Insights: Alerts

# Greenwashing Claims - Fashionable or Fashion Faux Pas?

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Consumers seem to want to buy products made from sustainable materials or made in sustainable ways. At least, companies seem to think that's what consumers want, as they continue making claims about how environmentally friendly and sustainable their products and manufacturing processes are. Company claims and pronouncements about how green, sustainable, and eco-friendly they can be, however, considered "greenwashing" – statements that are vague, overbroad, or subject to misinterpretation. The Federal Trade Commission is in the process of reviewing its Green Guides for environmental marketing claims, given that its last update was published in 2012 and certainly could use a refresh. Meanwhile, some companies have been the subject of litigation about arguably overly broad environmental claims. Two recent lawsuits brought against companies in the fashion industry are instructive.

Retailer H&M was hit with a proposed class action in 2022 asserting that H&M's "Conscious Choice" collection was misrepresented as sustainable or environmentally friendly, when the products were made from environmentally harmful, non-sustainable materials. *Lizama, et al., v. H&M Hennes & Mauritz LP*, No. 4:22-cv-01170 (E.D. Mo. 2022). A district court judge in Missouri recently dismissed Lizama's lawsuit. The Court emphasized the statements that H&M did *not* make—specifically, even though Lizama argued that H&M's clothing was falsely labeled as "environmentally friendly," the Court noted that H&M never actually used that phrase. Rather than make such general "green" claims, the Court explained, H&M's advertising was far more specific, including precise claims like "more sustainable materials."

The court concluded that "no reasonable consumer would understand [H&M's] representations to mean that the Conscious clothing line is inherently 'sustainable' or that H&M's clothing is 'environmentally friendly' when neither of those representations were ever made."

The H&M case appears to provide a lesson that cautious marketing and legal consultation before making advertising claims may avoid liability in the future. This lesson will again be tested, though, in a different Eastern District of Missouri case that was just filed last month, in May 2023 against Nike. *Ellis v. Nike USA, Inc. And Nike Retail Services, Inc.*, No. 4:23-cv-000632 (E.D. Mo. 2023).

In this case, the plaintiff brought a proposed class action alleging that Nike "falsely and misleadingly markets" over 2,000 products in its sustainability collection because "only 239 products are actually made with any recycled materials." It is also alleged that certain Nike products are predominantly made with virgin synthetic materials, including plastic-based materials, that even if recycled aren't biodegradable. Finally, Ellis argues that *any* use of recycled plastic in clothing is inherently not sustainable because there are other, *more* sustainable things that could have been done with that recycled plastic.

The complaint was just filed, and Nike has yet to respond. As usual, allegations are just that – mere allegations, and we cannot take anything concrete from mere allegations. However, while similar cases alleging greenwashing have

been dismissed at the pleading stage, it is not clear that dismissal is a trend just yet. We will be monitoring to see if *Ellis* follows the trend of *Lizama v. H&M*, or if Nike's sustainability claims prove to be a fashion faux pas.

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