

ESG Essentials: What You Need To Know Now

Episode 13 – Sustainable Ethos Litigation: Aspiration or Inaction?

Colvin: Welcome to Episode 13 of Fox Rothschild's "ESG Essentials: What You Need To Know Now" podcast. I'm your host, David Colvin, co-chair of the firm's ESG Practice Group.

As our returning listeners know well, Fox's series of topical and timely podcasts cover core ESG concepts and explore really important issues for businesses that are concerned with developing and deploying an ESG profile; responding to increased scrutiny from regulators, investors or consumers regarding their environmental and social impact; and minimizing the potential legal, business and reputational risk that can be associated with ESG.

In today's episode, we'll be taking a deep dive into a recent decision from the Superior Court for the District of Columbia in the closely watched case of Earth Island Institute versus the Coca-Cola Company. And for that conversation, I am very pleased to welcome my partner out of our Seattle office, Maureen Mitchell.

Maureen represents clients in environmental litigation and regulatory matters in the areas of the Clean Air Act, Clean Water Act, in climate change, in carbon markets, as well as water rights. And so, there's nobody better suited to talk about the issues that were discussed in the case and in the opinion issued by the District of Columbia in the Earth Island Institute case than Maureen. So, Maureen, welcome to today's podcast.

Mitchell: Hey, David. Great to be here.

Colvin: So, just to level set for our listeners in terms of the case and the opinion that we're going to be talking about... we wanted to really focus on that case in particular because it really serves as a harbinger for what may come and the risks and potential areas of exposure that companies that are deploying either, for the first time, a sustainability program, or are working to improve and or amend their sustainability programs and initiatives.

I think a lot of the issues that were at play in the case can serve as a cautionary tale for what not to do -- or for what to do -- depending on which side of the "V" you're on. So, we want to take a quick look at that case together.

Maureen, I know you have looked at the opinion and you're familiar with the issues. If you just want to provide our audience with sort of a summary of the issues in the case and the claims asserted by Earth Island Institute against Coke.

Mitchell: Sure. In the words of the court, what Earth Island Institute challenged in Coca-Cola's actions was essentially its branding strategy.

It used quotes from various publications, sustainability reports, materials that were posted on websites and also Coca-Cola's Twitter account regarding its efforts to be sustainable and to be a more responsible company. And said that those materials were misrepresenting Coca-Cola's actual practices, which it alleged were not so environmentally friendly as were claimed.

The court wanted to evaluate the substance of the statements that were cited by Earth Island Institute and decided that they fell into roughly three categories, and none of them were valid claims under D.C.'s Consumer Protection Procedures Act. That's the acronym is CPPA. And the reasons were that the statements either were simply aspirational or goal setting; that were not sufficiently concrete or specific to become an enforceable promise; that the statements were not tied to a specific product or service. And the claim that plaintiff made that you could use a matrix of statements on the whole, as a basis for suing under the CPPA was not adequate. They were not allowed to simply piece together statements and representations that the plaintiff felt were inappropriate or misleading from various sources and then try to mush them all together into this complaint as a actionable claim.

So, basically the court decided that none of these statements were sufficiently concrete to be an enforceable promise, and therefore it dismissed the case.

Colvin: That's helpful background. So, let's look at the first category, which the court bucketed as the general aspirational statements and sort of corporate ethos statements. And I file these under the category of "no good deed goes unpunished," because on their face, these are the kinds of statements I think we all want to make, right? Everybody's out there, obviously, trying to demonstrate their commitment to sustainability, their commitment to improving their operations and the impact that they have on the communities in which they operate. So, just by way of example, one of the challenged statements in this case was, "Our planet matters. We act in ways to create a more sustainable and better shared future, to make a difference in people's lives, communities, and our planet by doing business the right way."

Close quote. That's one example of a challenge statement that Earth Island Institute based its claim upon, or for example, "Scaling sustainability solutions and partnering with others is a focus of ours." Close quote. Seems similar and appropriate. It's what we want companies out there doing. Yet it was challenged as violating the Consumer Protection Law in the D.C. Superior Court.

So, can you talk a little bit about this category of general aspirational statements and why the court found that Earth Island Institute failed to state a claim with respect to those statements under the Consumer Protection Law in D.C.?

Mitchell: Yeah, so, basically the court said that Coca-Cola never made any promises with any of these statements regarding any specific steps it was taking to ensure any specific amount of sustainability. You know, what ESG litigation comes down to, in my view these days, is whether there is any kind of way to measure the progress --or lack thereof --by a defendant in achieving its sustainability goals.

And, one of the areas that the court highlighted were specific statements regarding plans to, for example, collect and recycle a bottle or can for every one we sell globally by 2030, or make 100% of our packaging recyclable globally by 2025. And it said, we can't measure today whether Coca-Cola has

achieved these future goals. We can only know in 2025 or 2030 whether it has actually achieved those goals.

And one part of the opinion that really caught my attention was the court's observation that even if a company said something in the past about its future goals and failed to meet those goals, that's not evidence of a future inability to reach different goals that it has set for itself. These aspirational statements, it cuts both ways. You don't want to overpromise on what you are trying to achieve. But that doesn't mean that it's inappropriate to make general claims or general statements about your intentions as far as achieving a more sustainable business operation for your company.

Colvin: And I think that the statements that were made that were, as the court I think described them, as being more specific than the general aspirational statements regarding doing right by the environment and having a corporate ethos that focuses on the environment... those that you just mentioned regarding Coca-Cola statement that part of its plan for sustainability is to quote, "Help collect and recycle a bottle or can for everyone we sell globally by 2030." Close quote. Or, to quote, "Make a hundred percent of our packaging recyclable globally by 2025." Close quote. I think that those are the kinds of statements that stakeholders are expecting companies to be making, right, though? The very specific, hey, this is our plan. This is what we intend to do and this is how we intend to get there.

Yet, by virtue of making those statements, those very specific commitments to those timeframes, they find themselves on the other side of a lawsuit for allegedly violating the Consumer Protection Law of the District of Columbia, in part, presumably because there were allegations that prior commitments hadn't been met.

But aren't those specific representations and commitments exactly what stakeholders, whether they're investors or consumers or employees, isn't that what they want? Isn't that what we want more of from our companies?

Mitchell: Exactly. And you can also be accused of inaction if you fail to recognize the impacts of your business operations.

So, for example, Coca-Cola's case, a huge quantity of their product comes in single-use plastic bottles. And the plaintiff in the Earth Island case said, as long as you're selling product in single-use plastic bottles, it's not credible for you to make the statement that you're working on becoming a more sustainable company.

And the court said, we're not gonna go that far. That really is an overreach. We do want to encourage companies to not only make their products more sustainable, but also talk about it and to identify for their shareholders what they're doing about it. Because, you know, you can also be sued for inaction.

Colvin: And I think it's also important to point out to our listeners and companies that are either, again, either developing for the first time a sustainability program or revamping one that already exists, the fact that the court really focused on those goals that are set so far out into the future, whether it's 2030 or 2050, and we have lots of carbon neutral promises by certain years that are obviously well out into the future. There's no real ability or standard by which you can judge today, in 2023, to have, you know,

recyclable bottle or can for every one Coca-Cola sells by 2030. Again, it's too far out into the future to know today as we sit there.

Now, the sort of flip of all that is when companies make these very specific representations about their intentions and what they aspire to do in the future. They obviously need to have a plan and procedure in place to get there. Or as you say, the inaction will befall them a complaint like this.

Mitchell: I wanted to also talk about the second category of the court's decision in the discussion about the product packaging. All of the statements that the Earth Island Institute quoted came from some kind of materials other than the product packaging. And that was a critical distinction for the court in deciding that there were no unfair deceptive practices involved with describing the good or service that was being sold. What it says in that section is, companies can be a little bit more descriptive in their actions, in their publications and their published materials, but they should also be very careful about what they put on the product itself.

And the court cited a different decision involving sustainable salmon that had actually not been harvested in a sustainable manner. And when there was proof, actually, of that failure to comply with the sustainability standards, that was found to be actionable under the CPPA.

In contrast, the Coca-Cola claims were not based on any product packaging. There was no text from any label that was making claims that were deemed unfair or deceptive. And in fact, all of the statements came from other sources. And so I wanted to just mention that as another significant distinction between a successful and an unsuccessful claim under the CPPA.

Colvin: And just taking a quick detour, is there anything particular about the D.C. Consumer Protection Act that's unique or different than other, sort of, like-minded statutes across the country when it comes to consumer protection?

Mitchell: Yeah. So, one trend that we've seen is that these types of consumer protection lawsuits have been filed generally as class actions, most frequently in federal district courts. And some of the most popular venues have been California, New York, Illinois, places where there is a substantial volume of commerce and also a large pool of potentially impacted consumers.

Those tend to seek monetary damages as well as other relief. The D.C. venue has been opening up in response to this Consumer Protection Procedures Act that was enacted in 2012. And the reason for that is, it has a private attorney general's enforcement provision. What that means is that a public interest group or even ordinary citizens can pursue their own independent claims to enforce the provisions of the Act against just about any defendant that does business in D.C. And that has opened up a pretty broad range of plaintiffs. Now, they do have to show some nexus between the mission of the group or the interests of the plaintiff and the challenged conduct or product.

So, there is some element of standing that has to be shown, but generally this is a relatively unique vehicle for enforcing consumer protection laws. And we're seeing certainly an increasing trend of cases filed in the D.C. Superior Court.

After this decision was issued in November, the plaintiff did file an appeal. That appeal is proceeding in the D.C. Court of Appeals, which is their highest court. Briefing is expected to be started later in February of this year and will probably be wrapped up later in the spring.

Colvin: Okay.

In terms of companies with an ESG program that want to make public statements, either in their annual report, in an ESG type of report, in their public disclosures or even on social media or their websites, what does this case tell us about what companies can do or should be thinking about when it comes to minimizing the risk of exposure and to put themselves on solid footing in the event of a lawsuit like this one? Because obviously, no company can prevent the lawsuit from being filed, but when it's filed, they want to be armed and ready to defend it.

What should companies learn from this case so that they're on proper footing and on solid footing if they find themselves in a similar situation to Coca-Cola?

Mitchell: Sure. I think there's a few takeaways. One is, language is very important. And the court focused not only on the statements as a whole, but specific words that were used. For example, the court pointed to the word "help collect and recycle" a bottle or can, saying that Coca-Cola was not even committing to itself collecting and recycling the materials, but assisting. It's a level of vagueness and uncertainty that really cushions any type of specificity that the company is making.

So you want to be very careful with the language you use. And I think a general good practice is to speak broadly about your intentions and plans but perhaps avoid making very concrete promises that could form the basis of a lawsuit or future action.

And then to the extent the company does want to commit to specific objectives, make sure that they are defensible. Make sure that there is a sound factual basis for them. If you're, for example, labeling your can of salmon and saying that it's sustainably farmed or harvested, make sure that's actually the case. Do your due diligence. Make sure that you have appropriate supply chain due diligence programs and make sure that you are making statements that are true and accurate.

The other takeaway is, be careful what you put on your products and labels. If you are manufacturing a product and want to make certain statements, you want to make sure that they are also accurate.

Just a related example is a case that coincidentally was on a very similar litigation timeline. Coca-Cola was sued in California for stating on its bottles that they were 100% recyclable. Coca-Cola prevailed also in that case. A November 2022 decision came out and said that no reasonable consumer would believe that the bottle was guaranteed to be recycled after its use. That the word recyclable by its plain meaning means something that can be recycled, but is not a guarantee that it will be.

In that California Coca-Cola decision that came out in November, the motion to dismiss was granted. However, the plaintiffs were given leave to amend their complaint. They did do that in December and Coca-Cola has filed a new motion to dismiss the amended complaint. That motion is pending and it remains to be seen how the court will address the amended allegations in that case.

Colvin: That's all really good guidance. And I think, in terms of companies that are dealing with ESG obviously all of these issues are very fluid. And while there's no guarantee to stop a lawsuit from being filed, obviously clients and potential clients, companies want to be as well armed as they can be when they are.

So, I really appreciate you taking the time today to go through this Earth Island Institute decision and I appreciate you being here. Thank you, Maureen.

Mitchell: Thank you David.

Colvin: For all of our listeners out there, we appreciate you taking the time to join us and hope that you'll stay tuned for our next podcast .

Until then, be well stay safe and we'll talk to you soon.

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