

## Civil Suit Trends Cos. Can Expect From State AG Enforcement

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The enforcement agendas of state attorneys general often inspire civil litigation, seeking to monetize those agendas.

Take, for example, the opioid litigation proceeding in federal and state courts: What started out as investigations by state and federal regulators have led to thousands of lawsuits from public and private plaintiffs across the country.

By understanding the priorities and enforcement trends of state attorneys general, companies can prepare for possible future claims and manage litigation risks. This article examines some key priorities and enforcement actions of state attorneys general, corresponding recent civil claims and important takeaways for likely defendants.

### Greenwashing

"Greenwashing" refers to deceptive advertising efforts designed to persuade the public that an organization's policies or a company's products are environmentally friendly.

Greenwashing lawsuits target companies, often under consumer protection statutes, based on allegations of false or misleading statements regarding the environmental impact of their work or products.

State attorneys general have actively targeted companies that make unsubstantiated greenwashing claims. The California attorney general's office boasts on the greenwashing section of its website that it filed the "first-of-its-kind 'greenwashing' lawsuit" in 2011.[1]

More recently, the California attorney general supported a U.S. Securities and Exchange Commission proposal that would require U.S. companies to disclose accurate information about the financial risk they face from climate change, in part because the disclosure will "provide an effective counter to greenwashing." [2] The New York attorney general and several others have also supported the SEC proposal.



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This priority has gone beyond public statements, with state attorneys general recently filing a raft of greenwashing lawsuits.

For example, in September 2021, the Vermont attorney general sued multiple fossil fuel companies in *Vermont v. Exxon Mobil Corp.*, accusing them of greenwashing by deceptively portraying themselves "and their products as benefitting the environment and helping to solve climate change, when in fact they continue to remain major sources of the problem," according to a press release.[3] The attorneys general of Massachusetts, New York, District of Columbia and other states have filed similar lawsuits.[4]

Private plaintiffs have joined the fray, with greenwashing cases recently filed in California, New York, Illinois and Massachusetts, among other jurisdictions.[5] These cases have experienced mixed results.

For example, in *Spindel v. Gorton's Inc.*, the U.S. District Court for the District of Massachusetts denied Gorton's motion to dismiss in August because the plaintiffs plausibly alleged that the fish they purchased were sourced "from unsustainable Chinese fish farms with environmentally destructive and inhumane practices," making it therefore plausible that Gorton's statement that its tilapia products were sustainably sourced was false and misleading as alleged.[6]

But in *Dwyer v. Allbirds Inc.*, decided in April, the defendant successfully argued in the U.S. District Court for the Southern District of New York that its environmental impact claims — in that case, that its products were environmentally friendly and had a low carbon footprint — were not materially misleading because the plaintiff did not actually allege that the calculations behind those statements were wrong or inaccurate.[7]

This was true even though the plaintiffs alleged that other methods or calculations might show different impacts.[8] Notably, the existence of an objective methodology to back up challenged statements, even if the methodology itself is debatable, can help beat back these claims.

### **Plastics and Perfluoroalkyl and Polyfluoroalkyl Substances**

An increasingly popular category of greenwashing claims are claims involving plastic products. For example, in April, the California attorney general announced an investigation into the fossil fuel and petrochemical industries in part for their "aggressive campaign to deceive the public, perpetuating a myth that recycling can solve the plastics crisis." [9]

As with other greenwashing claims, private plaintiffs have filed lawsuits against companies for their allegedly false, deceptive and/or misleading statements regarding recyclability.[10] In California alone, there have been at least five lawsuits asserting plastics-related claims.[11]

Like the greenwashing cases discussed above, these plastics lawsuits have seen mixed results, with recent decisions in both directions.

For example, in *Smith v. Keurig Green Mountain Inc.* in the U.S. District Court for the Northern District of California, the plaintiff defeated the defendant's motion to dismiss in 2019 because she plausibly alleged that Keurig's representation that its coffee pods were recyclable would be misleading to reasonable consumers since, as alleged, the pods could not be recycled in many municipal recycling facilities.[12]

The parties subsequently settled for \$10 million, or approximately 11% of the defendant's estimated exposure, an amount the district court considered fair given the substantial risks in continuing to litigate

the case.[13]

By contrast, the U.S. District Court for the Southern District of New York in *Duchimaza v. Niagara Bottling LLC* granted the defendant's motion to dismiss in August.[14]

As to that plaintiff's claim that the bottle's 100% recyclable statement was false and misleading, the court found that the fact that bottles may not actually be recycled does not mean they are not 100% recyclable, nor does the fact that the bottle may have incidental components, like a label, that are not recyclable.[15]

In doing so, the court relied heavily on the Federal Trade Commission's Green Guides, suggesting that compliance with these guides can be a strong defense to these claims.

Though these cases thus far have targeted companies that make plastic products, companies that make other products that use plastic, or other products that are marketed as recyclable, could find themselves in the crosshairs next.

Along similar lines, state attorneys general and private plaintiffs have filed lawsuits targeting perfluoroalkyl and polyfluoroalkyl substances, also known as forever chemicals because they break down very slowly over time.

For example, in May, the Massachusetts attorney general sued 13 manufacturers of PFAS alleging, among other things, that the defendants falsely asserted that their products were safe.[16]

As to suits from private plaintiffs, some suits have alleged typical tort claims like negligence, while others have taken the form of shareholder derivative lawsuits.[17] To date, these PFAS lawsuits have had some success, with both tort claims and securities claims surviving motions to dismiss.[18]

### **Corporate Diversity, Equity and Inclusion**

Civil claims have also emanated from attorney general focus on corporate statements and commitments concerning workforce diversity, equity and inclusion, or in the promotion of investment products connected to environmental, social and governance, or ESG, criteria.

For example, in August, the attorneys general of New York, California and other states drafted a letter in support of an SEC proposal that would require enhanced disclosures regarding how companies use ESG criteria in their investment products.[19]

Explaining his support for the proposal, California Attorney General Rob Bonta noted that many funds promoting ESG-investment products "are not transparent about how they consider ESG criteria in their decision-making, and some of these funds in reality have done little to take [ESG] values into account."[20]

Similarly, private plaintiffs have filed various lawsuits, often in the form of shareholder derivative lawsuits, alleging that companies have failed to live up to their stated commitments to diversity.[21]

Most of these cases have failed at the pleading stage, often because the plaintiffs have failed to plead demand futility — a necessary element of shareholder derivative actions — or failed to plead that the alleged statements were false or misleading, with the requisite particularity.[22]

But even though the majority of these cases so far have failed at the pleading stage, it is possible that the plaintiffs bar will learn from these losses and eventually craft a complaint that survives past a motion to dismiss.

## Conclusion

Given that the announcement of a priority or enforcement action of state attorneys general tends to lead to increased attention from private plaintiffs, companies should pay close attention to the words and actions of state attorneys general.

The focus on greenwashing and ESG marketing claims by state attorneys general has translated directly into civil claims from private plaintiffs.

As state attorneys general continue to focus on these issues, companies should be mindful of the risk of suits related to statements made in marketing, advertising or relating to their commitment to ESG issues.

To reduce the likelihood of success of these suits, companies should ensure that statements promoting environmental claims or other ESG issues have objective evidence behind them, and to avoid statements that are obviously inconsistent with past practices or available evidence.

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[1] <https://oag.ca.gov/environment/greenwashing>.

[2] *Id.*

[3] <https://ago.vermont.gov/blog/2021/09/14/attorney-general-donovan-files-consumer-protection-suit-against-fossil-fuel-companies/>.

[4] See, e.g., *Commonwealth of Mass. v. Exxon Mobil Corp.*, Case No. 1984-CV-3333 (Mass. Super. Ct.); *District of Columbia v. Exxon Mobil Corp.*, Case No. 2020 CA 002892 B (D.C. Super. Ct.); *New York v. Exxon Mobil Corp.*, Case No. 452044/2018 (N.Y. Sup. Ct.).

[5] See, e.g., *Bush v. Rust-Oleum Corp.*, Case No. 20-3268 (N.D. Cal.) (alleging products deceptively labeled as "earth friendly"); *Dwyer v. Allbirds, Inc.*, Case No. 21-5238 (S.D.N.Y.) (alleging shoe company falsely advertised that products were environmentally friendly and would help reverse climate change); *Rawson v. ALDI, Inc.*, Case No. 21-2811 (N.D. Ill.) (class action alleging false and deceptive advertising regarding Atlantic salmon products as "sustainably sourced"); *Spindel v. Gorton's Inc.*, Case No. 22-10599 (D. Mass.) (same except regarding tilapia).

[6] *Spindel v. Gorton's Inc.*, 2022 WL 3648823, at \*1 (D. Mass. Aug. 24, 2022); see also *Rawson v. ALDI*,

Inc., 2022 WL 1556395 (N.D. Ill. May 17, 2022) (denying motion to dismiss); *Bush v. Rust-Oleum Corp.*, 2021 WL 24842 (N.D. Cal. Jan. 4, 2021) (denying motion to dismiss because plaintiff plausibly alleged labels were misleading).

[7] *Dwyer v. Allbirds, Inc.*, 2022 WL 1136799, at \*5–6 (S.D.N.Y. Apr. 18, 2022).

[8] *Id.* at 5–7.

[9] <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-investigation-fossil-fuel-and-petrochemical>. The California attorney general's website has an entire page dedicated to the plastics crisis and the "history of deception" around recyclability of plastic. See <https://oag.ca.gov/plastics>.

[10] See, e.g., *Smith v. Keurig Green Mountain, Inc.*, Case No. 18-6690 (N.D. Cal.) (class action alleging "recyclable" label on Keurig "K-Cups" is false and misleading); *Duchimaza v. Niagara Bottling, LLC*, Case No. 21-6434 (S.D.N.Y.) (class action against company that makes plastic bottles alleging that "100% recyclable" label is false and misleading); *Earth Island Institute v. Coca-Cola Co.*, Case No. 21-1926 (D.D.C.) (alleging false and misleading statements regarding defendant's commitment to reducing plastic pollution).

[11] See *Smith*; *Earth Island Institute v. Crystal Geyser Water Co. et al.*, Case No. 20-CIV-01213 (Cal. Super. Ct. San Mateo Cty.); *Greenpeace Inc. v. Walmart Inc.*, Case No. 21-754 (N.D. Cal.); *Swartz v. The Coca-Cola Co.*, Case No. 21-4643 (N.D. Cal.); *San Diego Coastkeeper v. Pretium Packaging, L.L.C.*, Case No. 22-185 (S.D. Cal.).

[12] *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 842, 845–47 (N.D. Cal. 2019) (denying motion to dismiss).

[13] See *Smith v. Keurig Green Mountain, Inc.*, 2022 WL 2644105, at \*10 (N.D. Cal. July 8, 2022) (granting preliminary approval to class action settlement).

[14] *Duchimaza v. Niagara Bottling, LLC*, 2022 WL 3139898 (S.D.N.Y. Aug. 5, 2022).

[15] *Id.* at \*8–11.

[16] See *Commonwealth of Mass. v. 3M Co., et al.*, MDL Case No. 2873 (D.S.C.).

[17] See, e.g., *Parris v. 3M Co.*, 2022 WL 976007 (N.D. Ga. Mar. 30, 2022) (denying motion to dismiss negligence and other tort claims arising out of contamination allegedly caused by PFAS); *In re Chemours Co. Securities Litig.*, 2022 WL 610671 (D. Del. Feb. 24, 2022) (allowing securities claim to proceed).

[18] *Id.*

[19] <https://oag.ca.gov/system/files/attachments/press-docs/NYAG%20comment%20letter%20%28S7-17-22%29.pdf>.

[20] <https://oag.ca.gov/news/press-releases/attorney-general-bonta-expresses-support-sec-proposal-increase-transparency-and>.

[21] See, e.g., *Ardalan v. Wells Fargo*, Case No. 22-3811 (N.D. Cal.); *City of Pontiac Police & Fire Retirement Sys. v. Jamison*, Case No. 20-874 (M.D. Tenn.); *In re Danaher Corp. Shareholder Derivative Litig.*, Case No. 20-2445 (D.D.C.).

[22] See, e.g., *In re Danaher Corp. Shareholder Derivative Litig.*, 549 F. Supp. 3d 59, 68–71, 74 (D.D.C. 2021) (dismissing derivative suit alleging false commitment to diversity because complaint failed to plead demand futility with particularity and failed to allege "particularized facts showing that the challenged statements were false or misleading"); *Falat v. Sacks*, 2021 WL 1558940, at \*4–6 (C.D. Cal. Apr. 8, 2021) (dismissing derivative suit against board of Monster Beverage Corporation alleging a false commitment to diversity because complaint failed to plead demand futility with particularity).