



Environmental Update

November 2022

Rise in Greenwashing Cases: What Companies Need to Know

What Is Greenwashing?

Broadly speaking, “greenwashing” is an umbrella term that describes companies marketing their products or practices as being sustainable or environmentally friendly in ways that may be unsupported by data or perceived as misleading or even false. The term greenwashing was [originally coined](#) by environmentalist Jay Westerveld in 1986, when he criticized the hotel industry’s “save the towel” movement as misleading. Westerveld argued that the industry’s true goal was not to reduce waste and help protect the environment, but to minimize the cost of washing towels.

Greenwashing suits are often led by environmentally conscious consumers who wish to expose businesses they believe are misleading consumers with hollow representations about their commitments to sustainability. No industry is immune from suit, either. These lawsuits target industries ranging from agribusiness to oil and gas. Greenwashing cases have been filed in both state and federal court and have included claims of unfair and deceptive trade practices, fraud, false advertising and nuisance.

As consumers continue to focus on climate change and its effects, and the demand for sustainable practices grows through corporate environmental, social and governance (ESG) initiatives, we anticipate that these types of lawsuits [will continue to increase](#).

What Drives Greenwashing?

The results of a [2018 McKinsey & Company study](#) show that generational attitudes and beliefs—particularly those prevalent among Generation Z (roughly, those born between 1997 and 2012)—indicate that consumers increasingly prefer to patronize companies they perceive to be ethical. Gen Z expects brands to be socially conscious and to formulate proactive and effective action on climate. These consumer expectations may tempt companies to greenwash in the hopes of remaining competitive with consumers.

Some companies have been sued even though their corporate sustainability statements were not intentionally misleading. Greenwashing can occur because of the lack of corporate and legal oversight, and many companies simply lack the knowledge and supporting data to make any promises about the effects of their sustainability efforts.

Recent Greenwashing Lawsuits

Companies are most vulnerable to accusations of greenwashing in their advertising and promotional materials. One class action filed just last month in a federal court in New York alleges that the manufacturer of a bottled water brand labels its products “carbon neutral,” even though the manufacturing process releases carbon dioxide. The complaint, which is currently backed by a single plaintiff, alleges that customers would not have purchased the products had they known that their labels were false. The plaintiff also contends that the manufacturer fails to provide any support or explanation for its statement that the product is carbon neutral. The lawsuit includes claims

under California and New York consumer laws of unfair deceptive trade practices and false advertising, breach of express and implied warranty, unjust enrichment and fraud. The plaintiff currently seeks additional nationwide plaintiffs to join the class.

A second recent lawsuit also shows that greenwashing plaintiffs are becoming increasingly creative and have their sights set on the utility industry. On August 4, 2022, several plaintiffs accused a Washington, D.C. utility company of violating District of Columbia consumer protection laws by allegedly misinforming customers about the effects of methane gas. The suit contends that the company's promotional materials discuss the environmental benefits of natural gas but fail to disclose that methane gas contributes to the current climate crisis and global warming. The suit is currently pending in the Superior Court of the District of Columbia.

Local governments are also joining in the chorus. At least 20 states, cities and counties around the United States have filed suit against the fossil fuel industry for allegedly failing to disclose connections between its products and climate change. The most recent suit was filed last month by the state of New Jersey in state court against five oil companies and a trade association. The state of New Jersey alleges that these defendants "continue to peddle climate misinformation" to the public in the face of contrary information about the effects of fossil fuels and greenhouse gases on climate change. The suit includes the following causes of action: failure to warn, negligence, impairment of public trust, trespass, public nuisance, private nuisance and violations of the New Jersey Consumer Fraud Act.

Recent greenwashing allegations have also reached the fashion industry. On November 3, 2022, two named plaintiffs on behalf of a class action sued a multinational fashion brand under both Missouri and California state consumer protection laws for unlawful, unfair and fraudulent business practices. The complaint also included state law claims of unjust enrichment, negligent misrepresentation and fraud. Plaintiffs allege that they purchased household products from the fashion brand's sustainable clothing line which comprises materials that are not environmentally friendly and are primarily made of

recycled polyester. As part of their requested relief, plaintiffs are seeking an order requiring the fashion brand to "undertake a corrective advertising campaign." The suit is currently pending in the U.S. District Court for the Eastern District of Missouri.

Mitigation Measures to Consider

To minimize the risk of a greenwashing lawsuit, consider the following:

- Speak the truth. Or, at most, *only* the truth that you can support with data or other evidence. If the available data does not support potential sustainability statements, remove them from company advertising, promotional materials and disclosures.
- Stay on top of the Federal Trade Commission's (FTC) most current [Green Guides](#), which provide guidance on the use of environmental marketing claims. The FTC may issue a revised version before year end. For now, companies should avoid vague terms like "eco-friendly," "all natural," and "sustainable." Instead, properly quantify carbon offsets and carefully document claims about compostability, degradability and recyclability.
- Have a lawyer review corporate sustainability statements on an ongoing basis and include these reviews as part of company-wide corporate audit programs.
- Implement a suite of mitigation measures—not just one. For example, obtaining a certification from a third party that your business operation is sustainable is unlikely to serve as a basis for dismissing a complaint.¹

What's to Come?

Previously, federal courts largely declined to exercise jurisdiction over greenwashing consumer protection claims and instead remanded the cases to state court. This trend seems to be changing as more plaintiffs are initially filing

¹*Usler v. Vital Farms, Inc.*, No. A-21-CV-447-RP, 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022) (allowing lawsuit to proceed even though defendant had received Humane Farm Animal Care certification for its egg farm operations).

their claims in federal court. We anticipate that we will start to see more of these cases proceed to discovery and produce settlements and decisions on the merits that will create a new body of case law. The current trends suggests that we will continue to see more of these lawsuits as consumers and governments seek to challenge the sufficiency of corporate ESG programs.

Stay tuned for updates on what is happening in this space.

FOR MORE INFORMATION

For more information, please contact:

Tanya C. Nesbitt*

404.407.3605, 202.331.8330

Tanya.Nesbitt@ThompsonHine.com

**Tanya is not admitted to practice in Georgia. She is admitted to practice only in the District of Columbia, Virginia and Washington.*

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