

Plastics on trial: a briefing series on evolving liability risks related to plastics.

Brief 1 Greenwashing



Introduction to this briefing series

Since plastics first started being used commercially in the 1950s, the material has become ubiquitous in modern life. However, with single-use plastic products accounting for over around half plastic produced each year,¹ the world has experienced an exponential increase in plastic production and waste. These plastics are contributing to climate change, degrading our ecosystems, threatening biodiversity, harming economies and impacting on human health.²

The damage caused by plastics, and the corresponding costs for governments, businesses, and society,³ is increasingly recognized by the public, by governments, and in courts. The first wave of legal cases on plastics have now been launched.⁴ We predict that these will evolve rapidly as public and government concern around the impact of plastics continues to grow, bolstered by the ongoing negotiations for a legally binding treaty on plastic pollution, the mandate for which was established in an historic resolution at the United Nations Environment Assembly in March 2022.⁵

This series of four briefs explores the developments in plastic-related legal action targeting companies. We have identified four themes around which plastic-related cases converge:

1. Greenwashing



2. Hazardous chemicals



3. In the environment



4. Waste disposal & recycling



Each brief outlines developments in legal action against companies relating to the relevant theme, and also considers how these trends may unfold in the future. Such legal cases have knock-on impacts on the financial sector, including banks and investors that provide financing for these companies, as well as the insurers that underwrite the risks they face.

Geographic focus and other research limitations

Our research has identified many plastic-related legal cases against corporate actors in the United States (US), Europe and to a lesser extent, Canada, converging around the four themes identified above. We have not identified any legal cases on plastics directly challenging corporates in other regions that relate to these themes. The geographic focus of these briefs reflects this. In part, the higher concentration of plastic-related litigation against companies in the US and Europe is likely to arise from characteristics of these legal systems, which may make it easier – or, in some cases, more desirable from a claimant’s perspective – to bring claims in these jurisdictions.

However, we fully acknowledge that our research has been limited by linguistic factors and the regional expertise of the authors of these briefs. We note from our consultations with experts from around the Globe on developments in plastic-related litigation that there are several highly significant cases in other regions, particularly in Asia. To our knowledge, to date, these cases name state actors as defendants, as opposed to corporate actors, and therefore fall outside the scope of these briefs. Nevertheless, such cases are likely to have direct and indirect implications for corporate actors (as we note with reference to specific examples in Brief 3 on Plastics in the environment and Brief 4 on Plastic waste disposal & recycling), and may foreshadow future legal claims directly challenging companies in the future.

It also highly likely that developments in climate litigation and environmental litigation on topics other than plastics will influence future legal cases on plastics. Throughout the briefing series, we occasionally refer to litigation on other topics where there are clear parallels to plastic, but note that such parallels could be explored in greater depth.

Regional analysis on how trends in environmental or other public interest litigation could affect future plastic lawsuits would be a particularly interesting complement to the findings of these briefs.

The web of national, regional and international legislation and agreements affecting the production, use and disposal of plastics is complex and, in many cases, subject to change, particularly in light of the ongoing plastic treaty negotiations referred to above. We have considered some relevant regional and supra-regional policy trends that may impact the type of frequency of plastic-related litigation but acknowledge that the complexity of the global policy landscape renders comprehensive consideration of its impact on plastic litigation beyond the scope of these briefs.

Finally, as described by UN Special rapporteur on toxics and human rights, Dr Marcos Orellana, “every stage of the plastics cycle has adverse effects on the full enjoyment of human rights”.⁶ Increasingly, civil society academia and governments are recognising the substantial human rights and environmental justice implications of the plastics crisis. We have not explored this angle in depth in these briefs – principally because human rights arguments are not yet widely used in the legal cases we refer to – but would welcome future research exploring how an improved understanding of the human rights implications of plastics may impact plastic-related litigation.

Plastic-related ‘greenwashing’

‘Greenwashing’ is not a legal concept itself, rather a label used to refer to sustainability-related misleading practices. ClientEarth describes the term ‘greenwashing’ as “where a company uses advertising and public messaging to appear more climate friendly and environmentally sustainable than it really is”.⁷ Greenwashing statementsⁱ may be made by companies with reference to specific products or services, or to attributes of the company, its activities, plans or goals in the form of ‘corporate reputational’ or ‘brand’ advertising. Legal definitions of the type of statements that constitute impermissible ‘greenwashing’ may differ across jurisdictions, it is generally understood to apply where statements are inaccurate, exaggerated, lack context and/or substantiation in a manner that is liable to mislead the readerⁱⁱ.

In relation to plastics, common product-specific plastic-related statements that have been criticized as ‘greenwashing’ under certain circumstances include claims relating to recyclability, biodegradability and compostability of plastics. At a corporate level, companies may also face allegations of greenwashing for the manner in which they present their actions and policies around the use, disposal, or management of plastics.

In the US, there have been several class actions filed against companies by their customers relating to environmental statements attached to plastic packaging, along with a number of legal challenges for misleading advertising filed by non-governmental organisations (NGOs). There have also been several court challenges in European Union (EU) Member States, brought both by competitors and consumer protection organisations. As regulators commit to applying more resources to address the issue, action from enforcement bodies is likely to also become more frequent. We explore all these developments in this first brief in the series ‘Plastics on trial’ on the topic of plastic-related greenwashing.

Litigation

US and Canada class actions

The US is the world’s most active jurisdiction for consumer claims, and those relating to greenwashing are no exception. Lawsuits on misleading packaging have been particularly prolific, with 100 false labelling claims being filed against food manufacturers in 2020 alone.⁸

ⁱ In this Brief, we generally refer to greenwashing (or alleged greenwashing) “statements” by companies, rather than “claims” to avoid confusion with reference to legal claims (in the sense of lawsuits).

ⁱⁱ The ‘reader’ may be consumers but, as we explore in this Brief, shareholders can also be misled by greenwashing statements.

In recent years, class actionsⁱⁱⁱ concerning greenwashing of plastic products have begun to proliferate in federal courts. These have mainly targeted consumer goods companies' use of the term "recyclable", particularly in relation to plastic packaging.

Manufacturer of coffee makers and coffee products, Keurig, has faced two separate class actions in the US regarding the recyclability of coffee pods. The first – *Smith v Keurig Green Mountain*⁹ – was certified by the California federal court as a statewide class action in October 2021.¹⁰ The parties have since reached a settlement¹¹ requiring Keurig to change the marketing of the product¹² and to contribute US\$ 10 million to a fund for class members, with any funds in excess being donated to environmental and consumer advocacy groups¹³. The same statement on recyclability also led to a class action in Canada, filed in early 2022.¹⁴ The class action lawsuit requests monetary damages on behalf of Canadian consumers who bought Keurig products nationwide.

This has been followed by class actions alleging that the "100% recyclable" claims made by the Coca-Cola Company, BlueTriton Brands and Niagara Bottling are false and misleading. In 2021, three California consumers filed a class action against the three companies, alleging that their marketing of plastic bottle products as "100% recyclable" was false and misleading (*Swartz v Coca-Cola Company*).¹⁵ A New Jersey consumer also filed a similar class action against BlueTriton Brands (formerly Nestlé Waters North America) and Niagara Bottling in relation to the same recyclability claim.^{16 17}

Claims brought by NGOs^{iv} – US and EU

Given that greenwashing sits at the crossover of two key areas of public interest – the environment and consumer protection – it is unsurprising that NGOs have also been active in greenwashing cases.

In the US, the same recyclability statement underlying the *Swartz v Coca-Cola Company* lawsuit has given rise to a misleading advertising complaint filed by NGO Sierra Club.¹⁸ Supermarket group Wal-Mart¹⁹ and a number of fast-moving consumer goods companies (including Procter & Gamble and L'Oréal USA)²⁰ have also been challenged for allegedly making misleading statements relating to recyclability of packaging, with the latter now having settled²¹.

ⁱⁱⁱ As described by Cornell Law School, class actions are "a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or 'class'." (Source: https://www.law.cornell.edu/wex/class_action). The US is the most established jurisdiction for bringing class actions. Other common and civil law jurisdictions permit class (or collective/representative actions), but they may be subject to restrictions that make class action lawsuits challenging to bring in practice.

^{iv} NGOs generally do not have the same right to claim compensation (damages) for breaches of consumer protection law as consumers. Usually, the remedies claimed include an order that the company desist the advertising in question and not engage in this kind of behaviour in future. Nevertheless, where actions brought by NGOs on the basis of misleading advertising are successful, the liability of the defendant companies is established, opening the door for follow-on claims from affected consumers, who may have the right to claim damages. Where these are class or representative actions involving multiple claimants, such as those described above, amounts at stake may be significant.

In the EU, consumer protection organisations have been active on plastic-related greenwashing. For example, a consumer protection association was successful in persuading the German courts that “climate neutral” labels attached to plastic bin bags were misleading.²² In France, consumer protection organisation Consommation, logement et Cadre de Vie (CLCV) launched a legal action against Nespresso, alleging that the company’s claims of carbon neutrality and 100% recyclability of coffee capsules had misled consumers.²³

Trends to watch

Corporate reputational advertising

In an interesting indication of how greenwashing lawsuits may develop in the future, the US environmental NGO Earth Island Institute filed two claims in 2021 against consumer goods companies, challenging the way they present their commitments on sustainability in light of their continued dependence on single-use plastic products. The first lawsuit alleged that the Coca-Cola Company had engaged in false and deceptive advertising by claiming on its website and other marketing materials that it is a “sustainable” company that “takes responsibility” for its plastic. The NGO has asked the court for an order prohibiting Coca-Cola’s greenwashing marketing campaign in the District of Columbia. The second challenged BlueTriton Brands’ advertising campaigns in which it claimed to be a “sustainable” company working for “a waste-free future” despite its on-going and increasing contribution to plastic pollution.^{24 25} Both cases are ongoing.

The growing criticism of methods of plastic waste management such as chemical recycling and ‘plastic offsetting’ (as described in Brief 4 on Disposal of plastic waste and recycling) indicates that these are topics to watch for future greenwashing allegations. Companies basing corporate reputational advertising on commitments relating to plastic waste management are vulnerable to legal challenges as the effectiveness of these methods faces increasing scrutiny.

Claims from competitor companies

Greenwashing is not just a consumer protection issue – it raises competition concerns as well. Companies seeking to debunk statements of competitors relating to sustainability may have recourse to unfair competition law. In 2018, one such corporate plaintiff succeeded in demonstrating to courts in Germany that the defendant’s statement regarding its use of recycled plastic recovered from the oceans were misleading consumers and giving them a competitive advantage.²⁶

In a recent case hailed as a “landmark decision”, an Italian court upheld a company’s request for an order to stop its competitor making “vague, false, and non-verifiable green claims”. Rather than relying on unfair competition law, the plaintiffs used instead claimed a breach of consumer protection law.²⁷ The reliance of competing companies on consumer protection provisions is a novel approach. In light of the competitive advantage to be obtained by claiming sustainability attributes, we can expect to see more of this type of case in the future.

Action from regulators

Proactive measures from regulators, including fines, are a powerful tool in holding companies responsible for plastic-related greenwashing. In the face of growing scepticism around green statements made by companies, regulators^v are showing commitment to tackle such practises more robustly.

US and Canada

The US Federal Trade Commission (FTC) has pursued several cases on greenwashing in the federal court in recent years and has powers to issue significant fines against companies found to mislead consumers. For example, in 2019, a cosmetics retailer was fined US\$ 1.76 million for misleading consumers by claiming products to be “organic” and “vegan”.²⁸

The FTC has provided guidance on environmental statements (the “Green Guides”) for nearly thirty years, but has committed to update them in 2022.²⁹ Commentators have observed that sustainability statements commonly attached to plastic packaging are “ripe for revision”.³⁰

The FTC has also used the Green Guides to support enforcement actions and issue warning letters against companies regarding misleading statements about recyclability or biodegradability of plastic bags.³¹ For example, in October 2015, the FTC issued a finding that ECM BioFilms made misleading statements about the biodegradability of chemically treated plastics, concluding that the company misled consumers as to how long the plastics would take to biodegrade.³² A federal court of appeals rejected ECM BioFilms’ appeal of the judgment.³³

Moreover, in an historic first, the FTC recently received a complaint filed by a group of NGOs against oil major Chevron’s pledge of “ever-greener energy”.³⁴ It is likely that complaints such as this from NGOs and consumer groups will become more common, adding to already significant pressure on the FTC to step-up enforcement action for greenwashing cases.

Notably, the recyclability claims by manufacturer of coffee products, Keurig, that resulted in class actions in the US and Canada have also given rise to a CA\$ 3 million fine from the Canadian regulatory authorities.³⁵ It is worth noting that the finding of fault by the Canadian Competition Bureau weighed heavily in the pleadings in the class action complaint and was used by the plaintiff’s attorneys to further publicize the lawsuit,³⁶ which may lead to the addition of more named plaintiffs. This may foreshadow a pattern in which action taken by regulators against greenwashing leads to follow-on class actions.

^v Our research indicates that the Europe is leading the way globally on regulatory action on misleading claims. However, we note that Australian Association of National Advertisers – an industry body established for self-regulation of advertisement – has also committed to updating its Environmental Claims Code. See: <https://aana.com.au/2022/08/09/global-trends-in-regulating-environmental-claims/>. Outside these jurisdictions, we have not identified legislative amendments or specific commitments to update consumer protection or other laws to address sustainability claims, but note that (i) such claims may already be addressed in consumer protection law, or (ii) we may have not have failed to identify relevant regulatory developments in the course of our research.

Europe

In Europe, competition and consumer protection authorities have also accelerated efforts to address greenwashing.

Competition and consumer protection authorities in the Netherlands and the United Kingdom have led the way in escalating enforcement action on greenwashing. The Dutch consumer protection authority (the ACM) issued robust guidelines on green claims for companies in 2020,³⁷ swiftly followed by the launch of an initiative that saw 170 companies receive letters advising them to check the accuracy of their statements in 2021.³⁸

In the UK, the Competition and Markets Authority (CMA) published similar guidelines in 2021³⁹ and the body has launched its enforcement action with a focus on the fashion retail sector.⁴⁰ The CMA has also indicated that it will be looking into the fast-moving consumer goods sector.⁴¹ Given that the guidelines were replete with examples of misleading statements relating to plastic packaging, it is likely that plastic will be a relevant topic for the regulator's actions in this sector.⁴²

In 2021, the European Commission and national consumer protection authorities dedicated their annual "sweep" (website screening for breaches of EU consumer law in online markets) to greenwashing. The conclusion: 42% of statements appeared to be "exaggerated, false or deceptive and could potentially qualify as unfair commercial practices under EU rules".⁴³ In response, the Commission committed to fight greenwashing, starting with the publication of its own guidance on misleading green statements in December 2021.⁴⁴

This commitment is all the more significant in light of legislative developments in Europe that will enable regulators and courts to order significant financial penalties against companies found to be misleading consumers.

In the EU, an amendment to consumer protection legislation provides that Member States for maximum fines of at least 4% of annual turnover for breaches involving "widespread infringements" (i.e. those affecting customers in more than one EU Member State).⁴⁵ A number of significant fines have already been issued under this new regime.⁴⁶

In the UK, a proposal to boost the CMA's powers by allowing them to issue fines of up to 10% of global turnover for infringements of consumer protection law is also on the table.⁴⁷

Shareholders: the next frontier of plastic greenwashing litigation?

Research conducted by Morgan Stanley in 2019 identified that the specific issue of plastic reduction sits alongside overall climate change concerns as a top priority for sustainable investors.⁴⁸ Citibank has emphasised the risks linked to this changing paradigm on plastics, referencing "increased consumer and regulatory concern toward single-use plastic".⁴⁹ Some investors have already taken decisive action. In the US, shareholder proposals have called on consumer goods companies and grocery retailers to achieve an absolute reduction in their use of plastic packaging. These proposals have received "well

above the average level [of support] traditionally seen for environmental and social shareholder proposals".⁵⁰

Investors' interest in plastic reduction – both from a sustainability perspective and a risk mitigation perspective – gives rise to another source of litigation risk for companies in the plastic supply chain: investor lawsuits against companies and their directors for losses alleged to arise from misleading statements regarding their performance on plastics.

Shareholder action on sustainability statements

A 'second generation' of greenwashing lawsuits – in which shareholders allege misleading environmental statements made by companies resulted in them suffering financial losses – are emerging, facilitated by various factors:

- Being perceived by investors as 'green' carries a competitive advantage for companies. Investors may be motivated by the expectation on them to invest sustainably, and by a desire to manage environmental risk.
- In order to attract investment or placate shareholders, companies may exaggerate their environmental performance, and/or their actions to mitigate risks related to the environment.
- Obligations to disclose sustainability-related information are also on the rise. Companies are expected to provide more information to investors (and other stakeholders), and "the more information organisations are expected to report, the more likely investors are to use and rely on it".⁵¹
- The increasing importance of sustainability factors in investment decision making makes it easier for shareholders to demonstrate in legal cases that information on sustainability provided by companies influenced their investment decisions. Difficulties in demonstrating this connection were a common reason why this kind of claim failed in the past,⁵² but this is less likely to be the case in the future.

Examples of such cases related to environmental and sustainability statements made by companies include:

1. In a class action brought by shareholders in Exxon Mobil, the court found that Exxon Mobil had made material misstatements regarding the cost of carbon in its business plans, and stated inaccuracies regarding the climate change financial implications on specific projects, with intent to deceive, which led to a crash in the value of stock when the market learnt of the real situation.⁵³
2. Last year, multiple class actions were filed in the US against oat milk manufacturer Oatly Group, together with some of its directors, for making false statements regarding its sustainability performance, among other topics. The claimants allege that this resulted in artificially high share prices, which plunged after short sellers published a damning report on the company that contradicted these statements⁵⁴.

Applicability to plastic-related statements

The (allegedly) greenwashing statements underlying these cases show clear parallels to criticisms regularly made against companies in the plastics value chain, including potential over-estimation of continued demand growth for plastics, exaggerated performance on cutting down on plastic packaging and misleading statements about the environmental credentials of plastics. Indeed, a controversy relating to claims of biodegradability made by plastics manufacturer, Danimer Scientific, has given rise to lawsuits filed by shareholders (a securities class action against the company⁵⁵ and a derivative action against its management⁵⁶). These claims were filed following the publication of an article in Wall Street Journal criticising Danimer's statements about the biodegradability of its products as "sensationalized", "not accurate" and "greenwashing", leading to a plummet in share prices.⁵⁷ Both cases are pending.

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⁴² Five examples out of 12 in the Guidance relate to plastic packaging see Competition & Markets Authority (CMA), "Guidance Making environmental claims on goods and services" (September 2021). Available online:

<https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services>.

⁴³ European Commission, "Screening of websites for 'greenwashing': half of green claims lack evidence" (January 2021). Available online:

https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269.

⁴⁴ European Commission - Directorate-General for Justice and Consumers, *Commission Notice*, “Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market”, 2021/C/526/01.

⁴⁵ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019, Articles 3 and 4.

⁴⁶ For example, the Italian communications industry regulator fined a series of companies up to EU 5 million for consumer law breaches, suggesting that similar fines could also be issued for greenwashing “... *looking across the EU, consumer law enforcement is becoming more widespread and the fines are alarming*” see Osborne Clarke, “Huge GDPR-style fines loom for breaches of consumer law across Europe” (May 2020). Available online:

<https://www.osborneclarke.com/insights/huge-gdpr-style-fines-loom-breaches-consumer-law-across-europe>.

⁴⁷ Robert Turner, “A fine time for consumer law compliance”, *Bird & Bird* (July 2021). Available online: <https://www.twobirds.com/en/insights/2021/uk/a-fine-time-for-consumer-law-compliance>.

⁴⁸ Morgan Stanley Institute for Sustainable Investing, “Sustainable Signals: Individual investor interest driven by impact, conviction and choice” (2019), p. 5. Available online: https://www.morganstanley.com/pub/content/dam/msdot.com/infographics/sustainable-investing/Sustainable_Signals_Individual_Investor_White_Paper_Final.pdf.

⁴⁹ Citi Global Perspectives and Solution, “Rethinking Single-use Plastics: Responding to a Sea Change in

Consumer Behaviour” (August 2018), p. 8. Available online:

<https://ir.citi.com/klrKXyZJnFzVcxKt3M%2B8ZjE95%2B42JwVomCDhiNLwPYpStDlxWT7eLP5gzY382k47r1a%2BFVqkE2U%3D>.

⁵⁰ RBC Wealth Management, “Plastics and recycling: a material issue for investors” (n.d.). Available online: <https://www.rbcwealthmanagement.com/gb/en/research-insights/plastics-and-recycling-a-material-issue-for-investors/detail/>.

⁵¹ Stewarts Law, “Could companies face shareholder activism in relation to their environmental transparency statements” (November 2021). Available online: <https://www.stewartslaw.com/news/could-companies-face-shareholder-action-in-relation-to-their-environmental-transparency-statements/>.

⁵² For example, re YUM! Brands, Inc Civil Action No. 3:13–CV–00463–CRS. Investors sued Yum! Brands (owners of Taco Bell and Kentucky Fried Chicken), claiming that the Group’s annual report contained a misleading statement regarding food quality standards, claiming compensation for the 17% drop in stock price that occurred after the media exposed drug and antibiotic residues in chicken sold by the Group’s brands.

⁵³ *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832 (N.D. Tex. 2018).

⁵⁴ These cases were consolidated in the Southern District of New York as *Jochims v. Oatly Group AB*, Case No. 21-cv-06360. In January 2022, Briefing regarding Oatly’s motion to dismiss the claims is scheduled to be completed by May 2022.

⁵⁵ *Rosencrants v. Danimer Scientific, Inc.* 1:21-cv-02708.

⁵⁶ *Perri v. Stephen E. Croskrey et al.* 1:21-CV-01423.

⁵⁷ Saabira Chaudhuri, “Plastic straws that quickly biodegrade in the ocean? Not quite, scientists say”, *Wall Street Journal* (March 2021).