LITIGATION MINUTE: PLAINTIFFS SEEK TO EXPAND GREENWASHING CLAIMS TO 'ASPIRATIONAL' STATEMENTS ABOUT BUSINESSES

ESG LITIGATION SERIES: PART THREE

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

In a minute or less, here is what you need to know about the expanding state of greenwashing litigation being filed against manufacturers, distributors, and retailers of consumer products.

Types of Suits

Greenwashing litigation—in which plaintiffs allege that companies falsely represent their products or themselves as environmentally friendly (or obscure negative environmental attributes)—poses a significant concern for companies involved in product manufacturing, distribution, and sales. Suits targeting the language on product labels or advertisements have become increasingly common, but plaintiffs are now going further, asserting that a challenged statement need not be about a specific product to fall within the ambit of consumer protection laws. In other words, any statement made by a manufacturer about the sustainability practices of the company—rather than a company product—may be the subject of litigation.

These lawsuits also challenge a broader range of statements. Plaintiffs are now seeking to challenge “aspirational statements” regarding businesses' efforts to become more sustainable, a category of statements that has historically been treated as beyond the reach of consumer protection statutes.

Plaintiffs' Targets and Claims

Consumers, environmental advocacy groups, and even state and local governments are filing greenwashing suits against companies across various industries—food, personal care products, fashion, cosmetics, transportation, technology, and more—that they believe have misled the public about the environmental attributes of their products and their businesses. Plaintiffs are targeting carbon-neutral and carbon-reduction claims, challenging the veracity of carbon-offset programs as a whole.

They also assert claims regarding the recyclability and compostability of products based on whether the product can technically be recycled or composted and whether, in practice, the product is actually recycled or composted.

In digging into ingredient lists and comparing the environmental effects of those ingredients to the products' and companies' marketing materials on environmental issues, plaintiffs are alleging that companies identifying

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sustainability among their values can be liable for any product the plaintiff believes does not live up to that standard.

The vast majority of these suits, when filed by consumers, are brought as putative class actions, but we also see public injunction lawsuits, in which a single person or advocacy group demands that a statement be retracted or revised, or that sales of the product containing the challenged advertising be halted.

How to Protect Yourself

Substantiation is key. Ensure that all environmental claims are backed by clear and accurate evidence, and have your marketing and legal teams collaborate closely to ensure that marketing materials are substantiated and compliant with relevant regulations.

Additionally, verify that any environmental certifications your company advertises come from reputable organizations, and maintain proper documentation to support these certifications. K&L Gates regularly advises and assists clients both in drafting their marketing and advertising to avoid greenwashing and in defending clients in greenwashing suits.

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