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# Generic ESG Statements and Securities Class Actions: Goldman Sachs Secures Second Circuit Victory in Long-Running Class Certification Battle

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A three-judge panel for the US Court of Appeals for the Second Circuit ***reversed*** a district court's class certification in the decade-long *Arkansas Teacher Retirement System v. Goldman Sachs Group* litigation regarding allegedly false public disclosures made by Goldman regarding its corporate governance and ethics policies and procedures.

The question of class certification, and whether Goldman's generic statements regarding its corporate principles could support the presumption of investor reliance necessary for a securities fraud class action to proceed, has been addressed in a series of decisions over the long history of the case. Most prominently, the US Supreme Court addressed these questions in a decision issued in June 2021, which reversed a prior grant of class certification in the *Goldman* case.

Following the Supreme Court's 2021 ***decision***, the case was remanded back to the district court—where, in December 2021, the court ***ruled*** for a third time that the case could proceed as a class action, based on a finding that the plaintiff class had presented sufficient evidence to support the presumption that they had relied on Goldman's statements, regardless of their generic nature.

The Second Circuit's latest decision once again reverses the district court on class certification, and provides new guidance on investor class actions and the impact of generic corporate statements and disclosures.

**Background of the *Goldman Sachs* Litigation**

The class action lawsuit against Goldman Sachs was filed nearly a decade ago. It was led by three pension funds, including the Arkansas Teacher Retirement System, on behalf of a class of Goldman shareholders. The class plaintiffs alleged that they had been misled by Goldman's written public statements and disclosures related to corporate governance issues and Goldman's handling of conflicts of interest.

Goldman argued that the public statements at the heart of the litigation were too generic and aspirational to have been misleading or to have induced investor reliance. They included statements contained in the company's annual report to shareholders such as "Our clients'

interests always come first" and "Integrity and honesty are at the heart of our business," as well as a disclosure in Goldman's Form 10-K that asserted: "We have extensive procedures and controls that are designed to identify and address conflicts of interest, including those designed to prevent the improper sharing of information among our businesses."

The plaintiff class of Goldman shareholders alleged that these statements were rendered false by several events in 2010—most notably, an SEC enforcement action against Goldman related to several collateralized debt obligation (CDO) transactions involving subprime mortgages. The SEC's allegations led Goldman's stock price to decline 12.79 percent the day after they became public.

Plaintiffs in the *Goldman* lawsuit first achieved class certification at the district court level back in 2015. The court's decision, however, was reversed on appeal to the Second Circuit, and remanded back to the district court. After another class certification battle in the district court, and another subsequent appeal, the case ultimately ended up before the Supreme Court.

In its June 2021 opinion, the Supreme Court confirmed that defendant corporations bear the burden of establishing that their public statements did not impact the firm's stock price, but also acknowledge that the generic nature of the statements should be included in a court's assessment of that impact. Specifically, the Supreme Court noted that the "generic nature of the misrepresentation often will be important evidence of a lack of price impact." The Supreme Court thus reversed class certification once more and remanded the case, directing the lower courts to "consider all record evidence relevant to price impact and apply the legal standard as supplemented by the Supreme Court."

After the district court certified the class action for a third time, the case once again made its way to the Second Circuit.

**The Second Circuit Opinion**

In its opinion issued on August 10, 2023, the Second Circuit ruled that, in light of the Supreme Court's 2021 decision and guidance, the class plaintiffs had not presented sufficient evidence to warrant class certification. At bottom, the Second Circuit held that claims like those brought by the plaintiffs in *Goldman* "require special attention to the generic nature of the disclosure," because "the duty to disclose more is triggered only where that which is disclosed is sufficiently specific."

The Court further noted that: "Were it otherwise, securities plaintiffs could find a road to success in the rearview mirror: they would need only find negative news, such as the revelation that a company may have committed securities fraud, and then point to any previous disclosure from the company which touches upon a similar subject, such as that company's commitment to complying with the law—no matter how generic that statement is."

Going forward, courts considering class certification in similar cases will be guided by not only the 2021 Supreme Court opinion, but also the Second Circuit's new guidance, which counsels that courts must conduct "a searching price impact analysis" where the claims are based on a company's generic risk disclosures.

**The Future of ESG Litigation and Investor Class Actions**

The latest guidance from the Second Circuit in the *Goldman Sachs* case holds lessons for both litigants in investor class action lawsuits, and companies issuing statements and disclosures related to ESG, or Environmental, Social and Governance, issues.

With respect to securities class actions, the Second Circuit's opinion widens the opportunity for corporate defendants to rebut the presumption of investor reliance established by the landmark case of *Basic v. Levinson*. In the future, where investor lawsuits are based on merely aspirational statements made by a company, defendants will have an easier time marshaling evidence to show that such statements were too generic to have induced investor reliance. However, investor lawsuits premised on more specific corporate disclosures are likely to remain a prominent part of the securities litigation landscape.

As for companies' public ESG statements, it now appears clear that, where such statements remain aspirational and sufficiently generic, courts may grant companies wider latitude, and such disclosures may be less likely to expose companies to liability. Nevertheless, ESG disclosures and corporations' aspirational statements related to issues like workplace diversity, corporate principles, and environmental goals, are likely to remain a target for class action and shareholder derivative plaintiffs. Companies in every industry should remain mindful of the recent guidance on such disclosures from both the Supreme Court and the Second Circuit, and should scrutinize any disclosures closely to ensure they are on safe ground in light of that guidance.

Bracewell has a multi-disciplinary team focused on ESG and securities litigation issues. We advise and support our clients drawing on our expertise in environmental strategies, securities matters, regulatory issues, government enforcement, labor and employment, commercial litigation, and crisis management, and we are at the forefront of the transition to sustainable energy. Please contact your Bracewell team member for more information.