CLIFFORD CHANCE

GROUP LITIGATION

A Major and Growing Risk for Corporates

Corporates need to take notice of the increasing numbers of group claims being litigated in the English courts. Group litigation is now an inherent risk of doing business in the UK.

In recent years, we have seen a significant increase in group litigation claims against large corporates and we expect this trend to continue. Corporates from all sectors and industries are being targeted, including the likes of Glencore, Google, Apple, BT, BHP and Barclays.

In this article we outline the developments in the group litigation market that have contributed to the growing risk to corporates. We also identify the steps corporates should take to prepare.

AT A GLANCE

1. **The UK litigation funding market is now the world's second largest after the US (estimated £2.2bn in 2022).** A well-resourced, sophisticated claimant industry has emerged, with funders, claims managers and law firms finding innovative ways to originate and litigate group claims.
2. **'Opt-out' claims create a significant litigation risk.** These claims – where anyone who falls under the class definition is automatically represented, unless they decide to opt out – tend to be large and lucrative, so are actively targeted by this new claimant industry. There is a particular risk for any consumer-facing businesses which may have a dominant position in their market or could otherwise be found to be infringing competition law through their activity.
3. **Increasing numbers of group claims are in the ESG space.** For-profit and not-for-profit funders continue to take advantage of the focus on the ESG agenda and the opportunity to use group litigation as a tool to achieve both financial returns and social, political and environmental change.
4. **'Stock drop' claims are a risk for listed companies.** Securities litigation claims, which focus on errors in published information used to be rare in the UK, but are being increasingly seen. These are easier and cheaper to scale than other group claims, making them popular with funders and claimants.
5. **Businesses should be proactive in assessing the risk of claims and ready to respond.** Robust policies and procedures may help to mitigate against the risk of claims, but sometimes litigation is unavoidable. How a company reacts in the early stages of litigation can have a profound impact on the shape of the litigation, meaning careful planning and cross-practice strategic advice are key.

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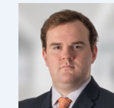
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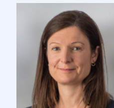
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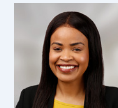
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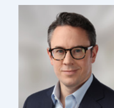
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1. General Counsel need to be alert to the risk of group litigation

The UK's group litigation industry will continue to develop and expand, fuelled by the proliferation of third-party funding from specialist litigation funders with very deep pockets. English courts are increasingly receptive to group claims and the thriving claimant industry is making maximum use of the litigation mechanisms and tools available.

The implications – both reputational and financial – are very significant, with many of these claims being valued in the hundreds of millions of pounds or more and requiring substantial expense and management time to defend.

Whilst most group litigation claims are brought with the objective of securing multi-million compensation pay-outs, not all claims are driven by financial objectives alone. NGOs and activists are increasingly using group litigation as a powerful tool in the armoury, to 'name and shame' corporates, inflict reputational damage and influence corporate behaviour.

2. 'Opt-out' claims can be significant, representing a real risk for corporates

We have seen more group claims being brought on an 'opt-out' basis – where anyone who falls under the class definition is automatically represented, unless they decide to opt out. For example, Apple is facing an opt-out claim concerning alleged abuse of their dominant position in relation to the installation of a software update in certain iPhone models which slowed device performance. That claim is said to be worth approximately £786 million, with nearly 25 million UK iPhone customers allegedly affected.

Opt-out claims can be very significant, particularly against large consumer businesses. However, they are difficult to bring, with competition law being one of the limited areas they can be brought under English law. As a result, we are seeing claims relating to breaches of environmental, data privacy or consumer protection laws being dressed up as competition law claims to take advantage of this route. For example, six water companies are facing collective actions for 'abuse of dominance' relating to the discharge of untreated sewage into rivers – which is essentially an environmental claim – on the basis that it avoided penalties that would have reduced bills for consumers.

3. Group claims are a powerful tool for ESG activists

ESG-focussed funders/claimants are using group claims to hold companies accountable for corporate governance failings and to advance the fight against climate change. Shareholder pressure on the ESG credentials of UK-listed companies is a recurring theme across recent AGM seasons, with large institutional investors and activists such as ShareAction pushing companies to adopt more ambitious climate change goals, and to keep to their published targets.

ClientEarth v Shell Plc saw activists purchase shares in Shell in order to take aim at Shell's Board through a derivative action based on alleged inaccuracies in published information relating to its climate change strategy. Although that claim was struck out, it demonstrates the appetite to use the English Courts to put pressure on companies in relation to their environmental and climate change strategies.

The ever-increasing ESG reporting requirements that large companies must adhere to, together with growing stakeholder pressure for bold sustainability targets, increase the risk of companies over-promising or making misleading statements in relation to their sustainability-related goals. Corporates should take extra caution when making ESG-related disclosures: if they under-deliver on published objectives, there will be no shortage of potential claimants. They should ensure statements are properly verified and that there is a reasonable basis for making forward-looking statements.

4. Listed corporates are susceptible to 'stock drop' claims

Securities litigation claims, which focus on errors in published information (*see Stock Drop Claims - The Basics*), are often initiated by a handful of anchor institutional investors. This means they are easier and cheaper to scale than other group claims, making them particularly popular with funders and claimants.

There has been a significant increase in securities claims in recent years, notably Glencore, Serco, G4S, RSA Insurance, Tesco and RBS are known to be facing, or to have recently faced, claims of this type.

Sustainability disclosures are a key new area to watch, for example, where claimants could allege that a share

price fall resulted from a company's failure to meet its ESG targets. Whether such claims take hold is uncertain, as a key difficulty for claims is establishing that shareholders suffered any loss because of the company's failure to meet its targets.

As liability can arise from information published via a regulatory information service (RIS), including Annual Reports & Accounts, robust policies and procedures around the scope, content and timing of public disclosures is key to managing the risk. Careful verification of RIS announcements and periodic reporting disclosures is essential.

5. The litigation risk extends to global operations

The Supreme Court decision in *Vedanta Resources PLC v Lungowe* established that UK-domiciled parent and group companies can be liable for the conduct of their overseas subsidiaries. Similar claims have been brought against Shell in relation to Niger Delta oil-spills and BHP in relation to the Mariana Dam collapse.

As such claims have had the 'green light' from the Supreme Court, there will likely be more in the pipeline. Multinationals therefore need to be alive to this and proceed on the basis that there is a risk of being drawn into group litigation in the UK in relation to the activities of worldwide subsidiaries.

The risk of UK-domiciled parent and group companies being held liable for the conduct of their overseas subsidiaries emphasises the need for effective and robust oversight by parent companies of their subsidiaries. This is particularly accute for listed companies where the parent's public disclosures will state that appropriate policies and procedures are in place to ensure that level of oversight. However, a balance must be struck as keeping a tight grip on subsidiaries increases the risk that parent and group companies are found to be *de facto* directors, increasing their exposure to the liabilities of subsidiaries.

FIND OUT MORE

Clifford Chance recently hosted a Group Litigation Summit for senior lawyers at corporates and financial institutions, focusing on the defendants' playbook to group litigation. See here for 10 key takeaways from the Summit.

STOCK DROP CLAIMS – THE BASICS

- These claims are typically brought under sections 90 and/or 90A of the Financial Services and Markets Act 2000 (FSMA), for untrue or misleading statements, or omissions in published information.
- **Information in Annual Reports & Accounts and RIS statements** - Section 90A and Schedule 10A of FSMA require an issuer to compensate investors where they have acquired, continued to hold, or disposed of shares in reliance on public statements published via an RIS and suffered a loss, as a result of an untrue or misleading statement, or dishonest omission, by the issuer. This can be information in RIS statements or contained in Annual Reports & Accounts.
- **Information in prospectuses** - Section 90 of FSMA creates liability for issuers and their directors to pay compensation to investors who have acquired the company's shares and suffered a loss as a result of an untrue or misleading statement in, or omissions from a listing particulars (e.g. an equity prospectus).
- Sections 90 and 90A of FSMA raise a wealth of complex legal questions, but there is limited case law to provide the answers - only one case has reached judgment (*ACL Netherlands B.V. v Lynch*). This lack of guiding precedent creates significant uncertainty as to how the English Courts will interpret and apply the legislation.

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