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'Green' Personal Care Proving Fertile Ground For Lawsuits In US Courts – Alston & Bird Attorneys

by [Eileen Francis](#)

Personal care marketers are under significant pressure to answer consumer demand for greener products and cleaner formulas, but hasty moves to keep up with the competition can attract NGO attention and potentially land companies in court.

NGOs and the class action bar are casting a wider net in their crusade against greenwashing and taking increased interest in “clean” personal care fraud, according to Alston & Bird attorneys.

“You’ve got consumers, NGOs and investors, all potentially looking at what these companies are saying,” noted Rachel Lowe, a partner in the litigation and practice group of Alston & Bird’s Los Angeles office, in a 24 May interview.

Lowe recognizes that personal care marketers are under significant pressure to meet market demand for greener products and cleaner formulas. The global clean beauty market is expected to double to a value of \$11.56bn by 2027, according to Brand Essence Research.

Packaging is a “new frontier” in the class action space as regulatory action heats up at the state level and industry works to ward off legislation with self-regulation.

Intent on exposing greenwashing within the booming area, non-governmental organizations are combing through claims online and even commissioning third-party lab tests of products to ensure personal care formulas are consistent with labeling and marketing claims.

At the same time, shareholders are analyzing claims companies make in Environmental, Social and Corporate Governance (ESG) reports and presentations to assess whether their value may be inflated on the basis of false claims.

The class action bar is monitoring the space as well.

“What are you saying on the website? What do you say in your social media? What do you say in your ESG report?” asked Lowe. She says class action litigants are “essentially building up cases not just around what the labeling claims are, but potentially around your marketing or your website or buried in a specific ad you don’t pay much attention to. A holistic view is worth your time.”

Lowe said in the case of one of her clients, the plaintiff pointed to a sustainability claim included in a blurb published on the company’s Pinterest page. “The company had made some comments about sustainability that no one had vetted and no one thought about,” she said. She noted the firm had strong arguments against certification and a complaint was not filed, but the situation highlights the level of detailed fishing some plaintiffs pursue.

Nonprofit Toxic Free USA dug into Coty, Inc.’s Sustainability Report where the firm champions its commitment to humanity, product safety and environmental causes, contending in a suit filed in late 2021 in District of Columbia Superior Court that such statements help to paint the company and its brands as clean and eco-friendly, when in reality CoverGirl TruBlend Pressed Powder may contain traces of per- and polyfluoroalkyl substances (PFAS). (Also see "[Not So Clean Beauty? False Advertising Lawsuits Allege PFAS In CoverGirl, BareMinerals Products](#)" - HBW Insight, 21 Jan, 2022.)

Sam Jockel, a senior associate in Alston & Bird’s Washington office, told HBW Insight that many companies are too eager to make claims their competitors appear to make without issue. However, he said, marketers must keep in mind the nuance at play among products and marketing campaigns.

Important considerations include the product promoted, the context in which claims appear, the specific market a company is targeting with the claims, a company’s visibility into the supply chain, and its “appetite for litigation,” Jockel said.

“A claim about sustainability potentially has some wide-ranging interpretations depending on who the consumer is and the context in which the claims are made. Qualifiers may be

appropriate for your product, even where they were not necessary for a different company's product. Third-party certifications can also be product-dependent," he said.

Jockel advises companies to ask themselves why they are making the claim in the first place and what is required to support it to mitigate any legal risks. Lowe added, "The more specific you make the sustainability claim and the more you can tether it to data you have that supports your claim, the better."

'Pure,' 'Clean' Will Draw Scrutiny

Marketers should assume that certain claims, including "pure," "clean," "non-toxic," and "good for you" – which Toxic Free USA cited in its complaint against Coty – will prompt an investigation of their formula, according to Jockel.

"The focus is, what is the composition of the product, how does that relate to the product claims? Are there any historically risky ingredients targeted by plaintiffs? If you're making a natural claim, are there any particular components that could be alleged to be unnatural or synthetic?" the attorney said.

In April, a class action suit was filed against The Clorox Company's Burt's Bees brand for claims suggesting its products are clean, including "Kind to Skin & Planet." The problem, according to plaintiffs, is that certain Burt's Bees mascara and lip products were allegedly found to contain suspected PFAS at trace levels.

The complaint cites findings from publicized third-party laboratory testing on behalf of women's wellness website and activist campaign Mamavation. (Also see "[Burt's Bees Joins Beauty Brands In Court Over PFAS](#)" - HBW Insight, 24 Feb, 2022.)

Shiseido Americas Corporation/BareMinerals is defending similar litigation in New York federal court.

Packaging is a "new frontier," the attorneys said. Legislative and regulatory action is playing out at the state level, while industry is pursuing self-regulation to ward off regulation and litigation, they noted. (Also see "[Global Beauty Consortium For Eco-Scoring Products Is 36 Companies Strong: Prototype By Year-End](#)" - HBW Insight, 1 Mar, 2022.)

"The NGOs have been focused on single-use plastics and the perceived lack of recyclability," noted Lowe, who has represented numerous food, beverage, supplement, and consumer goods companies in class actions alleging violations of California's and other states' consumer laws. "If you've got these plastic products and recyclable claims, they're also being increasingly legislated, especially out here in California. You'll potentially see additional actions by the NGOs."

California and at least four other states are considering legislation on the use of microplastic in products including cosmetics. California was contemplating AB 2787, introduced in the state Assembly on 18 February, which would have banned the sale of certain cosmetics containing intentionally added microplastics beginning on or after 1 January 2029, but it was recently ordered to "inactive" file. (Also see "[US States Take Aim At Microplastics Among 'Overwhelming' Number Of Bills With Cosmetics Relevance](#)" - HBW Insight, 4 Apr, 2022.)