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Reducing the Risk of 'Greenwashing' Litigation and Defending Actions That Are Filed

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Key Points

- As consumers place increasing emphasis on environmental sustainability, companies face not only the challenge of maintaining eco-friendly practices but also the threat of lawsuits alleging "greenwashing."
- Plaintiffs' attorneys, animal rights groups and state attorneys general have increasingly filed greenwashing consumer class actions.
- Preventive measures to fend off greenwashing suits include carefully reviewing and documenting product claims and training marketing staff to avoid unsubstantiated claims.
- Greenwashing cases often survive motions to dismiss, unless the flaws in the suit are evident from the packaging.

"Greenwashing" refers to the practice of making false or misleading claims about the environmental benefits of a product in order to represent it as more environmentally friendly than it actually is. Given consumers' increasing environmental sensibilities, it is unsurprising that greenwashing has become a major source of litigation.

Government agencies (*e.g.*, the Federal Trade Commission (FTC) and state attorneys general) sometimes assert greenwashing challenges on their own initiative. Most of the time, however, private attorneys file greenwashing lawsuits as class actions. These lawsuits largely focus on claims like "environmentally responsible," "sustainably sourced" and "humanely raised," arguing that these false environmental claims induce consumers to pay a premium for "greener" products.

Many greenwashing suits center on the alleged misrepresentation of sustainable manufacturing and sourcing of retail products. For example, in *Earth Island Institute v. BlueTriton Brands* (D.C. Super. June 07, 2022), a plaintiff alleged that a bottling company misled consumers by portraying itself as "sustainable" and committed to

reducing plastic pollution, all while engaging in other environmentally harmful practices. The Superior Court of the District of Columbia denied the defendant's motion to dismiss, finding that whether these statements were misleading was a fact question for the jury.

Other cases call into question products that include specific terms like "compostable," "recyclable" and "biodegradable." In *Duchimaza v. Niagara Bottling, LLC* (S.D.N.Y. 2022), for instance, a plaintiff took issue with claims that a water bottle was "100% recyclable," arguing that the product consisted of materials that are not recyclable due to the limited capacity of local and nationwide recycling systems. The U.S. District Court for the Southern District of New York dismissed the plaintiff's complaint, finding, *inter alia*, that the plaintiff failed to adequately allege facts regarding New York's recycling capacity and lacked standing for injunctive relief.

The use of "green" icons or third-party seals of approval on product marketing or packaging is also fodder for litigation. For example, in *Hemy v. Perdue Farms, Inc.* (D.N.J. Mar. 31, 2013), the plaintiff alleged it was misleading to place a Department of Agriculture (USDA) verified seal close to claims that the defendants' chickens were "humanely raised" and "raised cage free" because the seal suggested that the USDA had specifically approved these statements. The court denied the defendants' motion to dismiss, noting that the plaintiff's allegations included survey results demonstrating that 58% of consumers believed the "USDA Process Verified" shield meant the defendant met the USDA's standards for the treatment of chickens.

Animal cruelty cases are also on the rise and are sometimes alleged by the animal welfare community. Just recently, in *Foundation To Support Animal Protection v. Vital Farms, Inc.* (E.D. Va. Apr. 3, 2023), People for the Ethical Treatment of Animals, Inc. (PETA) brought a consumer class action against an egg producer, alleging that it engages in deceptive trade practices by marketing itself as an ethical company that treats its chickens humanely.

Minimizing Risks of Greenwashing Litigation

As long as companies make claims about their products, there will be lawsuits. Still, there are ways to avoid becoming a target.

Build in counsel review of representations. First and foremost, in-house counsel should review proposed labels and advertising, paying special attention to the FTC's Green Guides. While these are only guidelines and not enforceable regulations, courts frequently reference them to evaluate the validity of greenwashing claims.

Educate staff. Companies can also take steps to improve their ability to defend against greenwashing lawsuits (and product labeling challenges generally). Offering training about greenwashing legal principles to marketing employees is an important first step.

Keep records. Companies should be diligent in collecting, storing and possibly publishing information that supports their environmental representations. In *Dwyer v. Allbirds, Inc.* (S.D.N.Y. 2022), for example, the court determined that a shoe company's published methodology for developing the carbon footprint calculations listed on its website supported the dismissal of allegations that the company's "low carbon footprint" claims were misleading.

Consider disclaimers. Companies may also consider disclaimers where appropriate. These should be clear, precise and on the front of packaging. Courts are skeptical of disclaimers that are located on the sides or back of packaging, separated from the claim itself.

Defending Against Greenwashing Lawsuits

Before filing suit, plaintiffs' attorneys will often send pre-suit letters in efforts to obtain early settlement in exchange for a promise not to sue. Settling for a small sum pre-suit may seem desirable, but it will also paint a target on the company's back. Instead, companies should consider issuing a strong response, perhaps accompanied by documentary evidence substantiating all marketing claims. This can sometimes put an end to the threat. Companies should also consider the threat of sanctions where accusations appear unsupported.

If a lawsuit is filed, a motion to dismiss is an excellent opportunity to set the tone for the rest of the litigation and educate the court on the defendant's main points. Standing is a common defense. Courts will dismiss claims if there is no evidence that the plaintiffs purchased the allegedly misrepresented products. Environmental activist groups are particularly vulnerable to this defense.

Companies may also claim "puffery" to argue that the alleged misstatement is generalized, subjective or merely exaggerated boasting. And while there is generally no express preemption for greenwashing, legal scholars have increasingly argued for federal preemption of states' green marketing regulations.

Companies should also pursue aggressive discovery. The weakest point of the plaintiffs' case is usually the plaintiffs themselves. Rarely are these plaintiffs properly vetted in lawyer-driven class action litigation, making depositions of named plaintiffs critical.

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Likewise, subpoenaing loyalty records for products sold in supermarkets and drug stores has proven effective at weeding out false purchasers.

These strategies, as well as expert consumer surveys, are also critical to defeating class certification, because they can demonstrate that consumer decision-making is highly individualized.

In Sum

Greenwashing class actions have become increasingly common among the plaintiffs' class action bar. With proper preparation and litigation strategies, however, companies can successfully avoid or defend against these allegations. Companies should continue staying abreast of recent litigation trends as this area of the law continues to evolve.

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