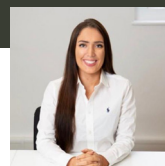


Group litigation

With Sunny Hundal, Public Affairs and Campaigns Lead at Pogust Goodhead; Adele Bourguignon, Pogust Goodhead Associate; and Stephen O'Dowd, Senior Director of Legal Finance at Harbour Litigation Funding



Sunny Hundal



Adele Bourguignon



Stephen O'Dowd

Pogust Goodhead and Harbour Litigation Funding are part of a new wave of group litigation in response to industrial disasters (Mariana dam) and corporate scandals (Post Office/Horizon). The value of UK class-actions from group lawsuits increased from £4bn in 2021 to £26bn in 2022 (Thomson Reuters). The rising volume of cases puts pressure on boardrooms to prioritise ESG strategy and reduce exposure to risk. As group litigation evolves, questions around regulatory mandates, the risk of green hushing, and the ethics behind often massive third-party funding commitments will become more pertinent.

Key takeaways

Group litigation has grown significantly in the UK since 2015

- 2000: Group Litigation Orders (GLOs) were introduced in England and Wales, enabling multiple claimants to group together.



- The 2015 Consumer Rights Act established an ‘opt-out’ regime for competition claims only. Collective legal action could then be brought forward on behalf of a defined group of claimants without requiring individual opt-ins.
- Another key driver is the ESG credentials that come with funding vulnerable groups in their court battles against companies that have acted irresponsibly.
- UK cases will likely rise because many global companies are domiciled in Britain.

Case study: Pogust Goodhead

- Pogust Goodhead is representing over 700,000 plaintiffs affected by the 2015 Mariana dam disaster at a mine in Brazil operated by Samarco, part-owned by Australian mining conglomerate BHP. At the time of the disaster, BHP PLC was headquartered in the UK.
- The case is lodged in English courts, however, much of the “substantive law” is Brazilian – e.g. protection of indigenous peoples.
- The disaster occurred almost ten years ago, progress has been slow. In April, the High Court requested employment documents of BHP’s CEO to prove liability.

Mitigating factors

- The UK’s loser pays principle, which does not apply in the US, is a “very significant deterrent. You have to be very careful about the types of claims you bring in this country. If you get it wrong, you can be on the hook for a significant amount of money”.
- Cases can be extremely long and costly, a recent environmental claim involving Indonesian seaweed farmers lasted eight years.
- Despite being “world-class, full of brilliant lawyers”, the England and Wales legal system “has a hole” in it. Class action is limited to competition claims stemming from companies taking advantage of monopolies – e.g. a multinational company abusing its very powerful position disadvantaging “the little person with very little money and very few rights who doesn’t know how to fight back”.
- Non-competition cases require universal ‘opt-in’. Such cases entail considerably higher costs – e.g. procuring a fleet of boats and off-road motorbikes to reach farmers in remote locations.
- Group litigation is often dependent on third-party funding due to the substantial costs involved. This can be problematic if the funder’s motives are purely profit-driven (see Issues Raised on p3).

Pressure on ESG

- Within companies, there is often tension between legal departments, who lean towards not disclosing information, and ESG/sustainability teams. “ESG is a transparency

mechanism that exacerbates that tension, leading to green hushing, whereby companies underreport their sustainability credentials for fear of being sued”.

- Companies risk shareholder litigation if they issue misleading ESG statements that cause a decline in their stock value. However, at this stage, we can only “suspect that we might see such claims”.
- Similarly, it is not yet clear whether the threat of group litigation is forcing boardrooms to re-evaluate their ESG risks and more strongly embed sustainability principles alongside more scrupulous corporate governance.

Issues raised

Penalties vs redress

Funding is largely profit-driven. Investors seek a share of the compensation because the risk of the case failing is high – the share will vary depending on the investor’s underlying ethical principles. However, while the corporation at fault may be penalised, redress is more complicated, particularly if the funder’s pre-agreed share of the damages is disproportionate and the number of claimants is high – e.g. a community spanning a whole riverbed. Legal fees can be considerable too – “the lawyers always win”.

Role of regulators — “Businesses want stability and a level playing field.”

Ofcom recently investigated BT for overcharging older, more loyal customers. However, the regulator’s powers were limited to preventing future exploitation. The task of sanctioning BT and other corporations falls to group litigants, underlining their important function. This example also poses questions about whether regulators should have larger mandates. Relying on litigation leads to a “lottery effect”, favouring higher profile incidents and communities more able to seek redress; litigation can be slow too.

There are limits to both regulation and legal action. Investors increasingly push for better governance and for boardrooms to embed environmental and social principles, which will have a systemic impact compared to litigation.

Activism vs litigation

Is litigation an effective weapon when a simple complaint from a celebrity can immediately trigger a dramatic fall in share price? Small groups of activists can be similarly effective. The answer is yes and no. Not all companies are the same, a global mining conglomerate will not have widespread brand recognition, and environmental and humanitarian disasters can be severely underreported.

Is group litigation a factor in UK-listed companies choosing to move to the US?

The risk of litigation is higher, not lower. In 2022, there were 1,590 documented climate cases in the US, followed by Australia with 130. The US accounts for the majority of cases worldwide (Sabin Center).

We would like to thank the members of our Advisory Board for their contributions and continuing support.

CLYDE&CO



Linklaters

Sage

SIX



To get involved, please contact
secretariat@plgesg.org.uk