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Developments in Greenwashing and ESG Regulation and Litigation Expected in 2023

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Special to the Legal

In 2022, there was increasing attention paid to companies' public promotion of their environmental and sustainability programs. That trend is likely to continue in 2023, with further developments in regulation and litigation pertaining to "greenwashing"—a marketing practice that involves unsubstantiated or exaggerated claims about the environmentally friendly or socially responsible attributes of an organization's products or services.

The term greenwashing was first used by environmentalist Jay Westerveld in a 1986 essay in which he suggested that the "save-a-towel" campaigns promoted by hotel chains were primarily motivated by cost-savings, rather than environmental considerations, despite hotel marketing materials suggesting otherwise. In response to growing public concern regarding greenwashing, in 1992, the Federal Trade Commission (FTC) published an administrative guidance document titled the Guides for the Use of Environmental Marketing Claims to help companies avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. Section 45. In developing the guides, the FTC relied upon consumer surveys to explain how reasonable consumers are likely to interpret various environmental claims, and offered nonbinding guidance on how to substantiate environmental

claims so as to avoid deceiving consumers. Following revisions in 1996, 1998, and 2012, the FTC published notice in the Federal Register on Dec. 20, 2022, that it is now undertaking a decennial review of the guides and is seeking public comment on potential updates to the guides. There

is a public comment period until April 24, 2023. The FTC is seeking feedback on the efficiency, costs, benefits, and regulatory impact of the guides to determine whether to retain, modify, or rescind them. It is also inviting comment on specific types of environmental benefit claims that have received increased attention in the past several years.

Separately, but relatedly, the Securities and Exchange Commission (SEC) announced the creation of a Climate and Environmental Social and Governance (ESG) Task Force on March 4, 2021. The current understanding of the acronym ESG (referencing environmental, social, and corporate governance) seems to have originated from a 2005 United Nations study, which urged companies to develop and report on their policies addressing climate change and human rights issues, among others, to inform their financial analyses and investors' strategies. Early last year,



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the SEC published notice of two proposed rulemakings which would impose specific ESG disclosure requirements on SEC registrants, investment advisers, and business developers. The public comment periods for both rulemakings are closed, and additional regulatory developments related to ESG are expected in 2023.

From a litigation standpoint, a number of greenwashing class action lawsuits, many of which rely upon alleged divergences from the Green Guides and companies' ESG statements, will continue to make their way through the courts in 2023, with potentially significant decisions on class certification and the merits of these claims expected in the coming year.

In *Woolard v. Reynolds Consumer Products*, No. 22-CV-1684 (S.D. Cal. Oct. 18, 2022), a putative nationwide class action case, suit was brought against the manufacturer of Hefty trash bags for allegedly misrepresenting that its "recycling"

trash bags are recyclable. According to the complaint, Hefty “recycling” trash bags are made from low-density polyethylene and are not in fact recyclable. Instead, the complaint alleges, “the bags and all of the otherwise recyclable items within them are not delivered to a recycling facility but are treated as regular solid waste materials,” finding their way to landfills or incinerators.

Similarly, in *Curtis v. 7-Eleven*, No. 21-cv-6079 (N.D. Ill. Sept. 13, 2022), the U.S. District Court for the Northern District of Illinois reviewed 7-Eleven’s motion to dismiss a putative class action alleging that the company falsely and deceptively marketed its party cups, freezer bags, and foam plates and cups as “recyclable” despite knowing that very few recycling facilities accept these products and that some of these products lacked markings, known as RIC numbers, which recycling facilities use to sort products by plastic type. Significantly, the court found that the putative class representative was entitled “to sue on behalf of class members with substantially similar injuries from similar products” after recognizing that there was a federal district court split on this issue. The court went on to find that 7-Eleven could only be held responsible on the putative class representative’s first claim regarding the lack of RIC numbers, which make those products intrinsically incapable of being recycled, while 7-Eleven could not be held responsible for extrinsic economic and social factors that make it unlikely that their products will ever be recycled.

The U.S. District for the Northern District of California came to the same conclusion in *Swartz v. The Coca-Cola Co.*, No. 21-cv-04643 (N.D. Cal. Nov. 18, 2022), in which the court granted the defendants’ motion to dismiss the plaintiffs’ claims that the “100% recyclable” labels on single-use plastic bottles were false and misleading because most plastic bottles are not recycled and instead end up in landfills or incinerators due to a lack of recycling capacity and a lack of demand

for recycled plastics. Like in *Curtis*, the court in *Swartz* found that the term “recyclable” denotes only that the material itself is capable of being recycled, not that it actually will be recycled, and dismissed the plaintiffs’ claims that relied on that theory.

The Superior Court for the District of Columbia dealt with similar “puffing” statements made on Coca-Cola’s website and social media accounts in *Earth Island Institute v. The Coca-Cola Co.*, No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022). The court found that neither the company’s general statements about sustainability, nor its more specific statements espousing its recycling goals, were sufficient to support a valid consumer fraud claim because the statements at issue were “aspirational, limited and vague,” and nothing in the law “prohibits an entity from cultivating an image” or branding itself.

Conversely, in *Henriquez v. ALDI*, No. 2:22-cv-06060 (C.D. Cal. Feb. 7, 2023), the court found that state consumer fraud claims relating to statements made on ALDI’s packaging, website, and social media accounts that its canned tuna is “dolphin safe” and “sustainable” were sufficiently plead to survive ALDI’s motion to dismiss. In that case, the plaintiff pointed to several allegedly fraudulent statements which could mislead a reasonable consumer as to the fishing methods used to obtain the tuna, including ALDI’s use of a unique “wild caught” logo on its tuna cans, and emphasis on its website that it participates in a number of independent partnerships that promote ethical and sustainable fishing.

Although the analysis can at times be nuanced, there is likely a meaningful distinction between the aspirational, forward-looking statements that were challenged in *Earth Island Institute* and measurable, verifiable statements that promote a product’s past or present benefits that were challenged in *Henriquez*. For the time being, state and federal courts alike seem inclined to dismiss complaints based on the former for failure to state a claim while

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permitting the latter to go forward for further proceedings. While many greenwashing actions thus far have dealt with claims related to a product’s recyclability, the universe of greenwashing claims seems to be expanding to include general sustainability and animal welfare claims, among others. As we embark on a new year, it is a good time for companies of any size to take a hard look at whether they can substantiate the environmental or ESG benefit claims made in their marketing materials on their websites, and even on social media, so as to minimize risk of exposure to greenwashing claims. •

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