LITIGATION MINUTE: THIRD-PARTY CERTIFICATIONS: ESG FRIEND OR FOE?

ESG IN LITIGATION SERIES: PART SIX OF EIGHT

Date: 12 July 2022

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Many companies are marketing their Environmental, Social, and Governance (ESG) efforts by labeling their products or services with a third-party certification. However, companies marketing such third-party certifications may be at risk of greenwashing lawsuits.

In a minute or less, here is what you need to know about this increasing risk of liability.

Greenwashing Litigation Over Third-Party Certifications

In a greenwashing lawsuit over a third-party certification, a plaintiff accuses a business of misrepresenting what a certification says about its ESG practices or accuses a business of relying on a third party whose certification process fails to adequately evaluate what it claims. The specific causes of action vary from case to case, but often include state and federal claims of unfair and deceptive trade practices, fraud, and false advertising.

In 2012, the Federal Trade Commission (FTC) released its most recent set of “Green Guides,” detailing best practices for companies to avoid greenwashing litigation when marketing their products and services. The Green Guides observe that it is deceptive to use a third-party certification or seal that does not convey the basis for the certification or implies general environmental benefits. The Green Guides recommend businesses maintain records that substantiate “all claims reasonably communicated by the certification” and to use “clear and prominent qualifying language” that indicates the certification refers only to specific ESG benefits.

Cases About Environmental “E” Certifications

In *Dwyer v. Allbirds, Inc.*, a consumer alleged Allbirds made misleading animal welfare claims, challenging Allbirds' statements that the sheep providing the company's wool “live the good life” because the wool is sourced from ZQ Merino certified farms.[1] The court dismissed the case because it found no reasonable consumer would expect farm animals to receive individual care or expect that the ZQ Merino certification process would require a particular methodology approved by PETA.

In 2016, the National Advertising Division (NAD), a self-regulating body in the advertising industry, forwarded a complaint to the FTC against battery-producer LEI Electronics (LEI) for marketing its products as “carbon-neutral,” as certified by Carbonfund.org and CarboNZero. The complaint was initially brought by LEI's competitor, Energizer. NAD concluded that LEI lacked independent evidence supporting its carbon-neutral marketing and that the third-party certifications alone were not sufficient. The FTC did not take any action against LEI.

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Cases About Social "S" Certifications

In *Walker v. Nestle USA, Inc.*, the court refused to dismiss a complaint because Nestlé's Rainforest Alliance certification, in combination with other marketing statements, could mislead a reasonable consumer into believing Nestlé sustainably sourced its chocolate.[2] The court held the certification "enhance[d] the advertising statements by suggesting that they are true because they were approved by a third-party."

Warnings for Companies Relying on Third-Party Certifications

Third-party certifications are not a shield against litigation or FTC enforcement. Marketing statements regarding products or services with third-party certifications must be supported by independent evidence.

1. Recent cases indicate that consumers are likely to bring consumer protection, fraud, or false advertising claims against companies for greenwashing statements regarding products or services certified by a third party.
2. Third-party certifications bolster marketing statements. If the marketing statements are already misleading, the certification makes it more so.
3. Verify that the third-party certification process matches what a reasonable consumer would expect for that sort of certification.

Mitigating These Risks

With assistance of counsel, businesses should analyze public statements against the soon-to-be-updated FTC Green Guides and evolving case law to avoid overstating what a third-party certification means. Businesses should maintain independent evidence that substantiates their certifications. Furthermore, businesses should vet the processes used by third-party certifiers to ensure they match consumer expectations.

We acknowledge the contributions to this publication from our summer associate Derek Kalbfleisch.

FOOTNOTES

[1] Dwyer v. Allbirds, Inc., No. 7:21-cv-05238, 2022 WL 1136799 (S.D.N.Y. 2022)
[2] Walker v. Nestle USA, Inc., No. 3:19-CV-723-L-DEB, 2022 WL 901553 (S.D. Cal. Mar. 28, 2022)

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