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Greenwashing Class Action Litigation: An Emerging Risk for Companies' Claims of Sustainability

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I. Introduction

Recent regulatory actions and consumer trends have increasingly motivated companies to make public claims about their products' sustainability.[1] Corporations, either in response to regulation requiring disclosure, or through their own affirmative efforts to market their products and services, are making detailed environmental and sustainability disclosures. In response, the plaintiffs' bar has begun to target these representations as "greenwashing," bringing a growing number of false advertising class-action lawsuits against companies that they allege cannot substantiate their claims.

So far, plaintiffs in greenwashing class actions are mostly targeting retailers and consumer-facing companies in industries like footwear, apparel, food, and beverages. Many of these suits are filed in states with strong consumer protection laws, like New York and California. Recently, a significant number of these class-action cases have survived initial motions to dismiss. This trend signals that courts are seriously considering these claims – and that potential defendants should also consider seriously the prospect of such greenwashing lawsuits. Class claims that proceed past a motion to dismiss stage, especially those that are certified, may have uncertain outcomes, be expensive to litigate, and can result in costly settlements for companies as well as significant reputational harm.

This article describes certain factors driving this surge in greenwashing class actions, highlights some representative cases with different outcomes, and summarizes emerging trends in this area of litigation. It also offers recommendations for minimizing companies' potential exposure to greenwashing claims based on insights gleaned from recent caselaw.

II. Background and Regulator Concerns

"Greenwashing" occurs when companies makes false or inflated claims about the environmentally beneficial nature of their products, services, or their business generally. For example, greenwashing is evident when companies charge a premium for goods or services they misrepresent as "sustainable."[2] Accordingly, greenwashing claims will often consist of plaintiffs highlighting companies' public statements about their products' environmental impacts and alleging that those statements are unsupported by company actions. There is, however, no broadly accepted definition of greenwashing, and claims will vary by product and service, as well as across different markets, regulators, and jurisdictions. Such claims are typically based on common law allegations of false advertising, fraud, unjust enrichment, breach of warranty, or pursuant to specific state consumer protection statutes. In practice, greenwashing allegations often target companies that sell consumer products and may focus on representations made in marketing, product labelling, and even company websites and corporate filings.

Recently, regulatory entities like the Securities and Exchange Commission (SEC) and Federal Trade Commission (FTC) have turned their attention to greenwashing in the business world. In March 2021, the SEC launched its Climate and ESG Task Force in an effort to "develop initiatives to proactively identify ESG-related misconduct."[3] The Task Force's focus is on "identify[ing] material gaps or misstatements in issuers' disclosure of climate risks under existing rules," as well as "analyz[ing] disclosure and compliance issues relating to investment advisers' and funds' ESG strategies."[4] Since its establishment, the Task Force has charged entities ranging from asset managers to mining companies for failing to follow internal procedures around ESG investment practices or to properly disclose the risks associated with ESG claims.[5]

Apart from its Climate and ESG Task Force, in May 2022, the SEC issued two new sets of proposed rules intended to combat greenwashing by investment funds: "Investment Company Names" ("Names Rule"); and newly required "Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies" ("ESG Disclosure Rule").[6] These rules, when implemented, will provide additional fodder for investors looking to sue over alleged material misstatements or omissions relating to ESG topics. Both initiatives are aimed primarily at investor protection rather than the consumer goods companies now being targeted by class-action greenwashing litigation; however, they illustrate regulators' increasing attention to public-facing representations and marketing around the environmental impacts of goods and services.

Meanwhile, in December 2022 the FTC announced it was seeking public comment on potential updates to its "Green Guides for the Use of Environmental Claims" ("Green Guides").[7] The FTC first released the Green Guides in 1992 and updated them in 1996, 1998, and 2012; the agency is now doing so again to "ensure the Green Guides provide current, accurate information about consumer perception of environmental benefit claims," in order to both "help marketers make truthful claims and consumers find the products they seek."[8] The Green Guides provide guidance to companies making environmental marketing claims, including how consumers may interpret particular claims and how marketers can substantiate them.[9] While the Green Guides can help companies better understand what kinds of statements might invite liability and where to exercise caution, they are non-binding (outside of potential FTC enforcement actions) and do not pre-empt state or federal laws.[10] As a result, compliance with the Green Guides does not necessarily eliminate companies' exposure to greenwashing litigation.

III. Greenwashing Trends and the Private Bar

A. Class Action Requirements

As a preliminary matter, it is helpful to explain briefly the requirements for filing a viable class action claim. A class action is a procedural device that allows one or more "named plaintiffs" to file claims or prosecute a lawsuit on the behalf of a larger group or "class." The device enables courts to adjudicate lawsuits that would otherwise be unmanageable if each individual plaintiff (who suffered the same alleged harm at the hands of the same defendant) joined in the lawsuit as a named plaintiff.

A class action commenced in federal court must meet the procedural requirements of Federal Rule of Civil Procedure 23 ("Rule 23.") Before addressing the requirements under Rule 23, however, a court must first determine whether the named plaintiff in the suit has standing to bring their action. The class representative must first establish that it is a member of the class and suffered the same injury as those it seeks to represent.[11] The Supreme Court has noted this implied prerequisite justifies a departure from the "usual rule that litigation is conducted by and on behalf of the individual parties only."[12] After plaintiff demonstrates they have standing to represent their class, plaintiff must next establish the following prerequisites set forth in Rule 23(a): (1) the class must be "so numerous that joinder of all members is impracticable," (2) there must be "questions of law or fact common to the class," (3) the claims or defenses of the class representatives must be "typical" of the claims or defenses of the class," and (4) the class representatives "must fairly and adequately protect the interests of the class."

In addition, to the aforementioned prerequisites under Rule 23(a), a class action must satisfy at least one of the three sections of subsection (b) of Rule 23, which sets forth three categories of class actions.[13] Greenwashing class actions are typically filed pursuant to Rule 23(b)(3), which requires that a named plaintiff show that all of the following three factors exist: (1) there are questions of law or fact common to all members of the class; (2) the common questions predominate over any questions which affect only individual members of the class; and (3) the class action is superior to all other available methods for the fair and efficient administration of the controversy.[14] While there is some overlap between these two tests, both must be satisfied in order for a court to "certify" a class to proceed with its lawsuit.

Defendants can defeat a class action, rendering it un-certifiable, by establishing plaintiff has failed to plead or establish that any of the aforementioned factors are present. However, if a class meets the procedural requirements of Rule 23 and is deemed certifiable, the size and scope of these actions can be perilous for Defendants. For example, consumer fraud class settlements cost defendants millions of dollars on average between 2019 and 2020.[15]

B. Number and Status of Cases

The number of greenwashing class action cases filed by private plaintiffs has significantly increased over recent years. As consumers demonstrate their preference for environmentally-friendly products, companies are increasingly advertising the sustainability of their brands.[16] Such marketing renders companies vulnerable to litigation when plaintiffs allege these representations are unfounded or inflated. There were more than a dozen (at least seventeen (17)) greenwashing class-action cases filed or decided within the two years prior to June 2023.[17]

Crucially, a large proportion of these cases have so far survived motions to dismiss. Of the seventeen (17) recent class-action cases reviewed, eleven (11) have progressed to a motion to dismiss; of those, eight (8) have at least partially survived. These trends indicate that courts appear to be taking greenwashing lawsuits seriously, plunging companies into an uncertain landscape. Successful greenwashing claims may prompt more litigation, exposing companies to potentially costly legal battles or

settlements.

C. How Claims Are Being Framed

Most recent greenwashing class-action cases rely on both common law and state statutory causes of action. The common law claims frequently include allegations of fraud, misrepresentation, unjust enrichment, deceit, and breach of express warranty.[18] The state statutory causes of action, meanwhile, use provisions in state consumer protection laws that enable private plaintiffs to bring class action claims for violations of those statutes. Recent greenwashing class actions have pled violations of statutes like New York's General Business Law §§349-50 and California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law.[19]

D. Prominent Class Action Venues

Many greenwashing cases are filed in California and New York, which have some of the strongest consumer protection laws in the nation.[20] For example, New York's General Business Law §§ 349-50 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]" and "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." This law has powerful advantages for plaintiffs. For instance, actions under the New York statute do not require proof of justifiable reliance on the challenged practice or representation, unlike in many other states.[21] Additionally, New York allows plaintiffs to bring class-action consumer protection claims, while other states require consumer protection claims to be prosecuted individually or by the Attorney General.[22]

Meanwhile, California consumer protection laws like the California Unfair Competition Law, California False Advertising Law, and California Consumers Legal Remedies Act are notably powerful statutes, with the latter having been characterized as "the most far-reaching consumer protection statute in the United States."[23] For example, the state's Unfair Competition Law is intentionally broad and applies to "'unfair competition,' a term it defines to 'include any unlawful, unfair or fraudulent business act or practice.'" Moreover, "a practice may be deemed unfair even if [it is] not specifically proscribed by some other law." Id..[24]

IV. Representative Case Studies

The following cases have been selected as notable case studies illustrating different potential outcomes in greenwashing litigation. Class-action cases have a few potential outcomes. Some cases reach settlement, which is often the most costly result for defendant companies. Alternatively, courts may dismiss claims at the pleadings or class certification stages of litigation. Finally, some claims survive motions to dismiss, either fully or in part, but continue through litigation and discovery before a court-ordered or negotiated resolution. The following cases have been selected as representative of these different stages and outcomes, relying on frequently used causes of action and venues for this type of litigation.

A. Settled Case: Smith v. Keurig Green Mountain, Inc., 2023 WL 2250264 (N.D. Cal. Feb. 27, 2023)

Smith v. Keurig Green Mountain was the only case in our review of recent greenwashing litigation to conclude in a settlement. Accordingly, this case is demonstrative of both the terms of greenwashing class action settlements and the type of greenwashing claims that may survive and encourage a settlement.[25]

Plaintiffs' allegations in Smith v. Keurig included common law breach of express warranty, unjust enrichment, and misrepresentation, as well as violations of the California Consumer Legal Remedies Act (CLRA) and Unfair Competition Law (UCL).[26] The facts centered on Keurig's representations around its K-cup coffee pods. Keurig marketed and sold its K-cups as recyclable, with labeling on K-cup packaging stating that consumers could "[h]ave [their] cup and recycle it, too," along with instructions on the packaging for how consumers could recycle the products.[27] Keurig's website contained similar statements and instructions around recycling.[28] However, plaintiffs alleged that the K-cups were in practice unrecyclable even if consumers followed the illustrated steps on the product packaging, as most recycling facilities were unable to capture materials as small as K-cups – and even if some could capture the products, there was no market to recycle them.[29] In 2019, the Northern District of California denied Keurig's motion to dismiss,[30] and in 2020 granted plaintiff's motion for class certification. In February 2023, the court granted final approval of a $10 million settlement.[31]

A few elements contributed to this case's outcome and were highlighted by the court. First, the complaint tied the alleged injury to labeling on the coffee pods, providing a direct and tangible linkage between the company's statements and specific products (as well as plaintiff's purchase of the products).[32] In initially denying defendant's motion to dismiss, the court cited the California Supreme Court as defining a misrepresentation as material if "a reasonable [consumer] would attach importance to its existence or nonexistence in determining [their] choice of action in the transaction in question," and accepted plaintiff's allegations that the "recyclable" labeling altered their course of action, making it a material misrepresentation.[33]

Second, the complaint centered on a demonstrably inaccurate statement – in this case, concerning the product's purported recyclability. In denying defendant's motion to dismiss, the court repeatedly

discussed defendant's inaccurate representations, finding that plaintiff met a "reasonable consumer" standard in alleging CRLA and UCL violations in part because "common sense would not so clearly lead a person to believe that a package labeled 'recyclable' is not recyclable anywhere."[34]

Finally, the court considered defendant's compliance with the Green Guides as part of its holding. In its motion to dismiss, Keurig argued that its statement was consistent with the Green Guides because the plastic material used to make the pods was itself recyclable and advertising for the pods qualified the recyclability statements with a "check locally" disclaimer.[35] However, the court noted that because the complaint alleged that the "size and design of the Pods render them non-recyclable," and the Green Guides state that "[a]n item that is made from recyclable material, but, because of its shape, size, or some other attribute, is not accepted in recycling programs, should not be marketed as recyclable," plaintiff's allegations were "not precluded based on the Green Guides' plain text."[36]

B. Case that Survived Motion to Dismiss: *Lee v. Canada Goose*, 2021 WL 6881256 (S.D.N.Y. Oct. 19, 2021)

Lee v. Canada Goose is an ongoing case against apparel company Canada Goose, which sells jackets and coats with coyote fur components. This case is representative of greenwashing class action cases that have survived an initial motion to dismiss. Similarly to the Keurig case, the claims here may indicate the type of claims that courts will take seriously in other proceedings.

In *Lee v. Canada Goose*, plaintiff's allegations centered on the product tags Canada Goose attached to its coats describing its coyote fur as sourced through "ethical" and "sustainable" practices.[37] The complaint alleged violations of common law doctrines, namely breach of express warranty and unjust enrichment, as well as violations of the DC Consumer Protection Procedures Act (CPPA) and other state consumer protection statutes. More specifically, plaintiff alleged that because coyote trappers in North America regularly use inhumane practices like leghold traps and snares, the company's representations are misleading to consumers (among other allegations).[38] While Canada Goose argued in its motion to dismiss that its representations are substantiated by third-party standards, plaintiff claimed that even compliance with the standards would be misleading, as "the[] standards themselves authorize inhumane trapping practices."[39] In June 2021, the Southern District of New York granted defendant's motion to dismiss in part, but allowed plaintiff's CPPA claims over Canada Goose's representations about ethical and sustainable fur sourcing to proceed.[40]

This case is notable for a few reasons. First, it further demonstrates the potential for company liability from product labels. As in *Smith v. Keurig*, the court in *Canada Goose* found that defendant's representations of "ethical" and "sustainable" fur sourcing on product labels created a sufficient issue of material misrepresentation to allow the case to continue.[41]

Second, the *Canada Goose* case demonstrates the potential inadequacy of reliance on third-party standards to remove liability. While the court dismissed plaintiff's specific claim that Canada Goose's representations as to compliance with third-party standards were misleading, holding that the basic statement as to compliance was accurate and not actionable, the court did not dismiss the underlying claim that Canada Goose's representations were inaccurate.[42] As a result, this case demonstrates that a company's compliance with third-party standards may not completely insulate it from liability.

C. An Example of a Dismissed Case: *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137 (S.D.N.Y. Apr. 18. 2022)

Dwyer v. Allbirds is an example of a greenwashing class-action case that was fully dismissed by a court. As a result, companies may look to the defendant's practices for ways to potentially mitigate greenwashing liability and make possible future claims less likely to succeed.

Allbirds is a shoe company that markets its shoes in part based on their sustainability, with representations like "Sustainability Meets Style," "Low Carbon Footprint," and "Environmentally Friendly."[43] Plaintiff brought three common law claims against the company (breach of express warranty, fraud, and unjust enrichment) and alleged violations of §§ 349-350 of the New York General Business Law.[44] The allegations targeted a few different public representations that Allbirds made. First, Allbirds' website shows the carbon footprint associated with its products based on a life-cycle analysis (LCA), as well as the environmental impact of the materials it uses based on the third-party Higg Material Sustainability Index ("Higg MSI").[45] Plaintiff alleged that these representations were inaccurate and misleading, criticizing the Higg MSI standard and LCA tool as incomplete measurements of product sustainability. Allbirds also makes animal welfare claims about the sheep from which it sources its wool in public-facing materials like its website, including statements like "Our Sheep Live The Good Life."[46] Plaintiff alleged that, as "[e]conomic realities dictate – and require – that all sheep bred for wool are also slaughtered and sold for their meat," as well as a lack of regular auditing of the sheep farms Allbirds uses, the statements about sheep welfare were misleading.[47]

In April 2022, the Southern District of New York granted Allbirds' motion to dismiss, holding that plaintiff's allegations about the inadequacy of the LCA and Higg MSI were merely criticism and that Allbirds' statements about its sheep were non-actionable puffery.[48] This outcome, especially when compared to other cases discussed here, is notable for a few reasons.

First, the court's dismissal of the *Allbirds* case demonstrates the importance of company transparency and public substantiation when making environmental representations. In dismissing plaintiff's allegations, the court highlighted that Allbirds described the exact components of its carbon footprint calculations, details regarding its LCA methodology, and reliance on the Higg MSI standard on its website.[49] As the court noted, Allbirds did "not mislead the reasonable consumer because it makes clear what is included in the carbon footprint calculation, and does not suggest that any factors are included that really are not."[50]

This outcome also highlights the fact that companies still have some leeway around using "puffery" in advertising and marketing. According to the court, Allbirds' statements about its sheep living "the Good Life" were "subjective, unmeasurable, and vague," and no reasonable consumer would regard them as "making a factual claim on which she could rely."[51]

V. Analysis of Private Litigation

A. Characteristics of Greenwashing Claims That Have Been Dismissed

Despite the recent increase in greenwashing claims against large companies, courts have generally dismissed challenges to representations based on publicly available methodology, corporate "aspirational statements," and humorous statements or puffery.

First, courts have dismissed cases where companies "showed their work" by publicly outlining their methodology or the factual basis of their sustainability claims. In *Dwyer v. Allbirds*, for instance, the court rejected the plaintiff's challenge to Allbirds' sustainability claims since the company outlined its methodology on its website and thereby made "clear what [was] included in its carbon footprint calculation."[52] In *Lizama v. H&M*, the court largely mirrored the *Allbirds* decision. Here, the plaintiff challenged H&M's "conscious choice" collection, which H&M claimed was made with "more sustainable and environmentally friendly" manufacturing practices, among other statements.[53] The plaintiff, who bought a sweater from H&M based on H&M's sustainability claims, alleged that the product line was unsustainable and contained a high quantity of synthetic materials.[54] Ultimately, the court rejected the plaintiff's arguments, noting that H&M's website included extensive information about the conscious choice collection, the content of its products, and its use of synthetics.[55] In other words, H&M did not misrepresent its "conscious choice" collection, as it publicly disclosed the basis for its statements.[56]

Second, courts have dismissed cases where companies made "aspirational statements," used puffery, or made statements that were "obviously intended as humorous." In *Allbirds*, for instance, plaintiff took issue with defendant's commercials, which showed "happy" sheep in "pastoral settings."[57] The advertisements made jokes about sheep farming, asking would-be customers to ponder, "What if every time you got a haircut they made shoes out of it? That would be pretty cool."[58] Ultimately, the court dismissed the plaintiff's claims, holding that the ads were "obviously intended to be humorous" and "[made] no representations at all."[59]

Earth Island Institute v. Coca-Cola, a case brought by an NGO (although not a class action), serves as another example of this trend. There, the plaintiff challenged Coca-Cola's statements outlining its commitment to sustainability and creating a "better shared future."[60] The court dismissed plaintiff's claims, holding that Coca-Cola merely outlined its "general, aspirational corporate ethos" but did not claim that any current products were sustainable or environmentally friendly.[61]

Importantly, courts have differentiated between these aspirational statements and broad or vague sustainability statements about specific products. As will be discussed in the following section, courts have often denied motions to dismiss claims challenging allegedly overbroad statements relating to specific products.

B. Characteristics of Greenwashing Claims That Have Survived Motions to Dismiss

As of late, judges have demonstrated a willingness to hear greenwashing class action cases, often allowing these claims to survive motions to dismiss. In the cases we reviewed, courts have denied motions to dismiss concerning challenges to sustainability claims on product tags or labels, or demonstrably inaccurate statements regarding a product's environmental impacts. Additionally, although courts often considered third-party verification of statements when evaluating such claims, they did not regard such verification as dispositive proof of a company's representations.

First, courts have generally denied motions to dismiss in cases where the defendant company made broad sustainability claims on product labels. In the past two years, we have identified at least five cases where challenges to such sustainability representations have survived motions to dismiss.[62] These cases suggest that companies must use caution when using certain broad terms—"humane," "sustainable," and "recyclable"—and consider how a "reasonable consumer" would interpret these phrases.

One clear example of this trend is *Usler v. Vital Farms*.[63] There, the court considered whether Vital Farms misled consumers by labelling its egg cartons as "humane" and "ethical," despite evidence suggesting that the company at least partially sourced products from inhumane facilities.[64] Vital Farms argued that its statements were not actionable, as they were "imprecise, subjective, and opinions" and

were not susceptible of definition.[65] The court rejected these arguments, holding that Vital Farms' statements—"humane," "ethical," and "pasture raised"—were indeed "susceptible of definition."[66] It further held that a reasonable consumer would understand the terms to bear their plain meaning.[67]

Courts have borrowed this logic when rejecting defendant's efforts to classify certain statements as non-actionable puffery. In *Rawson v. ALDI*, for instance, the court considered whether labels placed on fish products stating "Simple. Sustainable. Seafood" misled consumers.[68] The court rejected ALDI's argument that the label was merely "non-actionable puffery,"[69] since a reasonable consumer would have interpreted ALDI's sustainability label as "connect[ing] its product to at least some environmental benefit."[70]

Second, courts have not considered third-party verification as definitive proof of sustainability claims. Rather, they have analyzed company sustainability statements, even if companies provided external verification. For instance, in *Lee v. Canada Goose*, the court denied the defendant's motion to dismiss a challenge to a product tag stating the company's commitment to "ethical, responsible, and sustainable sourcing," even though Canada Goose was compliant with relevant Canadian and U.S. industry standards.[71] In at least one other case, courts have ruled in a similar manner.[72] In *Usler v. Vital Farms*, for instance, the court denied the defendant company's motion to dismiss a claim challenging its statements that its egg products were produced humanely, despite evidence that they were produced in compliance with Humane Farm Animal Care (HFAC) standards.[73] Here, the court held that the case could proceed, concluding that the definition of "pasture raised" employed by HFAC differed from the "plain meaning" of the term and could mislead reasonable consumers.[74]

Third, courts have denied motions to dismiss in cases where the defendant company made demonstrably inaccurate statements that misrepresented a product's recyclability, environmental impact, or sustainability. In *Hanscom v. Reynolds*, for instance, the court denied the defendant's motion to dismiss, as the products it labelled "recyclable" could not be processed by most recycling facilities.[75] Similarly, in *White v. Kroger*, the court denied Kroger's motion to dismiss claims that it misrepresented its sunscreen's impact on reefs, as the products included chemicals known to be harmful to such ecosystems.[76]

VI. Takeaways for companies

As a preliminary matter, companies must take these claims seriously. Based on our survey of recent cases, courts have shown a clear willingness to adjudicate these claims, as evidenced by the fact that greenwashing lawsuits appear to survive motions to dismiss at a high rate. Our review of the extant case law also indicates that greenwashing class action claims are becoming ever more common. In light of these trends, we recommend companies consider taking certain measures to better insulate themselves from greenwashing liability.

First, companies should avoid making demonstrably inaccurate statements. Products must not be labelled as "recyclable," "sustainable," or safe for certain ecosystems unless such statements are verifiably correct.

Second, companies should avoid labelling products with broad terms or phrases, such as "sustainable," "humane," or "recyclable." Companies should use caution when using these terms and consider how a "reasonable consumer" would interpret these phrases.

Third, companies should "show their work" by validating their claims on company promotional materials, websites, or product labels. To that end, companies may disclose their methodology or cite external verification of their claims. However, companies should be cautious when citing third party verification, as courts have held that such verification is not dispositive proof of sustainability claims.

Fourth, companies should exercise care when making sustainability claims about specific products through product tags or labels. In our survey of recent cases, courts heavily scrutinized such statements, and a significant number of these cases have survived motions to dismiss.[77] If companies make statements on their products, they should consider including additional information about such statements, such as their methodology.

These precautions, while necessary, are by no means sufficient alone to eliminate potential exposure to greenwashing class actions. The plaintiffs' bar is notoriously adept at developing creative legal theories, and we expect claims to continue to evolve as these suits become more prevalent. Nonetheless, our recommendations, gleaned from our survey of recent greenwashing class actions, are preliminary precautions worthy of consideration.

VII. Conclusion

In recent years, consumers have become increasingly concerned about the environmental impact of their purchases and have consequently paid a premium for sustainable, humane, and eco-friendly products, spurring companies to advertise the sustainability of their products. Plaintiffs have begun to target such advertising and marketing as "greenwashing," alleging that many companies are misrepresenting the environmental impacts of their products to attract environmentally conscious consumers. The potential consequences of these suits are serious. In addition to significant financial exposure, companies

challenged with greenwashing class action claims face potential long-lasting reputational harm.

Most recent litigation has targeted manufacturers of consumer products, especially apparel and food producers. These greenwashing claims have survived motions to dismiss at a relatively high rate, indicating that courts are taking these cases seriously and that more cases are likely forthcoming. As more cases are decided, and the FTC and SEC provide additional guidance on greenwashing, it will become increasingly important for companies to adjust their marketing to avoid costly litigation. Moreover, forthcoming SEC requirements are likely to require companies to disclose more information concerning ESG factors, exposing them to potential liability relating to sustainability claims. Plaintiffs' attorneys will continue to bring these cases, and companies should prepare accordingly by carefully evaluating the risks and costs associated with sustainability claims, and ways to minimize litigation risk.

[1] Caiti Zeytoonian et al., *Green Market Standards – Overhaul on the Horizon*, Reuters (Feb. 7, 2023), **https://www.reuters.com/legal/legalindustry/green-marketing-standards-overhaul-horizon-2023-02-07/**.

[2] Adam Hayes, *What Is Greenwashing? How It Works, Examples, and Statistics*, Investopedia (Mar. 31, 2023), **https://www.investopedia.com/terms/g/greenwashing.asp/**.

[3] Press Release, Securities and Exchange Commission, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), **https://www.sec.gov/news/press-release/2021-42**.

[4] Id.

[5] Press Release, Securities and Exchange Commission, SEC Charges Goldman Sachs Asset Management for Failing to Follow its Policies and Procedures Involving ESG Investments (Nov. 22, 2022), **https://www.sec.gov/news/press-release/2022-209**; Press Release, Securities and Exchange Commission, SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse (Apr. 28, 2022), **https://www.sec.gov/news/press-release/2022-72**.

[6] Jacob Hupart et al., *SEC Proposes Regulations to Address "Greenwashing" By Investment Funds*, Mintz (Jun. 13, 2022), **https://www.mintz.com/insights-center/viewpoints/2301/2022-06-13-sec-proposes-regulations-address-greenwashing-investment**.

[7] Press Release, Federal Trade Commission, FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims (Dec. 14, 2022), **https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims**.

[8] *Id.*

[9] *Id.*

[10] Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62124 (2012), **https://www.ftc.govsites/default/files/documents/federal_register_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfrn.pdf**, at § 260.1.

[11] 3-24 Mass Tort Litigation § 24.02.

[12] *Wal-Mart Stores*, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

[13] 3-24 Mass Tort Litigation § 24.02 (listing the requirements for Rule 23(b)(1) and Rule 23(b)(2) class actions).

[14] Fed. R. Civ. P. 23(b)(3) advisory committee's note.

[15] Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019–2020)* (July 2021), https://www.jonesday.com/en/insights/2020/04/empirical-analysis-consumer-fraud-class-action.

[16] Zeytoonian et al., supra note 1.

[17] *See Smith v. Keurig Green Mountain, Inc.*, 2023 WL 2250264 (N.D. Cal. Feb. 27, 2023); *Usler v. Vital Farms, Inc.*, 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022), *report and recommendation adopted*, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022); *Hanscom v. Reynolds Consumer Prod. LLC*, 2022 WL 3549677 (N.D. Cal. Aug. 18, 2022); *Lee v. Canada Goose US, Inc.*, 2021 WL 6881256 (S.D.N.Y. Oct. 19, 2021); *Rawson v.ALDI, Inc.*, 2022 WL 1556395 (N.D. Ill. May 17, 2022); *Henriquez v. ALDI Inc.*, 2023 WL 2559200 (C.D. Cal. Feb. 7, 2023); *White v. Kroger Co.*, No. 21-cv-08004-RS (N.D. Cal. Mar. 25, 2022); *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137 (S.D.N.Y. 2022); *Curtis v. 7-Eleven, Inc.*, 2022 WL 4182384 (N.D. Ill. Sept. 13, 2022); *Swartz v. Coca-Cola Co.*, 2022 WL 17881771 (N.D. Cal. Nov. 18, 2022) *Lizama v. H&M Hemmes & Mauritz LP*, 2023 WL 3433957 (E.D. Mo. May 12, 2023); *Woolard v. Reynolds Consumer Prod., Inc. et*

al., No. 3:22-cv-01684 (S.D. Cal. 2022); *Dorris v. Danone Waters of America*, No. 7:22-cv-08717 (S.D.N.Y. 2023); *Berrin v. Delta Air Lines, Inc.*, No. 2:23-cv-04150 (C.D. Cal. 2023); *Commodore v. H&M Hennes & Mauritz LP,* No. 7:22-cv-06247 (S.D.N.Y. 2022); *Marshall v. Red Lobster*, No. 2:21-cv-04786 (C.D. Cal. 2021); *Ellis v. Nike USA, Inc.*, No. 4:23-cv-00632 (E.D. Mo. 2023).

[18] *See, e.g., Smith v. Keurig Green Mountain, Inc.*, 2023 WL 2250264, at *1 (N.D. Cal. Feb. 27, 2023) (alleging unjust enrichment, misrepresentation, and breach of express warranty); *Usler v. Vital Farms, Inc.*, 2022 WL 1491091, at *2 (W.D. Tex. Jan. 31, 2022), *report and recommendation adopted*, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022) (alleging common law fraud, fraud by omission, and breach of express warranty); *Hanscom v. Reynolds Consumer Prod. LLC*, 2022 WL 3549677, at *1 (N.D. Cal. Aug. 18, 2022) (alleging fraud, deceit, and misrepresentation).

[19] *See, e.g., Smith v. Keurig Green Mountain, Inc.*, 2023 WL 2250264 (N.D. Cal. Feb. 27, 2023) (concerning class action brought pursuant to California's CLRA and UCL); *Dwyer v. Allbrids, Inc.*, 598 F. Supp. 3d 137, 147 (concerning class action based on violations of §§ 349 and 350 of the New York General Business Law).

[20] Ryan Clarkson et al., *Consumer Protection Laws and Regulations*, ICLG (Apr. 28, 2023), **https://iclg.com/practice-areas/consumer-protection-laws-and-regulations/usa**. Moreover, the New York State Legislature is currently fast-tracking a pair of bills that could radically expand the reach of the General Business Law's consumer protection sections. If passed, the proposed changes would allow consumer protection actions "regardless of whether or not the underlying violations is consumer-oriented [or] has a public impact" (overturning prior NY Court of Appeals precedent) as well as broaden the definition of illegal conduct to include "unfair" and "abusive" rather than just "deceptive" business practices. Kevin Frankel & Jeff Erlich, NY State Legislature to Dramatically Expand Power of Plaintiffs' Bar, New York Law Journal (Jun. 15, 2023), **https://www.law.com/newyorklawjournal/2023/06/15/ny-state-legislature-to-dramatically-expand-power-of-plaintiffs-bar/**.

[21] *Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995); Jonah Knobler, *Extreme Pro-Plaintiff Changes Proposed to New York's Consumer-Protection Law*, Patterson Belknap (May 15, 2019), **https://www.pbwt.com/misbranded/extreme-pro-plaintiff-changes-proposed-to-new-yorks-consumer-protection-law**.

[22] For instance, Iowa has a consumer protection statute that only permits the attorney general to bring an enforcement action. IA Code Ann. § 714.16(3). Meanwhile, consumer protection laws in states like Alabama, Georgia, Missouri, and Tennessee explicitly prohibit class actions. AL Code § 8-19-10(f); GA Code § 10-1-399(a); MS Code § 75-24-15(4); Tenn. Code § 47-18-109(g).

[23] James C. Sturdevant & Alexius Markwalder, *The Consumer Legal Remedies Act*, Plaintiff Magazine (Aug. 2007), **https://plaintiffmagazine.com/recent-issues/item/the-consumer-legal-remedies-act**.

[24] *California Med. Ass'n v. Aetna Health of California Inc.*, 2023 WL 4553703, at *3 (Cal. July 17, 2023) (quoting Cal. Bus. & Prof. Code § 17200)).

[25] *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 842 (N.D. Cal. 2019).

[26] *Smith v. Keurig Green Mountain*, Dkt. No. 1, Ex. B, ¶¶ 41 (Cal. Super. Ct. 2018).

[27] *Id*. ¶ 17.

[28] *Id*. ¶ 18.

[29] *Id*. ¶ 2.

[30] *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 850 (N.D. Cal. 2019).

[31] *Smith v. Keurig Green Mountain, Inc.*, 2023 WL 2250264, at *6 (N.D. Cal. Feb. 27, 2023).

[32] *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 844 (N.D. Cal. June 28, 2019).

[33] *Id*.

[34] *Id*. at 846-47

[35] *Id*. at 844-45.

[36] *Id*. at 846.

[37] *Lee v. Canada Goose*, 2021 WL 2665955, at *1 (S.D.N.Y. June 29, 2021).

[38] *Id*. at *2-3.

[39] *Id*. at *6.

[40] *Id*. at *11.

[41] *Id*. at *7.

[42] *Id*. at *5-6.

[43] *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 144-45, 147 (S.D.N.Y. Apr. 18, 2022).

[44] *Id*. at 147.

[45] *Id*. at 145.

[46] *Id*. at 146.

[47] *Id*.

[48] *Id*. at 137.

[49] *Id*. at 149-51.

[50] *Id.* at 150.

[51] *Id*. at 154.

[52] *Dwyer v. Allbirds, Inc*., 598 F. Supp. 3d 137, 150 (S.D.N.Y. 2022).

[53] *Lizama v. H&M Hennes & Mauritz LP*, 2023 WL 3433957, at *1 (E.D. Mo. May 12, 2023).

[54] *Id.* at *4.

[55] *Id.* at *4-5.

[56] *Id*. at *6.

[57] *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 146, 152 (S.D.N.Y. Apr. 18, 2022).

[58] *Id*.

[59] *Id*. at 152, 158.

[60] *Earth Island Institute v. Coca-Cola*, 2022 WL 18492133, at *4 (D.C. Super. Ct. 2022)

[61] *Id*. at *3.

[62] *See White v. Kroger Co.*, 21-cv-08004-RS (N.D. Cal. Mar. 25, 2022); *Lee v. Canada Goose*, 2021 WL 2665955, (S.D.N.Y. June 29, 2021); *Usler v. Vital Farms*, Inc., 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022), *report and recommendation adopted*, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022); *Rawson v. ALDI, Inc.*, 2022 WL 1556395 (N.D. Ill. May 17, 2022); *Hanscom v. Reynolds Consumer Prod. LLC*, 2022 WL 3549677 (N.D. Cal. Aug. 18, 2022).

[63] *Usler v. Vital Farms, Inc.*, 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022), *report and recommendation adopted*, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022).

[64] *Id*. at *1-2 (W.D. Tex. Jan. 31, 2022).

[65] *Id*. at *4-5.

[66] *Id*.

[67] *Id*.

[68] *Rawson v. ALDI, Inc.*, 2022 WL 1556395 at *1 (N.D. Ill. May 17, 2022).

[69] *Id*. at *3.

[70] *Id*.

[71] *Lee v. Canada Goose*, 2021 WL 6881256, at *6-7 (S.D.N.Y. Oct. 19, 2021).

[72] *Usler v. Vital Farms, Inc.*, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022).

[73] *Id*. at *3-4.

[74] *Id*.

[75] *Hanscom v. Reynolds Consumer Prod. LLC*, 2022 WL 3549677, at *3 (N.D. Cal. Aug. 18, 2022).

[76] *White v. Kroger Co.*, 21-cv-08004-RS, at *3-5 (N.D. Cal. Mar. 25, 2022).

[77] *White v. Kroger Co.*, 21-cv-08004-RS (N.D. Cal. Mar. 25, 2022); *Lee v. Canada Goose*, 2021 WL 2665955, (S.D.N.Y. June 29, 2021); *Usler v. Vital Farms, Inc.*, 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022), *report and recommendation adopted*, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022); *Rawson v. ALDI, Inc.*, 2022 WL 1556395 (N.D. Ill. May 17, 2022); *Hanscom v. Reynolds Consumer Prod. LLC*, 2022 WL 3549677 (N.D. Cal. Aug. 18, 2022).

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