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Plaintiffs' Bar Emboldened As Long As This 'Amorphous Term' Persists In Personal-Care Marketing

by Eileen Francis

Beauty and personal-care brands and retailers face an emboldened plaintiffs' bar challenging "clean" product claims, and that momentum could pick up under MoCRA. But industry is getting "a little bit more aggressive in pushing back," says Duane Morris attorney Kelly Bonner.

Increased transparency around product formulations and adverse event reports under updated US cosmetics regulations could fuel lawsuits targeting companies for "clean" claims on beauty and personal-care products.

Already, two of the biggest retailers of cosmetic products – Sephora USA, Inc. and Target Corporation – are embroiled in false advertising litigation concerning their clean beauty programs, which spotlight offerings across vendor brands that do not use listed ingredients of concern.

"So long as there is still this amorphous idea of what constitutes 'clean' and competing definitions of what constitutes clean, you're going to see an emboldened plaintiffs' bar who sees this area as ripe for pursuing class action claims," said Kelly Bonner, a trial attorney in Duane Morris LLP's Philadelphia office.

At the same time, "you're starting to see companies get a little bit more aggressive in pushing back," she said.

"With MoCRA, brands are going to have to provide a lot more information about product ingredients. There will be a lot more information available for plaintiffs and potential plaintiffs to scrutinize."

The class action complaint against Target was filed on 29 August by Pearlie Boyd and 13 other plaintiffs in the US District Court for the District of Minnesota. It alleges that the big-box retailer created and leverages "Target Clean" representations strictly for its own profit, applying it to brands that in some cases make no clean claims themselves. (Also see "[Target Corp.'s 'Clean' Marketing Challenged In Consumer Class Action](#)" - HBW Insight, 18 Sep, 2023.)

Target says the program helps consumers identify in-demand, "cleaner" products. The Target Clean green and white hexagonal seal – launched in 2019 for household essentials and baby goods and later extended to beauty items – directs shoppers to around 4,000 products in its stores and Target.com that are formulated without substances including phthalates, propyl- and butylparabens, and formaldehyde donors.

Plaintiffs allege Target's clean criteria are not always sufficiently spelled out to consumers at point of purchase and, ultimately, are not stringent enough.

"Everybody's got their own definition of it. And what plaintiffs are saying is 'Your idea of clean, Sephora and Target, is not my idea of clean. You are relying on a narrow subset of identified chemicals and ingredients to make claims that the products are clean, while essentially ignoring the presence of other ingredients that have been linked to health or environmental impacts,'" Bonner said.

Sephora asked New York's Northern District in February to toss a proposed class action in which plaintiff Lindsey Finster takes on the retailer's "Clean at Sephora" claims. Finster argues that consumers understand clean to mean natural or all-natural, i.e., free of synthetic ingredients, and that some number of Sephora's clean offerings miss the market accordingly. (Also see "[Clean Beauty, The New 'Natural,' Carries Same Litigation Risk – Attorneys](#)" - HBW Insight, 21 Jul, 2023.)

Sephora defies such notions, touting Clean at Sephora as a "model of transparency" that informs consumers "in plain terms" exactly what they are and are not buying. (Also see "[Sephora Asks NY Federal Court To Toss Out 'Clean at Sephora' False Advertising Suit](#)" - HBW Insight, 9 Feb, 2023.)



KELLY BONNER, ASSOCIATE, DUANE MORRIS LLP

The specialty retailer's website describes Clean at Sephora as "the beauty you want, minus the ingredients you might not" and lists parabens, sulfates SLS and SLES, and phthalates among ingredients its clean offerings avoid.

"Many other beauty retailers have very, very similar programs where they define clean. The problem with defining clean is that it isn't actually defined anywhere in terms of any statute or in the FTC," Bonner said.

More Vulnerable Target In Minneapolis?

Bonner believes Sephora may be better-positioned than Target to defend against claims in the pending cases.

In the Sephora case, the plaintiff's position that clean means free of synthetics is "a little too aggressive" of an argument in Bonner's view, and it is one that has failed plaintiffs in "natural" claims litigation and failed to convince the US Federal Trade Commission. (Also see "[FTC Finalizes 'All-Natural' Personal-Care Settlements, Offers A Word On 'Natural'](#)" - HBW Insight, 13 Jul, 2016.)

While Target, like Sephora, is "very clear" on what clean means to it, plaintiffs point to instances where "Target Clean" products actually are labeled as containing ingredients the retailer has identified as absent. For example, Physicians Formula's Mosaic Bronzer, marketed as "Target Clean," ostensibly contains propylparaben.

"I think that might give [plaintiffs] a bit more of a stronger claim, but it also depends on what the facts are" for each ingredient, Bonner said. "It's possible that they have certain other types or members of the [substance] family in there, so you'd really have to look at the specifics of what they're saying when they claim that Target banned certain ingredients but is actually kind of getting them in the back door."

She also said Target could struggle to argue that its fragrance-containing products are clean since the retailer does not require manufacturers to disclose the components of labeled "fragrance," as noted by plaintiffs.

"What is actually in the fragrance? Is it maybe a paraben or phthalate?" Bonner said.

She expects both defendants to be on solid footing in other respects. "Plaintiffs' claims that

‘clean’ is what reasonable consumers would interpret as being only natural or only certain types of ingredients – it doesn’t make sense when [the retailer has] prominently explained in plain terms what they mean. And I think they’re going to reject plaintiff’s attempts to characterize the program, to make it bigger than it is or broader than it is,” Bonner said.

Sephora and Target wins in their respective cases likely would take a great deal of wind out of plaintiffs’ sails. Or plaintiffs will simply modify their tactics in different courts and the suits will continue regardless.

“It all still boils down to the fact that ‘clean’ is an amorphous term, and absent regulatory guidance as to what ‘clean’ means, you’re always going to have a very engaged and active plaintiffs’ bar that really looks to pick apart what brands are saying,” Bonner said.

She added, “It’s going to be a bit of a battle over words.”

Advising companies using clean claims to define the term on their websites clearly and conspicuously and give special consideration in their programs to ingredients likely to draw scrutiny, Bonner provided a final note of warning on the US regulatory environment post-enactment of the Modernization of Cosmetics Regulations Act of 2022.

“With MoCRA, brands are going to have to provide a lot more information about product ingredients. There will be a lot more information available for plaintiffs and potential plaintiffs to scrutinize,” she said.