The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2024
PHILADELPHIA, FEBRUARY 21, 2024
ALM.

ENVIRONMENTAL LAW

Recent Developments and Trends in Greenwashing Claims

BY GISELLE F. MAZMANIAN AND KATE CAMPBELL

Special to the Legal

As consumers increasingly look to buy sustainable products and services, environmental claims made by companies are under greater scrutiny by consumers and regulators. Lawsuits alleging greenwashing are on the rise, targeting companies emphasizing environmentally conscious business practices and promoting environmental benefits of goods or services. Below is an overview of forthcoming greenwashing guidance, decisions and current trends.

MAZMANIAN

CAMPBELL

GISELLE F. MAZMANIAN *and* **KATE CAMPBELL** *are attorneys with the environmental, energy, safety and land use law and litigation firm Manko, Gold, Katcher & Fox, located in suburban Philadelphia. They can be reached at 484-430-5700 or gmazmanian@mankogold.com and kcampbell@mankogold.com.*

NEW GUIDANCE AND RULES EXPECTED IN 2024

The Federal Trade Commission (FTC) and Securities Exchange Commission (SEC) are both expected to finalize key regulatory packages related to greenwashing in 2024.

First, the long-anticipated revisions to the FTC's "Guides for the Use of Environmental Marketing Claims" (Green Guides), published in 16 C.F.R. Section 260, are expected to be issued this year. The Green Guides have become the national standard for environmental marketing claims. While not binding, they set forth the FTC's current views about environmental claims and are intended to guide marketers to avoid making unfair or deceptive claims about the environmental attributes of a product, package, or service under Section 5 of the FTC Act, 15 U.S.C. Section 45. Currently, the Green Guides describe how consumers interpret product claims such as "recyclable" and "biodegradable" and how companies can substantiate those claims, but they do not address other common claims, such as "organic," "sustainable," or "natural" claims.

In December 2022, the FTC sought comments on potential changes to the Green Guides (87 FR 77766). Questions posed for comment included the need for the Green Guides, environmental claims not currently covered, and whether the Green Guides should consider any international, federal, state or local laws, regulations, or standards. The FTC is also expected to revisit the inclusion of "sustainable," "organic," "carbon neutral" and "net zero" marketing claims and consider the current types of "recyclable" claims. Perhaps most significantly, the FTC is considering whether it should initiate a proceeding to consider a rulemaking relating to environmental benefit claims under its FTC Act authority. Currently, the Green Guides make clear that "they do not confer any rights on any person and do not operate to bind the FTC or the public." See 16 U.S.C. Section 260.1(a).

The second key regulatory development being closely watched is the SEC's climate change disclosure rulemaking, which is expected to be finalized in April 2024. If the proposed rule amendments are adopted, climate change-related marketing claims may alter significantly as publicly traded companies will be required to include certain climate-related disclosures in registration statements and periodic reports.

RECENT LAWSUITS AND NOTEWORTHY DECISIONS

FTC lawsuits have been limited over recent years, reportedly due to lack of funding. But greenwashing litigation has nevertheless continued apace, with consumer class actions and state attorneys general actions being filed with increased frequency. A few recent decisions highlight the current landscape in the courts.

The first case is a win for the defense, both at the trial court and on appeal. In *McGinity v. Procter & Gamble*, 69 F.4th 1093 (9th Cir. 2023), the plaintiff alleged that the phrase "nature fusion" on the front of a shampoo bottle violated

California consumer protection laws and misled him to believe that the ingredients were "from nature or otherwise natural." In August 2021, the U.S. District Court for the Northern District of California granted Procter & Gamble's motion to dismiss, finding that the "nature fusion" label does not reasonably mean the that a product was free of synthetic ingredients. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's finding on June 9, 2023, confirming that a reasonable consumer would not be deceived by ambiguous statements on a front product label where the back label clarifies the statement and provides an ingredient list.

Two more recent cases—including one out of the same court as *McGinity*—went the other way, demonstrating the fact-specific nature of these cases.

In *Dorris v. Danone Waters of America*, Docket No. 7:22-cv-08717 (S.D.N.Y.), plaintiffs brought an action in the U.S. District Court for the Southern District of New York on behalf of a proposed nationwide class of consumers alleging that Evian's labeling and packaging on its bottled water misled consumers to believe that production of the bottles was "sustainable," "carbon neutral," and "did not leave a carbon footprint." The plaintiffs alleged that Evian bottled water, certified carbon neutral by third parties, is not "carbon neutral" in the way a reasonable consumer would understand the term (i.e., that "the manufacturing of the product—from materials used, to production, to transportation—is sustainable and does not leave a carbon footprint.") The plaintiffs asserted that even if "carbon neutral" means that the carbon emissions created during the production of the plastic water bottles are offset by purchased carbon credits, the representation is false and misleading as any offsets will be deferred for decades. The plaintiffs raised claims for violation of California, New York, and Massachusetts consumer protection laws, breach of express warranty, breach of implied warranty, unjust enrichment, and fraud. Danone filed a motion to dismiss the claim stating that the plaintiffs' subjective interpretation of Danone's carbon neutral claim is "manifestly unreasonable" as no reasonable consumer would expect producing and shipping bottled water would not create carbon dioxide. On Jan. 10, 2024, the district court granted in part and denied in part the motion to dismiss, finding that an average consumer could easily interpret "carbon neutral" to mean "zero carbon emissions" given varied meanings of the term. As a result of the ruling, plaintiffs can proceed with all of their claims, except those under New York law and the breach of implied warranty claim.

In *Bush v. Rust-Oleum,* Docket No. 3:20-cv-03268 (N.D. Cal.), the plaintiff filed a false advertising lawsuit in the U.S. District Court for the Northern District of California (the same court that decided *McGinity*), accusing Rust-Oleum of labeling several of its cleaning products with the terms "nontoxic" and "Earth friendly," despite the products containing ingredients that pose a risk of harm to the environment, humans and animals. After several years of discovery, Rust-Oleum filed a motion for summary judgment, arguing that because the word "nontoxic" is next to "Caution: Eye and Skin Irritant," no reasonable consumer would be misled. Further, Rust-Oleum asserted that the term "Earth friendly" is not actionable because it is mere puffery. On Jan. 26, 2024, the district court denied the summary judgment motion, holding that whether reasonable consumers would be tricked by the challenged statements on the product labels is a question of fact to be resolved at trial. The court also found that "Earth friendly" is not so nonspecific as to make it "extremely unlikely" that a consumer would rely on it; rather, California views this term to mean that the product is not harmful to, or is beneficial to, the natural environment. Just over a week later, on Feb. 5, the court certified a statewide class consisting of all residents of California, who, within four years prior to the filing of the complaint, purchased a Rust-Oleum product at issue.

> *"Lawsuits alleging greenwashing are on the rise, targeting companies emphasizing environmentally conscious business practices and promoting environmental benefits of goods or services."*

TAKEAWAYS

The anticipated release of the revised FTC Green Guides this year will likely provide additional guidance to both potential plaintiffs and the companies they may wish to target about when and how environmental marketing claims might "cross the line" into misleading advertising or labeling. In addition, the forthcoming SEC climate disclosure rules could provide new fodder for future greenwashing litigation, as marketing messages are compared to the more objective risk reporting that will be required under the new rules.

Since the analysis as to whether a particular marketing statement "crosses the line" is often nuanced, companies should be careful to make measurable and verifiable statements about an initiative, product or service and substantiate all reasonable interpretations. And, now more than ever, companies should continue to stay abreast of litigation decisions and trends as well as regulatory developments at the federal and state levels.

MANKO | GOLD
KATCHER | FOX LLP
AN ENVIRONMENTAL AND ENERGY LAW PRACTICE