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How DC Consumer Protection Suits May Advance ESG Goals

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In an article published by *Law360*, Christopher Cole, partner and chair of Katten's Advertising, Marketing and Promotions practice group, Johnjerica Hodge, partner and chair of Katten's Corporate and Social Governance and Investigations group, and Intellectual Property associate Katie O'Brien highlight a new approach adopted by parties bringing suits in the District of Columbia to challenge allegedly false corporate claims regarding environmental, social, and governance (ESG) initiatives.

Several recent cases have asserted violations of the DC Consumer Protection Procedures Act (CPPA) based on alleged misrepresentations relating to ESG initiatives, including representations appearing in various media. The article explains that "these lawsuits are premised on the argument that the CPPA may protect consumers from false or misleading representations regarding a company's sustainability practices and aspirations that appear on brand websites and social media accounts, instead of the more typical argument based on representations made on product packaging or advertisements." Underlying these cases is the question of whether such representations are actionable "trade practices" within the scope of the CPPA.

The article offers an overview of two separate cases – each brought by the same environmental advocacy group – in which the Superior Court for the District of Columbia arrived at different answers. (*See also December 5, 2022 post, "Advertising About Sustainability Aspirations Does Not Violate DC Consumer Protection Procedures Act"*). The case against the *Coca-Cola Company*, in which the court granted the beverage company's motion to dismiss, is now on appeal before the DC Court of Appeals. The pending appeal may help reconcile the lower court's seemingly contradictory opinions on whether the CPPA applies only to "packaging claims" or applies to "any brand-related advertising, regardless of media," according to the article.

The authors further note that DC plaintiffs are using the CPPA to contest not only environmental sustainability claims but also social and governance claims. DC Attorney General Karl A. Racine has

brought such a case, alleging that the *Washington Commanders* and other defendants deceived consumers about an investigation into allegations of a hostile workplace culture and sexual harassment, with the goal of misleading consumers so that they would continue purchasing tickets. The *Coca-Cola* appeal may bear on whether the *Washington Commanders* court treats the AG's claims as actionable trade practices under the CPPA – as the plaintiff in *Coca-Cola* similarly argued that the company "falsely represented itself as an environmentally sustainable company to convince climate-concerned consumers to purchase products," the article observed.

"If the court permits *Washington Commanders* to move forward, it may signal an expansion of the CPPA's reach to include general corporate public relations statements not directly designed to effectuate a sale of the product, and which are not included on the product packaging, nor even about any particular product," according to the article. "As such, it would treat any statement put out by a corporation that is designed to make the public feel better about the corporation effectively as advertising. Such a ruling would greatly strengthen plaintiffs' ability to advance their respective ESG agendas through the CPPA."

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