

## **It's Not Easy Being Green: Recognizing (and Avoiding) Potential Greenwashing Claims**

Driven by consumers' heightened focus on environmental sustainability, companies are increasingly seeking to market their products as cleaner and greener. And while marketers tout these claims, plaintiffs' counsel stand ready to pounce—challenging overstated and under-substantiated (i.e., “greenwashed”) environmental marketing messages. While claiming to be “committed to environmental sustainability” may seem innocuous or aspirational, such claims can still form the basis for class action suits under false advertising, consumer protection, or securities laws. With plaintiffs' attorneys “seeing green” when it comes to greenwashed marketing and advertising, companies should learn to recognize the red flags of (and put the red light on) unsupported environmental claims.

### **I. Greenwashing: An Introduction**

As the name suggests, “greenwashing” is “the act or practice of making a product, policy, [or] activity. . . appear to be more environmentally friendly or less environmentally damaging than it really is.”<sup>i</sup> Recent greenwashing cases involve selected industries beyond the usual targets of mining, manufacturing, and oil and gas extraction. From airlines to agribusinesses, chain restaurants to fashion retailers, if a business is *saying* something about its environmental footprint, it may end up *paying* something if its actions toward environmental sustainability do not live up to its marketing claims.

Companies are understandably eager to position themselves as achieving environmental sustainability and making progress toward climate targets. In 2023, 68% of Americans stated that they would choose to spend more for environmentally sustainable products,<sup>ii</sup> and other sources indicate that percentage could be even higher.<sup>iii</sup> As a result, there is an established market, especially among Millennial, Zillennial, and Gen Z consumers, for products that claim to be environmentally friendly. Meanwhile, companies that engage in greenwashing experience decreased customer satisfaction scores, and ultimately, decreased profits.

### **II. Recognizing Greenwashing Red Flags**

The potential perils of greenwashing challenges have caused some companies to become silent as to their environmental programs and priorities, a practice known as “greenhushing.” But companies that learn to recognize (and minimize) the assertions that could make them greenwashing targets can make their claims with confidence. Although by no means exhaustive, the following tips are a good starting point for evaluating the relative risk of your company's green claims and adopting best practices for environmental marketing.

- 1) Word Choice Matters: Carefully evaluate terms that are ambiguous or undefined before using them to describe the environmental attributes of a product or company.

The following is a list of “words to watch”—amorphous or ambiguous terms without clear regulatory definitions that plaintiffs may pull out of context to form the basis for their greenwashing claims. Plaintiffs frequently challenge these terms as misleading where a product or company fails to live up to their strictest possible definitions. For example, where a product marketed as “pure” or “natural” contains trace amounts of a pesticide, a plaintiff may challenge the claim as misleading because, by their most stringent interpretations, “pure” and “natural” mean the absence of any contaminants or synthetic chemicals.

Greenwashing “Words to Watch”:

- Natural
- Healthier
- Free of
- Wholesome
- Non-toxic
- Pure
- Organic
- Recyclable
- Eco-friendly/Environmentally friendly
- Green
- Conscious
- Sustainable

In contrast to the United States, where challenges to vague environmental claims mainly come in the context of consumer class action litigation, the European Union (“EU”) has taken an aggressive legislative stance against such claims. The EU is in the process of adopting regulations that would outlaw the use of “generic environmental claims” (e.g., “environmentally friendly,” “natural,” “biodegradable,” and “climate neutral”) unless a company can demonstrate actual evidence of environmental performance.<sup>iv</sup>

- 2) Break Down Silos: Integrate greenwashing considerations across business units and functions.

Companies often overlook the widespread and pervasive nature of greenwashing claims and their potential to impact (or originate from) any angle of the business. Recognizing and preventing greenwashing should be a common goal communicated and implemented across the company. As businesses evaluate their exposure to greenwashing litigation risks, the following areas are important to consider:

- Product distribution;
- Product sourcing;
- Product labeling;
- Supply chain management;

- Product disposal (e.g., recycling);
- Diversity, equity and inclusion, and human rights;
- Governance and reporting/corporate accountability structures;
- Innovation processes; and
- Reputational and public relations concerns.

3) Recognize the multi-faceted nature of greenwashing litigation risk. Greenwashing claims take many forms (consumer class action lawsuits, shareholder derivative suits, regulatory enforcement actions, etc.) and can be pursued by many different plaintiffs, from state attorneys general to non-governmental organizations to business competitors. Knowledge of the possible claimants and causes of action for greenwashing suits enables in-house counsel to identify and quantify potential business and reputational risks. Common grounds for greenwashing actions include the following:

- Consumer Protection Claims:
  - State unfair competition or deceptive trade practices laws
  - False advertising statutes
  - Contract or warranty claims
  - Unjust enrichment claims
  - Fraudulent or negligent misrepresentation claims
- Securities Litigation: Greenwashing in public-facing company statements or proxy materials may form the basis for securities claims.
- Advertising Challenges: Competitors, NGOs or consumer advocacy groups may challenge greenwashing in marketing through third-party regulatory bodies, such as the Better Business Bureau's National Advertising Division ("NAD").<sup>v</sup>

The following are recent high-profile examples of greenwashing claims against prominent companies across a wide range of sectors—from food and consumer products companies to technology and transportation firms.

- JBS USA: NAD/National Advertising Review Board challenge addressing under-substantiated "net zero" claims by world's largest animal protein producer.<sup>vi</sup>
- American Airlines: Employee challenge to company retirement plan that allegedly pursued environmental, social, and governance ("ESG") goals over plan performance and profit.<sup>vii</sup>
- Nike: Consumer class action challenging green claims made in connection with Nike's "Sustainability Collection" products.<sup>viii</sup>

- Delta Airlines: Consumer class action challenging Delta's carbon neutrality claims premised on the purchase of carbon offsets.<sup>ix</sup>
- Target: Consumer class action challenging "clean" claims regarding beauty products where cosmetics allegedly contained "unwanted and harmful chemicals."<sup>x</sup>
- Lumen Technologies (formerly CenturyLink): Securities class action challenging company's positive representations about its social and environmental credentials where the company allegedly used telecom cables coated in lead, increasing the public's exposure to the contaminant in the environment.<sup>xi</sup>

### III. Show-Me Greenwashing: A Missouri Court's Approach

On May 12, 2023, the United States District Court for the Eastern District of Missouri dismissed a greenwashing case involving H&M, the Swedish fast-fashion giant.<sup>xii</sup> The original complaint alleged that H&M overstated the sustainability credentials of its "Conscious Choice" clothing line through statements such as:

- "The shortcut to more sustainable shopping."
- "You can identify our most environmentally sustainable products by looking out for our green Conscious hangtags."
- "Pieces created with a little extra consideration for the planet. Each Conscious Choice product contains at least 50% or more sustainable materials – like organic cotton or recycled polyester – but many contain a lot more than that. The only exception is recycled cotton, where we accept a level of at least 20%."
- "With new technological solutions and innovations, we're continually working to make our range even more sustainable."<sup>xiii</sup>

Specifically, the plaintiffs alleged that "Conscious Choice" products were not made from materials that fit their notion of "sustainable." For example, Conscious Choice products allegedly contained more synthetic fabrics than other H&M clothing lines, and the polyester in the Conscious Choice products, derived from recycled PET plastic bottles, was likely to be disposed of in unsustainable ways (e.g., landfilling, incineration or dumping) due to the inability of the material to be recycled.

Key considerations from H&M's successful defense of this case include:

- **No personal jurisdiction over H&M**. One named plaintiff was from Missouri and purchased his H&M "Conscious Choice" products in Missouri, while the other named plaintiff was from California and made his purchases in California. The court dismissed the California plaintiff's claims because they lacked any

affiliation with the forum state—Missouri—sufficient to invoke specific personal jurisdiction over H&M with respect to those claims. Because H&M was not subject to general personal jurisdiction in Missouri (as it was not incorporated in Missouri and did not have a principal place of business in the state), the California plaintiff's claims were dismissed for lack of personal jurisdiction over H&M.

- **Plaintiffs mistakenly relied on implied statements.** The court refused to entertain claims based on statements that H&M did not actually make, but which plaintiffs claimed were implied by the company's Conscious Choice marketing, such as "environmentally friendly" or "sustainable." Specifically, the Court stated: "Despite [Plaintiffs'] repeated use of the phrase 'environmentally friendly' in the complaint, H&M never actually claims that its Conscious Choice collection items are 'environmentally friendly.' Because H&M never uses the phrase 'environmentally friendly' in its marketing, the Court does not consider that phrase in its determination of whether [Plaintiffs'] claims survive dismissal." Likewise, the court refused to interpret claims that H&M's Conscious Choice garments contained "more sustainable materials" and represented H&M's "most sustainable products" as blanket statements about the sustainability of the Conscious Choice line. Rather, "the only reasonable reading of H&M's advertisements" was that the Conscious Choice collection used materials that were more sustainable than those used in H&M's other product lines.
- **Plaintiffs made the wrong comparisons.** The plaintiffs claimed that H&M's polyester sourced from recycled PET plastic bottles was not a "more sustainable" option, contrary to H&M's representations. While PET plastic bottles may be recycled into other bottles numerous times, recycled polyester garments derived from PET plastic bottles are not particularly recyclable themselves and are likely to end up discarded in landfills or the environment. The court noted that a reasonable consumer would not compare clothing "made from recycled polyester to PET bottles when evaluating whether recycled polyester is a 'more sustainable material.'" Instead, the relevant comparison that reasonable consumers would make was between recycled polyester and non-recycled, or virgin, polyester, and recycled polyester was clearly the more sustainable option. Likewise, the plaintiffs' claims that H&M's "Conscious Choice" marketing was misleading because the product line contained more synthetic fabrics than H&M's other product lines was misguided. Although the Conscious Choice line *did* utilize more synthetic fabrics than other H&M lines, it used more *recycled* synthetics, which could be considered "more sustainable materials" than virgin synthetics.
- **H&M appropriately qualified environmental claims.** Plaintiffs further challenged H&M's Conscious Choice representations for violating the Federal

Trade Commission’s Guides for the Use of Environmental Marketing Claims<sup>xiv</sup> (known as the “Green Guides”), which prohibit “unqualified general environmental benefit claims” and claims that state or imply only negligible environmental benefits. The court concluded that H&M’s statement that “each Conscious Choice product contains at least 50% more sustainable materials – like organic cotton or recycled polyester” were sufficiently qualified because the percentages were accurate, and it was uncontested that organic cotton and recycled polyester were more environmentally beneficial than non-organic cotton and virgin polyester. Likewise, the environmental benefits advertised by H&M were not “negligible” because garments were only included in the Conscious Choice product line if the *majority* of their materials were “more sustainable.”

#### IV. Conclusion

As evidenced by the recent H&M case, to prevail against a greenwashing claim, it is important for companies to take a holistic approach to their environmental marketing strategies, viewing all public-facing sustainability statements collectively, rather than in isolation, and evaluating all messages they convey (both directly intended and those implied by consumers). By ensuring sustainability messages are contextualized, not generalized, and substantiated, not exaggerated, in-house counsel can give the green light to environmental marketing initiatives while minimizing the red flags associated with greenwashing lawsuits.

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<sup>i</sup> Definition of “Greenwashing” – Merriam-Webster Dictionary (2023).

<sup>ii</sup> See Report Finds Consumers Willing to Pay More for Sustainability | PDI Technologies, Inc. (Apr. 26, 2023).

<sup>iii</sup> See, e.g., Most Consumers Want Sustainable Products and Packaging, Business News Daily (Feb. 21, 2023).

<sup>iv</sup> EU to ban greenwashing and improve consumer information on product durability, European Parliament (Sept. 19, 2023).

<sup>v</sup> Better Business Bureau National Programs – National Advertising Division.

<sup>vi</sup> See National Advertising Review Board Recommends JBS Discontinue “Net Zero” Emissions by 2040 Claims (June 20, 2023).

<sup>vii</sup> Spence v. American Airlines, Inc., No. 4:23-cv-00552-O (N.D. Tex.) (filed June 2, 2023).

<sup>viii</sup> Ellis v. Nike USA, Inc., No. 4:23-cv-00632 (E.D. Mo.) (filed May 10, 2023).

<sup>ix</sup> Berrin v. Delta Air Lines, Inc., No. 2:23-cv-04150 (C.D. Cal.) (filed May 30, 2023).

<sup>x</sup> Boyd v. Target Corp., No. 0:23-cv-02668-KMM-DJF (D. Minn.) (filed Aug. 2, 2023).

<sup>xi</sup> McLemore v. Lumen Tech., Inc., No. 3:23-cv-01290 (W.D. La.) (filed Sept. 15, 2023).

<sup>xii</sup> Lizama v. H&M Hennes & Mauritz LP, No. 4:22-cv-01170 (E.D. Mo. May 12, 2023).

<sup>xiii</sup> Lizama, No. 4:22-cv-01170 (E.D. Mo.) (filed Nov. 3, 2022).

<sup>xiv</sup> Guides for the Use of Environmental Marketing Claims (“Green Guides”), Federal Trade Commission (Oct. 11, 2012).