



MELISSA CLARKE is a counsel at Saul Ewing LLP, resident in the firm's Princeton office. Melissa concentrates her practice in the areas of environmental law and real estate transactions, with a particular focus on site remediation, environmental due diligence, and environmental regulatory and compliance matters. Melissa also has experience navigating complex business and real estate disputes, as well as allocations of liability among potentially responsible parties at Superfund sites.



ANDREA LIPUMA, a partner in Saul Ewing's Litigation Practice and Vice Chair of the firm's Environmental Practice, has significant experience representing clients in litigation matters in New Jersey state and federal courts, including class actions, toxic torts, environmental matters, products liability actions, business tort and contract litigation. Andrea is also a member of Saul Ewing's ESG Taskforce, which tracks the legal trends and developments around environmental, social and governance (ESG).

GREENWASHING CLAIMS

Agency Guidance, Litigation Trends Provide Road Map for Marketers

By **Melissa A. Clarke** and **Andrea A. Lipuma**

American consumers are increasingly seeking environmentally friendly “green” products.¹ In response, companies employ “green” marketing to advertise the purported environmental benefits of their products. But what companies believe their green claims mean and how consumers interpret those claims may not always be in sync.

“Greenwashing” is deceptive marketing, and it occurs when companies make false, misleading or exaggerated claims about the environmentally beneficial nature of their products, services or their business. For example, greenwashing occurs when goods or services have been misrepresented as “sustainable,” “environmentally responsible” or “humanely raised.” Greenwashing claims will vary by product and service, as well as across markets and jurisdictions. Broadly speaking, greenwashing claims are based on common law allegations of fraud, misrepresentation, false advertising, breach of express warranty, unjust enrichment and/or pursuant to specific state consumer protection laws. Greenwashing suits often target the representations

made in marketing materials, product labels and even corporate filings.

Greenwashing Trends: Agency Oversight

The Federal Trade Commission's Green Guides

The Federal Trade Commission (FTC) enforces federal consumer protection laws that prevent fraud, deception and unfair business practices. The FTC has developed “Green Guides for the Use of Environmental Claims” (“Green Guides”), which set forth the FTC’s current views about environmental marketing claims to help marketers avoid making claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. The Green Guides were first issued in 1992 and were revised in 1996, 1998 and 2012. The guidance they provide includes: 1) general principles that apply to all environmental marketing claims; 2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and 3) how marketers can qualify their claims to avoid deceiving consumers. More specifically, the Green Guides apply to claims about the environmental attributes of a product, package or service in connection with the marketing, offering for sale or sale of such item or service to individuals or businesses. This includes environmental claims in labeling, advertising, promotional materials and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names or any other means.

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on the net impression of the advertisement, label or other promotional material at issue. That is, the Green Guides focus on consumer deception, *whether intentional or not*. The Green Guides are also a primary source of definitions of terms commonly used in environmental marketing campaigns.

As administrative interpretations of the law, the Green Guides are not themselves enforceable.² That said, the FTC can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the Green Guides. In any such enforcement action, the FTC must prove that the challenged practice is unfair or deceptive in violation of Section 5 of the FTC Act. For example, on April 4, 2022, the FTC commenced two nearly identical lawsuits charging that, in marketing and selling rayon textile products as “bamboo,” the defendant retailers each participated in deceptive acts or practices in violation of Section 5 of the FTC Act and engaged in mislabeling or deceptive advertising of textile products in violation of the Textile Act, 15 U.S.C. § 70 et seq., and the Textile Rules, 16 C.F.R. Part 303.³ Each action resulted in a Stipulated Order and Judgment for Civil Penalties, Permanent

Injunction, and Other Relief, including more than \$5 million in civil penalties, collectively, and compliance reporting obligations.⁴

The Green Guides do not preempt federal, state or local laws. Conversely, compliance with those laws will not preclude FTC enforcement action under the FTC Act. Thus, while the Green Guides can help companies better understand what kinds of statements might provoke claims, compliance with the FTC Green Guides does not necessarily eliminate a company’s exposure to greenwashing litigation.

The FTC’s most recent proposed update of the Green Guides includes new guidance on marketers’ use of product certifications and seals of approval, claims about materials and energy sources that are “renewable” and “carbon offset” claims. In December 2022, the FTC announced it was seeking public comment on potential updates to its Green Guides. The anticipated update is on hold as the FTC reviews thousands of responses. Commenters have called for, among other things, measurable and objective standards and formal rulemaking instead of guidance to provide more clarity and “even the playing field” for

claims of sustainability or carbon neutrality.⁵

Securities and Exchange Commission Proposed Rules

In May 2022, the Securities and Exchange Commission (SEC) issued two new sets of proposed rules intended to combat greenwashing by investment funds, the “Investment Company Names” (“Names Rule”) and “Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies” (“ESG Disclosure Rule”). These rules, when implemented, will provide additional bases for investors looking to litigate purported material misrepresentations or omissions involving greenwashing. While these SEC initiatives are aimed at investor protection, rather than consumer goods, they further highlight the increasing attention on public-facing representations in the context of environmental impacts of goods and services. These regulatory efforts are similar to those being undertaken by other advanced economies (e.g., the European Union and the United Kingdom).

Greenwashing Trends: State Government

State attorneys general have filed greenwashing lawsuits to address deceptive marketing and included greenwashing claims in climate change suits. In October 2011, the Attorney General of California filed a first-of-its-kind greenwashing lawsuit against three companies that allegedly made false and misleading claims by marketing plastic water bottles as “100 percent biodegradable and recyclable.”⁶

New Jersey is no stranger to government-led litigation aimed at consumer protection. Indeed, the state Attorney General, the New Jersey Department of Environmental Protection and Acting Director of the New Jersey Division of Consumer Affairs (collectively, the

“State”) has commenced a lawsuit against five oil companies—ExxonMobil, Shell Oil, Chevron, BP and ConocoPhillips—as well as the American Petroleum Institute for their alleged role in deceiving consumers and the public about climate change.⁷ The complaint, premised on the State’s allegation that, “for decades, the fossil fuel industry has misled consumers and the public about climate change” seeks to ensure defendants “bear the costs of that deceptive commercial activity, rather than the State, its taxpayers, its residents, or broader segments of the public.”⁸ Claims include failure to warn, negligence, impairment of the public trust, trespass, public nuisance, private nuisance and violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2 et. seq.⁹ New Jersey joins at least six other states in bringing climate claims against oil companies.¹⁰

Greenwashing Trends: The Private Bar

The number of greenwashing actions nationwide have steadily increased in recent years, and the majority of greenwashing cases have been filed by private attorneys as class actions. Greenwashing cases typically rely on common law and state statutory causes of action. The common law claims may include allegations of fraud, misrepresentation, unjust enrichment and breach of express warranty. The statutory causes of action typically rely on state consumer protection laws that enable private plaintiffs to bring class action claims for violations of those statutes, which protects consumers from fraudulent and deceptive business practices. Recent litigation has targeted manufacturers of consumer products, especially apparel and food producers.

Many greenwashing suits focus on alleged misrepresentations about “sustainable” manufacturing or sourcing and “recyclability.” This is true of various plastic bottle suits. For example, in *Earth Island Institute v. Brands*, the plaintiff

alleged that a bottling company misled consumers by portraying itself as “sustainable” and committed to reducing plastic pollution, while engaging in other environmentally harmful practices.¹¹ The court denied the defendant’s motion to dismiss, holding that whether these statements were misleading was a fact question for the jury.¹²

Similarly illustrative of the perils of “sustainable” claims is the ALDI Atlantic salmon case.¹³ The complaint alleges ALDI made deceptive sustainability claims in marketing its fresh Atlantic salmon products by using the label “Simple. Sustainable. Seafood,” while sourcing its salmon from large industrial fish farms that use environmentally destructive and unsustainable practices.¹⁴ The complaint included counts under New York statutes prohibiting “[d]eceptive acts or practices in the conduct of any business, trade or commerce,” as well as “[f]alse advertising in the conduct of any business, trade or commerce.”¹⁵ The class-action suit was voluntarily dismissed in November 2023, based on a settlement wherein ALDI agreed, among other things, to revise its fresh Atlantic salmon product labeling and marketing.

Efforts to use third-party seals of approval on product marketing or packaging is also fodder for greenwashing litigation, especially where those seals can mislead the reasonable consumer. In *Hemy v. Perdue Farms, Inc.*, the plaintiff alleged it was misleading to place a U.S. Department of Agriculture (USDA) verified seal close to claims that the defendant’s chickens were “humanely raised” and “raised cage free” because the seal suggested that the USDA had specifically approved these statements.¹⁶ The court denied the defendant’s 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.¹⁷

Animal cruelty cases may also fall within the ambit of greenwashing litigation. In *Usler v. Vital Farms, Inc.*, the court considered whether Vital Farms misled consumers by labelling its egg cartons as “humane” and “ethical,” where evidence suggested that the company at least partially sourced products from inhumane facilities.¹⁸ Vital Farms argued that its statements were not actionable, as they were “imprecise, subjective, and opinions” and not susceptible of definition.¹⁹ The court rejected these arguments, holding that Vital Farms’ statements—“humane,” “ethical,” and “pasture raised”—were indeed “susceptible of definition,” and a reasonable consumer would understand the terms to bear their plain meaning.²⁰

Courts have generally dismissed challenges to representations based on publicly available methodology, “aspirational statements,” and humorous statements or puffery. In *Dwyer v. Allbirds*, for instance, the plaintiff took issue with the defendant’s commercials for wool sneakers, which showed “happy” sheep in “pastoral settings,” as well as advertisements depicting sheep captioned, “What if every time you got a haircut they made shoes out of it? That would be pretty cool.”²¹ Ultimately, the court dismissed the plaintiff’s claims, holding that the ads were “obviously intended to be humorous” and “[made] no representations at all.”²² Moreover, the *Allbirds* court rejected the plaintiff’s challenge to Allbirds’ sustainability claims since the company outlined its methodology on its website and made “clear what [was] included in its carbon footprint calculation.”²³ Similarly, in *Lizama v. H&M Hennes & Mauritz LP*, the court dismissed the plaintiff’s claim because H&M never made a misrepresentation of fact regarding its “conscious choice collection;” the defendant retailer only claimed the clothing line contained “more sustainable materials” and further disclosed its methodology by providing

“on its website all of the information [a consumer] needed to determine the source, composition and relevant comparison of the ‘more sustainable materials’ used by H&M in its conscious choice collection.”²⁴

Courts have also dismissed greenwashing cases where the purported misrepresentation was a result of circumstances beyond the defendant company’s control. For instance, in *Duchimaza v. Niagara Bottling, LLC*, a plaintiff took issue with a water bottle manufacturer’s marketing claims that its 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.²⁵ The court relied on the Green Guides in evaluating the “recyclable” claims and concluded the buyer failed to state claims for deceptive practices and false advertising.²⁶ Similarly, a court in California expressed skepticism about claims that various bottling companies misled consumers about the recyclability of their beverage bottles because “the consumer deception alleged in the [first amended complaint] is tied to forces and circumstances well beyond defendants’ control,” namely, “such unpredictable factors as changes in importation policy by the national government in China, and the economics of the recycling business.”²⁷

Conclusion

As more greenwashing claims are decided, and the FTC and SEC provide additional guidance on greenwashing, it will become increasingly important for companies to adjust their marketing to avoid costly litigation. Recent greenwashing cases suggest that courts and litigants often rely on the Green Guides’ standards when evaluating greenwashing claims, and companies must exercise caution when using certain broad terms like “sustainable,” “humane” and “recyclable.” If the marketer cannot substantiate

the claim, it should consider avoiding its use. Unqualified, general environmental benefit claims like “green” or “eco-friendly” will be difficult—if not impossible—to substantiate.

Best practices for companies making green claims include becoming familiar with the FTC’s Green Guides, particularly the definitions of terms commonly used in “green” marketing campaigns, basing marketing on claims that can be substantiated, and qualifying claims that could be viewed as vague or overbroad with clear, prominent and specific environmental benefits. Courts may dismiss greenwashing cases where companies publicly disclosed the basis of their sustainability claims (“show your work”), used puffery, made statements that were “obviously intended as humorous” and/or were subject to factors beyond their control, like global economics. ■

Endnotes

1. Eco-Friendly and Green Marketing Claims, *available at*: ftc.gov/news-events/topics/truth-advertising/green-guides.
2. While the Green Guides are currently nonbinding, the FTC is considering codifying them into regulations enforceable by civil penalties. In addition, certain states have incorporated the Green Guides into state law.
3. Press release with links to cases, *available at*: ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls.
4. Because the Green Guides rely on enforcement via Section 5 of the FTC Act, the FTC generally cannot obtain money penalties in connection with first-time violations related to the Green Guides.

5. After the comment period ended in April 2023, the FTC held a public workshop in May 2023 to gather further opinions on “recyclable” claims and requested additional public comments on that issue. The FTC may hold additional public workshops focused on other specific issues, such as sustainability or carbon offsets, and solicit further comments on those issues before taking any further action with respect to updating the Green Guides or commencing a formal rulemaking process.
6. Complaint, *available at*: oag.ca.gov/system/files/attachments/press_releases/n2577_complaint.pdf.
7. *Platkin, et al v. Exxon Mobil Co., et al.*, MER L-001797-22 (N.J. Super. Ct.), Complaint and Jury Demand, *available at*: nj.gov/oag/newsreleases22/2022-1018_NJ-Climate-Complaint-FILED.pdf.
8. *Id.*, at p. 1, 13.
9. Given New Jersey’s robust CFA, with its fee shifting and treble damages provisions, the state may be a particularly attractive venue for would-be greenwashing litigants.
10. Rhode Island, Delaware, Connecticut, Massachusetts, Minnesota and Vermont have pursued similar climate actions.
11. No. 2021 CA 003027 B, 2022 WL 2132634, at *1 (D.C.Super. June 07, 2022).
12. *Id.* at *5.
13. *Rawson v. ALDI, Inc.*, No. 21-CV-2811, 2022 WL 1556395 (N.D. Ill. May 17, 2022).
14. *Id.* at *1.
15. N.Y. Gen. Bus. Law §§349-50 (McKinney).
16. No. CIV.A. 11-888 MAS, 2013 WL 1338199 (D.N.J. Mar. 31, 2013).
17. *Id.* at *8.
18. No. A-21-CV-447-RP, 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022), report and recommendation adopted, No. 1:21-CV-447-RP, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022).
19. *Id.* at *4.
20. *Id.* at *4-5.
21. 598 F.Supp. 3d 137, 152, 153 (S.D.N.Y. 2022).
22. *Id.* at 152.
23. *Id.* at 150.
24. No. 4:22 CV 1170 (RWS), 2023 WL 3433957, at *6 (E.D. Mo. May 12, 2023).
25. 619 F. Supp. 3d 395 (S.D.N.Y. 2022).
26. *Id.* at 412.
27. *Swartz v. Coca-Cola Co.*, No. 21-CV-04643-JD, 2023 WL 4828680, at *4 (N.D. Cal. July 27, 2023).



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