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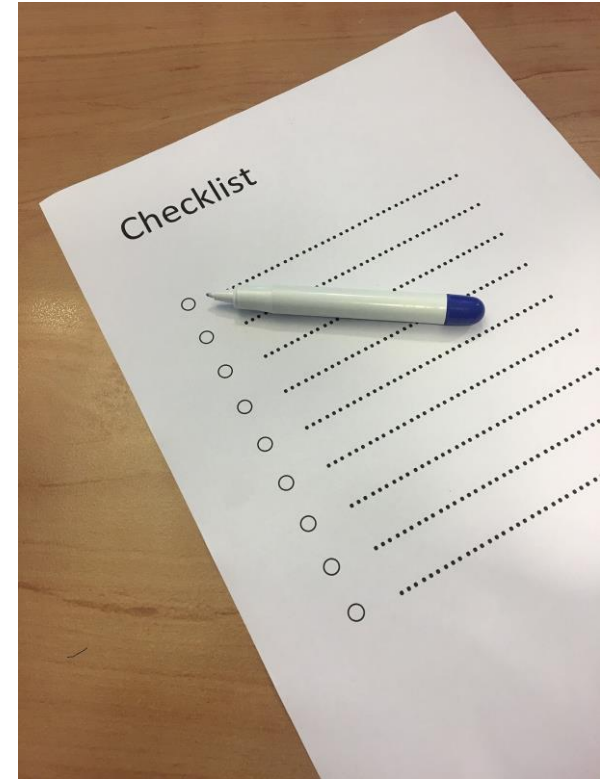
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The Case for and Against Shareholders Litigating ESG Issues

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Today's Discussion

- ESG Investing v. ESG Shareholder Litigation
- Hot Topics in ESG Shareholder Litigation
- Successful/Unsuccessful Theories
- Hypotheticals and Discussion



ESG Investing

- Should my plan/fund consider ESG factors when making investment decisions v. strictly maximizing plan assets?
- Do better ESG practices increase returns to investors?
- This presentation does not advocate *for or against* ESG investing



What is ESG Shareholder Litigation?

- Cases brought by shareholders relating in some way to Environmental, Social, or Governance issues
- Whatever your views on ESG investing, trustees should be aware of ESG shareholder litigation options



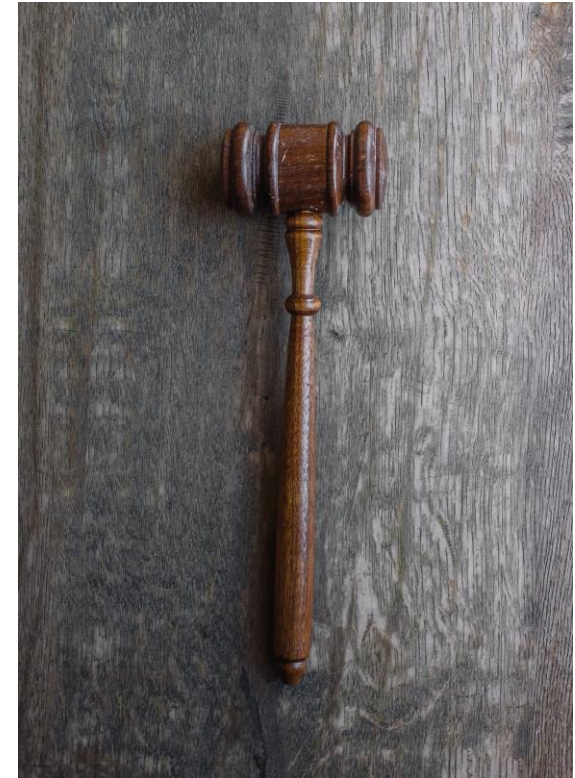
Federal Securities Cases

- Suit against corporation, directors, officers for damages to investors
- Requirements (among others)



State Shareholder Cases

- Derivative action: Suit on behalf of company against wrongdoer(s)



ESG Shareholder Litigation is Not a New Phenomenon

- Shareholder governance lawsuits alleging breaches of fiduciary duties have been common for years
- With increased focus on ESG investing decisions, ESG shareholder litigation has taken on a renewed significance



Environmental Shareholder Litigation

- Materially misleading statements or omissions concerning environmental compliance
- Disclosure of environmental violations leads to fines and costs of cleanup



Greenwashing

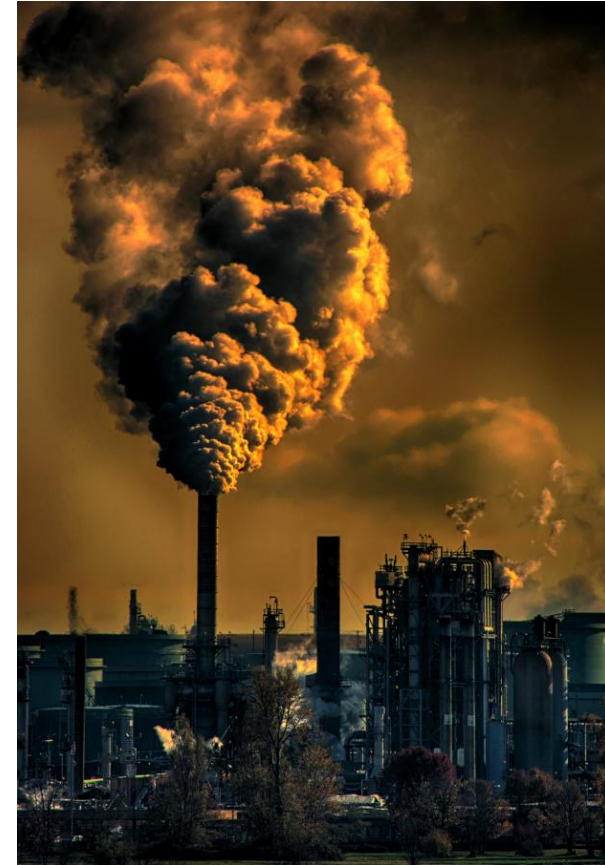
- Making public statements (ads, SEC filings) designed to convey a false impression that a company is more environmentally responsible than it really is.

Coal, the “natural” energy source!



Environmental Litigation Hypothetical

- Company knowingly pollutes river, and when caught, government forces it to clean up the river at great cost



Deepwater Horizon Litigation

Class and Derivative actions against Transocean (owner) and BP (operator) related to allegedly false statements concerning safety protocols



Environmental Litigation Hypothetical

- Company states in its SEC filings that its goal is to become carbon neutral, but has taken few steps to do so



New York v. ExxonMobil

- Alleged that ExxonMobil deceived investors by portraying a rosy picture of how it would be able to manage future climate change risk and future regulation
- ExxonMobil allegedly used internal climate change cost projections that differed from publicly-disclosed projections

The ExxonMobil logo is displayed in red. It features the word "Exxon" in a bold, sans-serif font with a distinctive 'X' that has a diagonal slash through it, followed by the word "Mobil" in a similar bold, sans-serif font.

Massachusetts v. ExxonMobil

- Alleged ExxonMobil “systematically and intentionally ... misled Massachusetts investors and consumers about climate change”
- ExxonMobil was “dishonest with investors about the material climate change-driven risks to its business and with consumers about how its fossil fuel products cause climate change...”

The ExxonMobil logo is displayed in a bold, red, sans-serif font. The word "Exxon" is written in a slightly larger font size than "Mobil", and the two words are joined together. The logo is positioned to the right of the main text area.

Environmental Litigation Hypothetical

- Company conveys false impression that all of its products are produced from 100% recycled material



Social Shareholder Litigation

- Seeks to recover damages for shareholders related to:
 - Sexual misconduct of top executives
 - Failure to meet diversity requirements
 - Company's use of slave labor in its supply chain or otherwise compromising worker safety



Social Litigation Hypothetical

- Company publishes a strict policy for dealing with allegations of sexual misconduct, and publicly states that it complies with the policy in all circumstances
- Company ignores published policy for high earning and valuable employees



21st Century Fox Derivative Case

- FoxNews allegedly turned a blind eye to sexual harassment by Roger Ailes and Bill O'Reilly
- FoxNews paid over **\$30 million** in settlements to accusers, and gave Ailes and O'Reilly huge contract renewals with knowledge of their misconduct



CBS Sexual Misconduct Litigation

- CEO Les Moonves stated he had not previously known about sexual misconduct allegations at CBS
 - Allegedly, at the time said, he was actively trying to conceal his own past misconduct
 - When the truth about his actions was revealed, CBS's stock price declined



Social Litigation Hypothetical

- Company states in its SEC filings that its goal is to achieve management and board diversity, yet lacks diversity of both



Cisco Diversity Litigation

- Derivative action alleging that Cisco had publicly represented itself as a leader in achieving diversity, when it had few African Americans in leadership positions



Facebook Diversity Litigation

- Derivative action alleging FB's public commitment to diversity was untrue



Social Litigation Hypothetical

- Company states it is committed to protecting worker rights and safe workplaces. Company is hiding unsafe working conditions and hiring illegal workers that it pays below minimum wage or uses slave labor in its supply chain



Governance Litigation Hypothetical

- Company publicly claims its cybersecurity is “top-notch.” Thereafter, Company is hacked and tens of thousands of its customers have their personal identifying information exposed



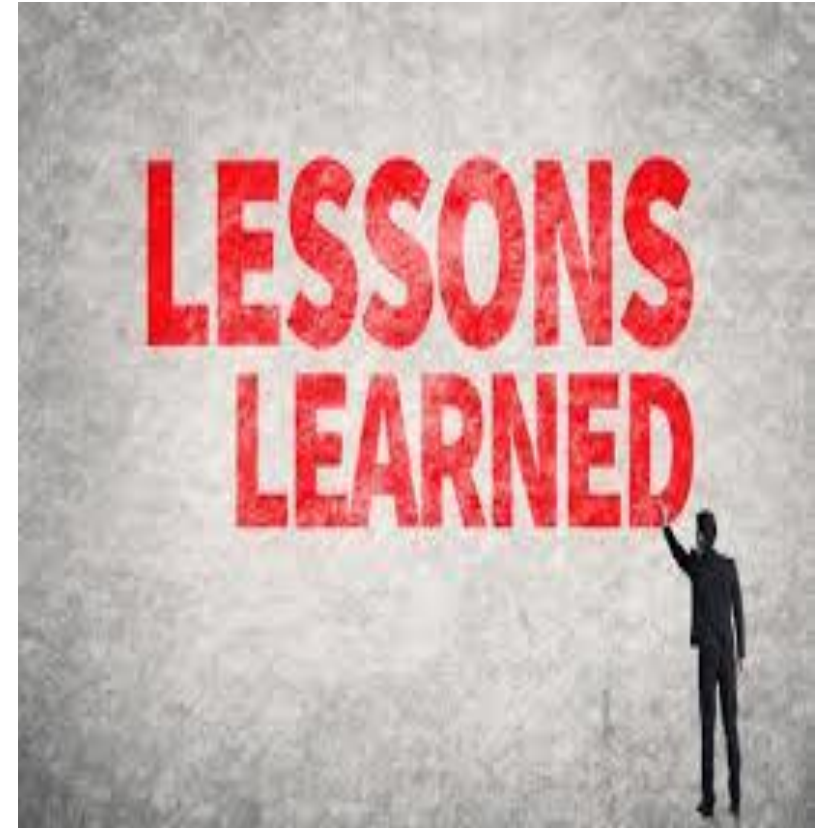
Governance Litigation Hypothetical

- Company in India with securities publicly traded in the U.S. is found to have violated the FCPA and pays **\$50 million** fine causing stock price to go down significantly



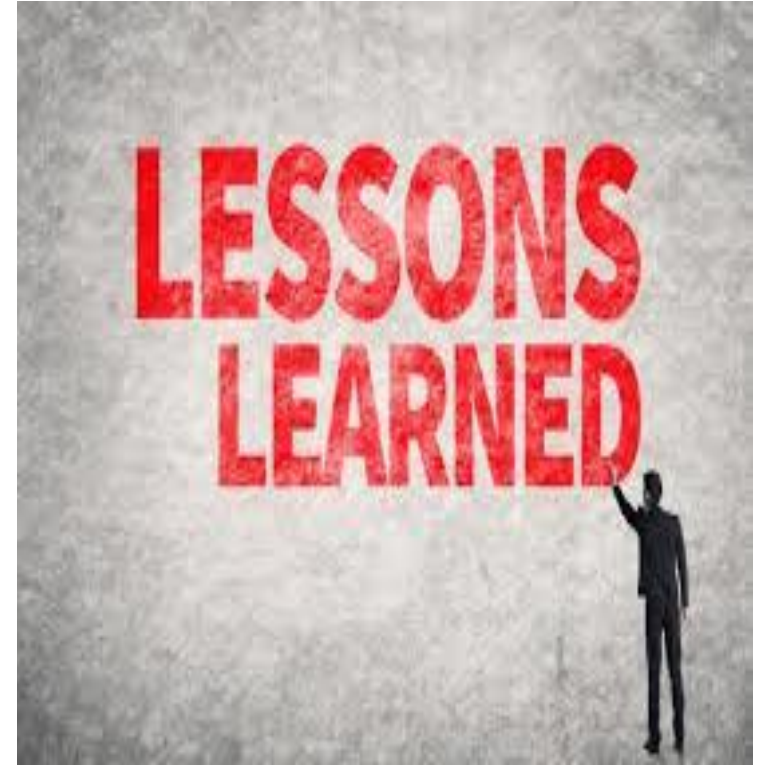
Takeaways (Part I)

- Whatever your opinion on ESG investing, a company's lies or malfeasance may cause your fund to lose money
 - Shareholder class action or derivative litigation may provide the fund and its fiduciaries a way to recover some of their losses



Takeaways (Part II)

- ESG issues have and will give rise to investor litigation
- Cases have had mixed results
- Before litigating, important to ask questions, such as:
 - What is the strength of the case (*e.g.*, aspirational vs. concrete statements)?
 - How does this case compare to other cases that have been brought?
 - Goals of the litigation



Questions?

Thank You!

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