week for a trial in state court.

What we're seeing now is an increase in a number of nuisance cases brought by plaintiffs of all kinds, state AGs, private plaintiffs, consumer advocacy groups — all alleging public nuisance. Particularly noteworthy are cases brought against technology companies and

consumer product companies for their use of plastics. Coca-Cola, for example, was recently sued by an environmental group in California state court on the theory that plastic waste, in particular microplastics from their products, is causing global pollution.

Those are some of the trends that we're seeing—some really kind of new and creative theories rooted in the traditional nuisance doctrine.

Looking ahead, what could be the strategy when working with clients to mitigate risks?

The type of novel nuisance claims that we are seeing now are primarily based on the downstream effects of an individual's use of a product. These claims are asserting various attenuated theories of causation and liability.

What's the strategy? Focus on the elements of the nuisance claims. Nuisance is not intended to be an aggregator of individual claims or a public budget tool. The elements of a public nuisance claim—whether it be a common law claim or a statutory claim—highlight the claim's boundaries. In particular, plaintiffs' legal theories can't nullify the requirements of causation, which are common to nuisance claims across the country and its focus on causation is critical to the nuisance inquiries. Going back to the basics and looking at the actual elements of the claim, divorced from the public policy consideration is critical to the defense of a nuisance claim.