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2022-2023 National Litigation Trends  
**Danny Van Horn**

# Hot Areas:

**(1) ESG Litigation**

**(2) Employment & ADA  
Claims**

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**(3) Covenants Not to  
Compete and  
Associated Business  
Torts**


**(4) Products Liability**

**(5) Commercial  
Litigation / Class  
Actions**

**(6) Antitrust**



# ESG Litigation

- Securities Based Claims (statements about ESG commitments in securities filings)
  - Consumer Based Claims (labeling a package as 100% recycled when it is not)
  - Employment Based Claims (public statements not matching either behavior or results)
  - Public Nuisance Based Claims (a corporate practice generally damages the environment)
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# ESG Litigation: Securities Based Claims


## “Greenwashing” - New SEC Proposed Rules

- *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832 (N.D. Tex. 2018) (denying a motion to dismiss claims that Exxon made material misstatements about proxy costs for carbon)
  - *In re Vale S.A. Sec. Litig.*, 2020 WL 2610979, at \*9 (E.D.N.Y. May 20, 2020) (alleging securities law claims that a mining accident demonstrated a Brazilian mining company’s sustainability and safety claims were misleading)
  - *Jochims v. Oatly Group AB*, 1:21-cv-06360 (S.D.N.Y. Oct. 26, 2021) (order granting motion to dismiss claims that an oat milk company made materially false and misleading statements about the company’s sustainability)
  - *Goldman Sachs Group, Inc. v. Arkansas Retirement System*, 141 S.Ct. 1951 (2021) (generic statements may not impact stock price)
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# ESG Litigation: Consumer Based Claims

- *Swatz v. Coca-Cola Company et al.*, 3:21-cv-04643 (N.D. Cal. Nov. 18, 2022) (allegation that Dasani bottles were 100% recycled was false advertising – case dismissed on “common sense” test)
- *Smith v. Keurig Green Mountain, Inc.*, 2020 WL 5630051 (N.D. Cal. 2020) (motion to dismiss denied permitting warranty and consumer fraud claims to move forward on allegation that K Cup pods are “recyclable”)
- *Lee v. Canada Goose US, Inc.*, 20-cv-9809 (S.D.N.Y.) (class action related to the sourcing of coyote fur in jackets pending on consumer protection claims, unjust enrichment and misrepresentation).

# ESG Litigation: Employment Based Claims

- *California Department of Fair Employment and Housing v. Tesla*, 22-cv-006830 (Cal. Supr. Ct. 2022) (claims of rampant racial discrimination and harassment – Tesla’s ESG statement cited in complaint)
  - European Union “audits” of company pay systems to look for gender based wage differentials based on ESG statements
  - UK gender gap reporting
  - *Ardlan v. Wells Fargo & Company*, 3:22-cv-03811 (N.D. Cal.) (securities claim that Wells Fargo allegedly falsified records as to the percentage of applicants interviewed who were diverse – 50% rule).
  - Alien Tort Statute (child labor and human trafficking) & Traffic Victims Protection Act
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# ESG Litigation: Public Nuisance Claims


- *Boulder County et al v. Suncor Energy and Exxon Mobil Corp.*, - D. Colorado, 10<sup>th</sup> Cir. and Colorado state court Boulder sued Suncor and Exxon Mobil under public nuisance theories for climate change related infrastructure costs. Claim survived every motion to dismiss thus far.
  - PFAS MDL (D.S.C.)
  - *People v. ConAgra Grocery Prod. Co.* (lead paint public nuisance claim that resulted in \$1.15 billion abatement fund)
  - *Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) (public nuisance judgment reversed)
  - *City of Trumbull v. Perdue Pharmaceuticals*, 18-op-35032 (N.D. Ohio) (opioids as a public nuisance)
  - *Earth Island Institute v. Crystal Geyser Water Co.*, 20-civ-01213 (Cal. Supr. Ct. 2020) (claim that the company's plastic packaging constitutes a public nuisance).
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# Employment Claims & ADA

- Total employment based discrimination claims are flat or decreasing.
  - However, ADA/disability claims are on the raise.
  - Echo from the pandemic – what constitutes being perceived as having a disability and what constitutes a reasonable accommodation.
  - Work from home policies and terminations.
  - Increased hostility to mandatory arbitration of employment claims.
  - “Silenced no more” and related statutes.
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# Covenants Not to Compete & Business Torts

- Increased employee movement – layoffs, reductions in force, return to work policies
  - Increased hostility to covenants not to compete – Biden administration and FTC rule making
  - Uptick in restrictive covenant cases being filed and injunctive relief being granted
  - Greater need now than ever but also need to be reasonably narrow
  - Trade secrets in biologics and biosimilar products
  - Increase in “fair use” copyright cases and novel trademark theories (“e.g. “Queen of Christmas”)
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# Products Liability and Mass Bankruptcy

Rise of the MDLs – Currently 70 product MDLs pending in 2022:

- Opioid Class Actions – Perdue Pharmacy Bankruptcy
  - Combat Arms/3M MDL – Bankruptcy back to an MDL
  - PFAS MDL – D.S.C.
  - JUUL Labs MDL – N.D. Cal
  - Takata Air Bags – Bankruptcy
  - Boy Scouts of America – Bankruptcy
  - Talc – Bankruptcy
  - Pelvic Mesh – MDL West Virginia
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# Commercial Litigation / Class Actions

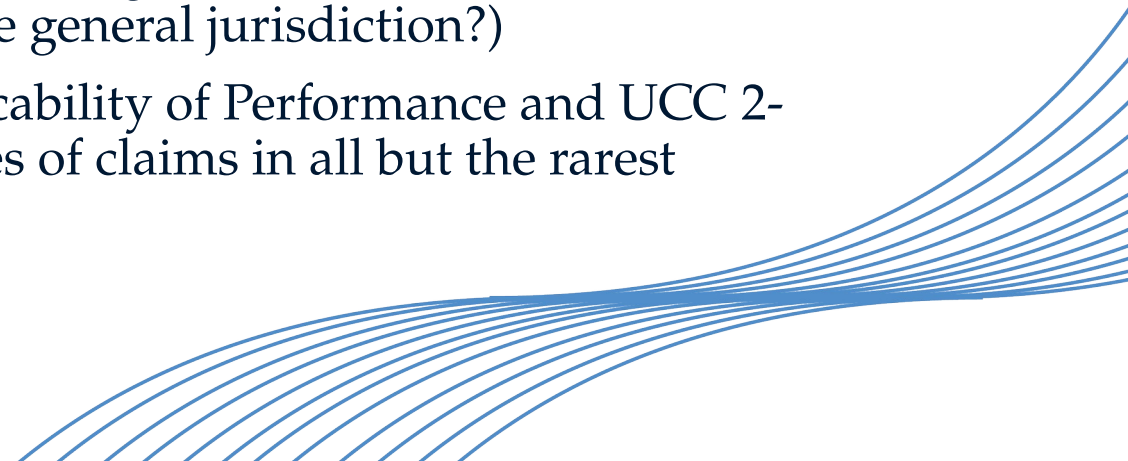
- 3 way circuit split over Rule 23(c)(4) – “class actions with respect to particular issues”

5<sup>th</sup> and 11<sup>th</sup> Circuits say the (b)(3) “predominance” requirements must first be met


2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> Circuits say issue classes may be certified even if predominance is not met.

3<sup>rd</sup> Circuit has a unique two-step test that allows issues classes in certain circumstances

- “But For” Causation and Specific Jurisdiction: *Ford Motor Company v. Montana Eighth District Court*, 141 S.Ct. 1017 (2021) – in 2022 an increase in decisions finding that specific personal jurisdiction exists.
- *Mallory v. Norfolk Southern Railway Co.* (currently awaiting decision before the US Supreme Court) (does consent to do business create general jurisdiction?)
- Force Majeure Clauses, Impossibility and Impracticability of Performance and UCC 2-615 – courts are increasingly skeptical of these types of claims in all but the rarest circumstances.



# Antitrust

- Significant increase in FTC scrutiny on proposed mergers and business activity – particularly with big tech
  - Differing standards of review DOJ v. FTC
  - New theories of “harm”: data privacy, ESG, labor concerns
  - Already seeing an increase in civil suits filed
  - Increased European regulator scrutiny as well
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# **Volume of Cases and Time to Disposition**

# National Federal Case Filings

- New Case Filings -33%
- Cases Pending +8%
- Filing to Civil Disposition = 10.8 months (down from 2021)
- Filing to Trial = 33.8 months (significantly up from 2021)
- 1.5% of civil cases go to trial
- 35-45% of all civil cases end on a motion to dismiss or a motion for summary judgment

# Tennessee Federal Case Filings

- New Case Filings

EDTN – 17.7%   MDTN -18.8%   WDTN -9.5%

- Cases Pending

EDTN – 18.3%   MDTN -16.2%   WDTN -6.2%

- Filing to Civil Disposition

EDTN 12.6m   MDTN 10.8m   WDTN 10.2m

- Filing to Trial

EDTN 32.3m   MDTN 39.7m   WDTN 20.8





# Thank You

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