LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, FEBRUARY 14, 2024

GUEST COLUMN

Turning up the heat for California's class action climate

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Companies have for years faced lawsuits over their representations describing efforts to be more environmentally friendly. The state of California's three new climate disclosure laws – establishing reporting requirements for companies doing business in California – heighten the risk not only of state enforcement but of accompanying class action litigation. This alert describes the nature of the new potential class action claims on the horizon and how companies can guard against the risk of this unwanted collateral litigation arising from these and other new ESG disclosure requirements

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California's new ESG disclosure laws

On Oct. 7, 2023, Governor Newsom signed into law three climate disclosure bills, creating reporting obligations for companies doing business in California. These bills include the Climate Corporate Data Accountability Act (SB 253), the Climate-Related Financial Risk Act (SB 261), and the Voluntary Carbon Market Disclosures Act (AB 1305).

SB 253, which by its terms will require the first disclosures in 2026, will require a large number of companies to disclose their Scope 1, 2, and 3 greenhouse gas emissions. SB 261, which also contemplates disclosure in 2026, will require an even larger population of companies to disclose climate-related financial risks consistent with the recommendations of the Task Force on Climate-Related Financial Disclosures, as well as related remedial measures.

In contrast, AB 1305 had an effective date of Jan. 1, 2024. On Thurs., Nov. 30, 2023, Assemblymember Jesse Gabriel, the author of AB 1305, wrote a letter expressing his intent that AB 1305 take effect on Jan. 1, 2025, not Jan. 1, 2024. The letter does not have the force of law. As of this writing, there has been no new legislation seeking to extend the effective date of AB 1305 from Jan. 1, 2024, to Jan. 1, 2025. It requires companies that make claims about carbon neutrality or significant emissions reductions, including involving voluntary carbon offsets (VCOs), to disclose details about the applicable offsets and/or how the claims are determined to be accurate. Failure to comply with AB 1305's reporting requirements can result in a $2,500 fine each day when the information is not available or is inaccurate.

California's consumer protection laws

California boasts some of the most robust consumer protection laws in the country. With the passage of SB 253, SB 261, and AB 1305, businesses should be aware of potential collateral litigation that can stem from California's consumer protection laws. Lawsuits under the following statutes are typically brought together, and often in the form of putative class action claims: (1) California's Unfair Competition Law (UCL); (2) California's False Advertising Law (FAL); and (3) California's Consumer Legal Remedies Act (CLRA).

California's UCL is a consumer protection statute that prohibits "unlawful, unfair, or fraudulent" business practices. Cal. Bus. & Prof. Code § 17200. California's FAL is a similar consumer protection statute that prohibits not only false advertising but also advertising, although true, that is either misleading or has the capacity to deceive the consuming public of which the business knows of or reasonably should have known. Cal. Bus. & Prof. Code § 17500; *Leoni v. State Bar*, 39 Cal. 3d 609, 626 (Cal. 1985); *Arizona Cartridge Remanufacturers Ass'n, Inc. v. Lexmark Intern., Inc.*, 421 F.3d 981, 985 (9th Cir. 2005). California's CLRA is another consumer protection statute that specifically prohibits various deceptive practices in connection with the sale of consumer goods or services, including, for example:

Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, ben-efits, or quantities that they do not have.

Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model if they are of another. *See* Cal. Civ. Code § 1770(a).

These claims are often brought as putative class action claims, making them costly to defend, with the possibility of wide-ranging discovery, if they survive past a motion to dismiss.

Attorney's fees provisions make these attractive claims for class action plaintiffs to file. Although the UCL and FAL do not explicitly authorize an award of attorneys' fees, plaintiffs typically seek them under California Civil Procedure Code § 1021.5, California's private attorney general statute. Under § 1021.5, a court may award fees to the successful party in an action that resulted in the enforcement of a right affecting the public interest. Cal. Civ. P. Code § 1021.5. California courts have broadly interpreted "successful party" to mean the party who achieved its litigation objectives, such as a change in the defendant's conduct or a settlement. *See*, e.g., Hogar Dulce *Hogar v. Cmty. Dev. Com. of City of Escondido*, 157 Cal. App. 4th 1358, 1365 (Cal. Ct. App. 2007); *Henderson v. J.M. Smucker Co.*, 2013 WL 3146774, at *4 (C.D. Cal. June 19, 2013). The CLRA contains a mandatory fee-shifting provision that awards reasonable attorneys' fees to the prevailing party. Cal. Civ. Code § 1780(e). Like § 1021.5, California courts broadly interpret "prevailing party" to mean the party who has achieved its litigation objectives, such as by obtaining a settlement. *See, e.g., Kim v. Euromotors W./The Auto Gallery*, 149 Cal. App. 4th 170, 180 (Cal. Ct. App. 2007); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1169 (C.D. Cal. 2010).

New landscape of greenwashing litigation post-climate disclosure laws

As companies continue to use terms like "net zero emissions" and "carbon neutral," lawsuits challenging companies' representations of being environmentally friendly are on the rise. Also known as "greenwashing" claims, these lawsuits are based on allegations that a company's public statements pertaining to its efforts to be more environmentally friendly are either inaccurate or unsubstantiated. Failure to comply with SB 253, SB 261, and AB 1305 may result in significant new collateral litigation by class-action plaintiffs alleging violations of California's UCL, FAL, and CLRA.

Even before California's new climate disclosure requirements, greenwashing claims have been an active area of litigation. For example—

* *Bargetto v. Walgreen Co.*, No. 22-cv-02639 (N.D. Cal. 2022): In July 2015, California passed Senate Bill 270 (SB 270) prohibiting the sale of single-use plastic grocery bags. Stores may instead sell reusable plastic bags made of recycled material and are recyclable in the state of California. In *Bargetto*, class action plaintiffs alleged that Walgreens sold plastic reusable bags, but that they were not recyclable in California, thereby violating SB 270. Second Amended Compl. at ¶¶ 55–59. Plaintiffs brought claims under California's UCL and CLRA. They alleged that the violation of SB 270 gave rise to an "unlawful" business practice in violation of the UCL. Additionally, the class-action plaintiffs claimed that Walgreens represented that reusable bags were recyclable in California when they were not. Specifically, the class-action plaintiffs alleged that Walgreens engaged in deceptive practices as outlined in §§ 1770(a)(5), (7), and (9) of the CLRA. The case is currently ongoing and in discovery.

Smith v. Keurig Green Mountain, Inc., No. 18-cv-06690 (N.D. Cal. 2018): In Smith, Keurig represented that its single-serve coffee pods were made of recyclable plastic material. Class-action plaintiffs claimed that the representation was misleading because recycling facilities could not recycle the plastic material, thereby confusing consumers into thinking the pods were recyclable when they were not. Amended Compl. at ¶ 2. Plaintiffs brought claims under California's CLRA and UCL, alleging that Keurig's pods were deceptively labeled "recyclable" when they were not. They similarly claimed that Keurig's violation of the CLRA gave rise to an "unlawful" business practice in violation of the UCL. In February 2023, the case settled for $10 million. Order Granting Final Approval of Class Action Settlement, ECF No. 166, at 3–4.

White v. Kroger Co., No. 21-cv-08004 (N.D. Cal. 2022): In *White*, Kroger produced sunscreen sprays that prominently featured a label with the term "reef-friendly," indicating that the sunscreen was produced with ingredients that were not harmful to ocean coral reefs. Amended Compl. At ¶¶ 2–4. Class-action plaintiffs brought claims under California's UCL, FAL, and CLRA, claiming that the use of the "reef–friendly" label on the sun screen products was deceptive when the products were produced with ingredients allegedly harmful to ocean coral reefs. In June 2023, the court granted the plaintiff's motion to voluntarily dismiss the case. Order Granting Motion to Dismiss, ECF No. 111.

Class-action plaintiffs will likely try to use a business's non-compliance with either SB 253, SB 261, and AB 1305 as a steppingstone to bring collateral claims under California's UCL, FAL, and CLRA. More specifically, future "greenwashing" litigation derivative of these new California climate disclosure requirements may involve the following allegations: a business made certain representations about its efforts to be more environmentally friendly; the business is subject to one or more of the new California climate disclosure laws; the business failed to make the required or accurate disclosures under them; and a consumer purchased a product or service from the business that she would not otherwise have purchased absent the inaccurate or incomplete environmental disclosure. Like other types of collateral litigation, such actions can be expected to seek or exploit related enforcement activity, such as by seeking documents produced to the regulator; looking to establish elements of the claims through any findings in related enforcement proceedings; and trying to use as leverage that companies may be fighting similar claims on multiple fronts.

Four action items and takeaways

Determine whether your company has, or will have, any disclosure obligations under any of the three climate disclosure laws. Now is the time to do that assessment, with a particular focus on AB 1305.

With AB 1305's effective date of Jan. 1, 2024, companies that make representations regarding carbon neutrality or net zero emissions or significant emissions reductions, including those that purchase, or use VCOs, should ensure that they have adequate controls in place to ensure disclosure compliance. The civil penalties are not insubstantial, and any enforcement action by California officials will likely be followed by a heightened risk of greenwashing class action lawsuits.

Companies subject to greenhouse gas, climate-related financial risk, and carbon offset disclosure requirements should ensure that their disclosures for each are consistent. Compliance controls and processes should be flexible to account for the differing requirements under SB 253, SB 261, and AB 1305.

Companies investing in businesses that make environmental disclosures subject to SB 253, SB 261, or AB 1305 must ensure that those businesses have sufficient compliance measures in place to account for the various disclosure requirements set forth in the newly enacted statutes.

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