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Fashion Alert

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Greenwashing Litigation 101: A brand owner's guide to avoiding the "fashion police"

By Staci Jennifer Trager, Erin Huntington, and Carlo F. Bustillos

Several well-known brands have fallen prey to "greenwashing" claims. Here's how to keep your brand on the right side of the law—and the court of public opinion.

What's the Impact?

- Brands that publicize commitments and disclosures concerning the environmental impacts of products and practices must exercise caution and comply with advertising regulations.
- Be on the lookout—FTC is updating its "Green Guides" manual that describes how to avoid making environmental claims that violate federal deceptive advertising rules.

The idea of environmental, social, and corporate governance (ESG) is not a new one. In fact, ESG—and more specifically the notion that responsible and ethical practices are core corporate values—has been around for decades. But while ESG may not necessarily be new—it is the *new normal* for demanding consumers whose decision making is increasingly informed by environmental impact alongside traditional factors like price and quality.

As these principles take center stage, fashion brands should be well positioned to navigate the elevated scrutiny from consumers, regulators, and strategic litigants that has resulted in a sharp uptick in lawsuits alleging deceptive misrepresentations concerning the individual or aggregated environmental impacts of brand owners' products and practices.

What are examples of "greenwashing" in the fashion industry?

While greenwashing claims can be industry agnostic, various world-famous fashion brands—from luxury designers to beauty retailers—have recently been caught in the crosshairs.

Allbirds, a relative newcomer to the footwear and apparel space that grounds its brand identity in producing sustainable and eco-friendly products, was recently hit with a greenwashing class action suit concerning its statements surrounding the environmental footprint of its products and its "sustainable" and "responsible" manufacturing practices. Plaintiffs in that case alleged that Allbirds knowingly misled consumers through marketing campaigns in an effort to boost its brand value "which has helped it become worth over one billion dollars." The Allbirds case exemplifies how, as a result of the new normal in fashion, "consumers are increasingly influenced by the business practices of companies they choose to engage" and display a strong preference for brands that "act[] in a way that protects the environment."

Canada Goose, a luxury brand known for its famous collection of winter coats and apparel, also recently found itself under fire for making overly generalized statements concerning its commitment to "ethical, responsible, and sustainable sourcing and use of real fur." Plaintiffs brought their claims, in part, due to the impacts of downstream fur-sourcing practices used by Canada Goose's affiliates. The misled consumers claimed to believe that the practices used by the fur-trappers "prevent[ed] the infliction of extreme pain or distress on animals trapped for their fur products" when they did not.

Indeed, even multinational beauty retailers, like Sephora, have seen similar statements challenged when products allegedly fail to measure up to the language in corresponding advertising campaigns. In that case, the "Clean at Sephora" program was challenged on the basis that "the Products contained ingredients that are known or suspected to be potentially harmful to human health and/or the environment." Although slightly different than the recent claims brought against fashion retailers, the attack on Sephora exemplifies the risks associated with publishing marketing statements relating to (or with the potential to be perceived by opportunistic litigants as relating to) environmentally friendly product composition or impact. The case is currently ongoing in the Southern District of New York and is amongst the latest in the ongoing saga of greenwashing litigation that has taken courts around the country by storm.

All in all, these cases represent a brief overview of the landscape surrounding greenwashing lawsuits in the fashion and beauty industries and will remain highly relevant as brands continue to double-down on commitments and subsequent disclosures concerning the environmental impacts of products and practices.

Avoiding the "fashion police"

While most brands are looking to increase corporate sustainability efforts, such efforts do come with risks. Nonetheless, the following best practices can provide a starting point and should help minimize the risks associated with transparent disclosures of a company's efforts in this space.

Avoid using broad statements about your products and practices

While an absolute bar on generic "green" language like "eco-friendly," "organic," "natural," "ethical," or "sustainable" is not necessary, brand owners should exercise diligence—and restraint—in using these types of words in advertising without providing additional context by way of explicit disclosures or aspirational qualifying language. Framing a company's commitment to ESG as a goal can provide a defensible position in court without comprising the brand's green mission.

Be aware of environmental claims in the aggregate

Regulators and consumers are increasingly viewing corporate advertising campaigns in the aggregate, including associating entire corporate brands with (un)sustainable practices. Brand owners should be cognizant of the fact that sustainability efforts relating to a particular clothing line or collection can be mistakenly viewed as implying broader "green" efforts relating to the brand as a whole. While this might seem counterintuitive from a pure marketing perspective, limiting the crossover between green product lines and "regular" products is advisable.

Keep an eye out for an updated version of the FTC's "Green Guides"

The Federal Trade Commission is working on updating its "Green Guides"—a non-binding guide on how to avoid making environmental claims that violate federal deceptive advertising rules. If and when these federal agency guidelines work their way through the administrative rule-making maze, they will increase plaintiffs' ability to accurately measure and weaponize brand owners' environmental disclosures. Keeping an eye out for an updated version of the FTC's "Green Guides" and promptly working to revise corporate "green policies" based on those changes is essential.

The verdict

The recent rise of greenwashing lawsuits against fashion brands of all shapes and sizes indicates an alarming trend that is unlikely to stop gaining momentum in the near future due to ESG's place as the new normal. Brand owners should carefully review our basic best practices and keep an eye out for future updates.

If you have questions about how the rise of greenwashing litigation can impact your business, please contact any member of Nixon Peabody's Fashion Group.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Staci Jennifer Trager
213.629.6041
strager@nixonpeabody.com

Erin Huntington
518.427.2748
ehuntington@nixonpeabody.com

Carlo F. Bustillos
415.984.8448
cbustillos@nixonpeabody.com