

Partner spotlight

ESG and product compliance



Sedgwick's brand protection Spotlight features insight and perspective from our strategic partners across industries on safety issues that have the potential to influence a company's view on product-related crises and business operations.

Welcome to the latest edition of Spotlight. Spotlight is our way of sharing insights and perspectives from our strategic partners – lawyers, insurers, risk managers and crisis communications experts.

In this edition, we are joined by William Troutman, a partner at Norton Rose Fulbright, who shares his thoughts on risk created at the intersection of Environmental, Social and Governance (ESG) claims and compliance for the consumer goods industry.



William Troutman
Partner
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About William Troutman

Will is a partner in the Los Angeles office and the US Head of Consumer Markets and US Co-Lead for ESG and Human Rights. He concentrates his practice on ESG, product safety and compliance, market access for the US and California, and environmental disputes.

Will's expertise includes ESG issues in transactions; supply chain dynamics involving ESG, human rights, and CSR issues; regulatory compliance for consumer products,

food, cosmetics, and automotive parts; and compliance and enforcement for chemicals and pesticides, including Proposition 65; and Superfund and other environmental regulations.

What is the connection between ESG and product compliance?

Increasingly, consumers care about how companies operate in terms of both Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG) practices. Does the company use sustainable materials in their products? Do they treat their employees fairly? How are raw materials sourced?

Because these issues are important to consumers and investors, companies are talking about them more in their corporate reporting and their marketing materials. As a result, we are seeing a trend in which companies' general ESG claims are creating risk when applied to specific products in specific circumstances. A company will make general statements about the company's approach to sustainability and product safety. And then suddenly they get hit with a false advertising or false claims class action based on the attributes of a specific product. This creates a big issue for companies who feel they need to talk about their role as a good corporate citizen, but don't want their reputation damaged by the allegations in these types of lawsuits.

In the past few years, we have seen a trend in which non-governmental organizations (NGOs) are examining chemical usage in a particular product class and then publishing reports claiming they found chemicals and therefore the products were unsafe. It is worth noting that these NGOs are not regulated in their approach to testing and there are not always generally-accepted test methods or approaches for the chemicals they are citing in their reports. Once these documents are released by the NGOs, there are class action lawsuits, either threatened or filed, against the companies identified in the reports. The suits cite the company's brand statements made in ESG, sustainability and other similar company publications as the false or deceptive advertising, claiming the NGO's findings demonstrate the products are not safe or sustainable. The companies typically intend for these ESG publications to reflect overarching goals and efforts of the company—not specific to any given product. However, the threatened or filed lawsuits connect the specific products in the NGO reports to the company ESG publications, applying the brand corporate statements at a granular product level.

We've seen examples of this in connection with alleged benzene in certain personal care products and PFAS substances in adult underwear, performance apparel and cosmetics. In some of these cases, the identified brands recalled certain products and settled the claims. In other instances, the brands are fighting the lawsuits. While we do not know the basis for the product recalls and settlements, we should not assume that the brands determined the products were unsafe and that the reports were valid. It is entirely possible that they made a risk-based calculation and determined that moving swiftly, and moving on, was a better legal strategy than a protracted fight—especially since their ESG statements—and therefore their brands—were in the spotlight. Many times, that is exactly what the plaintiffs' attorneys are hoping for, and why they file these cases.

How can companies mitigate risk?

This new trend of class actions is difficult for companies. They must talk about ESG issues because they are important to brand image, shareholders and consumers. However, they also must worry about the potential for lapses in quality assurance and how much they can trust their manufacturers and suppliers to do what they've said they will do.

Compounding the issue is supply chain disruption due to the COVID-19 pandemic and now ongoing geopolitical events. That means that what an upstream supplier said in an original agreement written a year ago about materials may have changed. That supplier may have substituted an ingredient or been less rigorous in vetting upstream companies, and the company may not even know this is happening. ESG statements are not made—or updated—in real time. Nor can they be.

To help reduce their risk, there are few things companies can do. First, they should look at what they believe to be true in terms of their materials and production processes. And they need to compare that to what they are saying in their materials. That includes having the marketing team talk to the regulatory and safety teams to make sure that data is complete and cross-checked.

Next, it is important to routinely revisit published information to confirm that it remains true, especially if the company has changed suppliers or production facilities. With dynamic supply chains, what is true today may not be true tomorrow, but could be true again the day after that.

While those actions will not completely protect against claims from plaintiffs' lawyers, it will at least provide some internal assurances about marketing claims and ideally limit problems to one-off mistakes, rather than wholesale lapses. It also provides documentation that the company has been making an effort to be honest and transparent.

About Spotlight

Brand and reputation are the most valuable and vulnerable assets a business has. Brands embody and encapsulate everything a business does, and everything its customers expect. Nothing says more about a company's commitment to consumers than its efforts to uphold promises of safety, quality and service. However, too often, recall and remediation management is treated as a low priority, only to be applied – or even discussed – when a product needs to be withdrawn from the market. At Sedgwick, we seek to change that.

Sedgwick's brand protection Spotlight is one way we share perspectives from our strategic partners – lawyers, insurers, risk managers and crisis communications experts across industries – on product safety issues that have the potential to influence a company's view on in-market incidents and crisis management. In some cases, the connection is obvious, but the perspective is new. In others, we will raise questions that you may have never considered in the context of recall and remediation management. That's our intent.

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To learn more about our product recall, remediation, and customer retention solutions, contact:

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