

Commercial division update: Climate change litigation hits a storm

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This article examines New York City’s legal actions against companies engaging in product greenwashing.

The claims

The city brought claims under the CPL (N.Y.C. Admin. Code §20-700, *et seq.*) alleging that defendants misled consumers about the environmental impact of their fossil fuel products and overstated their commitments to clean energy.

It alleged two primary forms of what the city called greenwashing: (1) product greenwashing, or statements that mislead consumers as to the climate benefits of a product and (2) corporate greenwashing, or statements that falsely present a corporation and its brand as climate friendly to induce consumers to purchase its products.

The city claimed that defendants engaged in product greenwashing through advertisements promoting specific gasoline products, such as additives, as environmentally beneficial, and that these advertisements created a misleading impression by emphasizing emission reductions without disclosing that fossil fuels, regardless of additives, remain a primary driver of climate change.

The city alleged that defendants engaged in corporate greenwashing by branding themselves as sustainability leaders to influence consumer purchasing decisions, and that they exaggerated their investments in clean energy by prominently advertising renewable energy initiatives without disclosing that such initiatives represented only a negligible portion of their overall businesses.

The complaint alleged defendants disseminated misleading advertisements through various marketing and public relations initiatives, aiming to increase product sales in New York City and to attract environmentally conscious consumers who sought to purchase from companies prioritizing sustainability.

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Attorney advertising

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Personal jurisdiction

Initially, the court addressed defendants' assertion of lack of personal jurisdiction over their alleged misrepresentations that occurred outside of New York City. According to defendants, the advertisements and statements at issue were largely posted on websites, social media, or in publications beyond the city's borders, and thus were too passive and insufficiently connected to New York City to establish "purposeful availment" under the governing case law.

The city countered that defendants deliberately cultivated New York's fossil fuel market by operating branded gas stations in the state, by selling petroleum products in New York City, and by placing or publishing advertisements — print, internet, and otherwise — that they allegedly knew would reach New York City consumers. According to the city, there was a clear nexus to New York City in the national and online campaigns to increase sales to climate-conscious New Yorkers.

The court concluded that the complaint sufficiently pleaded CPLR §302 long-arm jurisdiction. While recognizing that a purely passive website would be insufficient, the court distinguished claims where corporations lacked a physical presence in the forum, and had merely posted general advertisements or social media content accessible everywhere, from cases like this one where the corporations had a physical presence.

The court relied on the fact that defendants here were registered to do business in New York, operated physical retail gasoline stations within the city and state, and utilized national (including internet-based) advertising that the complaint alleged specifically targeted New York consumers, in concluding the defendants had purposefully availed themselves of New York's market.

Moreover, the court reasoned that the quality of contacts with New York was not diminished simply because the advertisements also reached consumers outside of New York City.

Unthinking consumer or reasonable consumer

A central substantive issue in this case was whether the court's CPL analysis should assess defendants' marketing statements under the "unthinking consumer" standard or the "objective reasonable consumer" standard. Relying on *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977), the city argued that the CPL compels courts to guard not just the average buyer but also "the ignorant, the unthinking and the credulous," *i.e.*, consumers who seldom scrutinize claims before making purchases.

From the city's perspective, *Guggenheimer* remained good law as to the CPL because subsequent Court of Appeals rulings that embraced a "reasonable consumer" test arose mainly in cases under General Business Law ("GBL") §349, which does not define deceptive practices as explicitly as does the CPL.

Defendants countered that New York courts have retreated from *Guggenheimer's* unthinking consumer formulation, and now consistently employ a reasonable-consumer approach — even for CPL claims.

They cited a line of cases that applied the objective "likely to mislead a reasonable consumer acting reasonably under the circumstances" test to CPL claims. See, e.g., *Oswego v. Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995); *City Line Auto Mall, Inc. v. Mintz*, 840 N.Y.S.2d 783, 784 (1st Dep't 2007).

The court agreed with defendants, holding that more contemporary cases use an objective standard for CPL claims. Moreover, because the statutory language of the CPL states that it shall not be inconsistent with the Federal Trade Commission Act and GBL §350, the court concluded that New York courts should no longer apply a separate unthinking consumer test for consumer-protection actions under New York City law.

Product greenwashing

Another key issue was whether the city's greenwashing allegations amounted to a "pure omissions" theory or a "mixed misrepresentation" claim. From defendants' perspective, the city was effectively arguing that any accurate statement about a fossil fuel product's benefit (such as "reduced emissions" or "improved engine performance") is deceptive unless the company simultaneously declares that fossil fuels increase greenhouse gas emissions and contribute to climate change.

Defendants labeled this an unprecedented approach under New York's consumer protection statutes, arguing that well-settled law requires that an omission be material and exclusively within the defendant's control. Defendants argued that there is no duty to disclose widely available information — especially not a publicly known fact like the link between fossil fuels and climate change. Because the complaint conceded that climate change is a matter of "widespread public concern," defendants insisted that no additional disclosure was required.

The city disagreed with the characterization that its claims were grounded in a "pure omission" theory, insisting that defendants were affirmatively misrepresenting the climate benefits of fossil fuel products.

The court accepted defendants' framing of the omissions theory, finding that the city had not adequately alleged any specific factual inaccuracies nor any secret or proprietary data in defendants' sole possession. Rather, the omitted information — the link between burning fossil fuels and greenhouse gas emissions — was both longstanding and publicly known.

According to the court, when the withheld fact is already part of the very center of public discourse, no additional duty to disclose arises under New York City's consumer protection law. While the city argued that defendants' statements were actionable misrepresentations, the court treated them as omissions because the complaint itself acknowledged that the statements were factually accurate regarding minor emission improvements or engine benefits.

The city's core grievance, then, was that the ads lacked broader context. Under established caselaw, the court concluded that a failure to restate widely available information cannot sustain an omissions claim — even if the plaintiff characterizes it as a "half-truth."

Corporate greenwashing

Finally, defendants argued that the city's corporate greenwashing allegations fell outside the CPL's strict requirement that a challenged statement be "made in connection with the sale of consumer goods or services." Because the city did not, for example, allege that defendants sold wind, solar, hydrogen, or other green energy sources to New York City consumers, defendants maintained that their broad statements touting renewable energy initiatives were simply not tied to a consumer product sold in New York City.

The city countered that the targeted statements were sufficiently connected with the sale of products in the city, even if they were not directly promoting products that were actually sold to New York City consumers.

For example, references to net-zero targets, alternative energy investments, or long-term decarbonization strategies were designed to reassure environmentally conscious consumers and thus indirectly boosted sales of products, creating a sufficient connection between the statements and the defendants' goods.

It argued that, while the statements did not expressly mention products actually sold, they misled customers into purchasing products sold by defendants in the city. In the city's view, this indirect effect on New York City consumer purchasing decisions was enough to trigger coverage under the CPL's broad scope, which prohibits statements having "the capacity, tendency, or effect of deceiving or misleading consumers" "in connection with the sale" of goods.

The court strictly interpreted the CPL's "in connection with" requirement, holding that statements like "We are working to make energy cleaner and better," or "We support the ambition to achieve net-zero by 2050," were too unrelated to the sale or offering of any salable consumer good in New York City.

Because none of the defendants were alleged to be selling green technology to the city's residents, the court saw no plausible link between these "aspirational or policy-based statements" and the sale of gasoline, diesel, or other fossil fuels that the defendants do sell in the city. Unlike jurisdictions with broader consumer-protection statutes, the court held the New York City law imposes a clear requirement that a deceptive statement must be strictly connected to a product or service actually sold in the city.

Conclusion

While subject to likely appellate review, the court's decision reaffirms several important principles of New York City's Consumer Protection Law. First, an omission is not actionable under the CPL when the withheld fact is already widely understood by the public, and plaintiffs need to point to specific misstatements to escape an omissions analysis.

Second, the court strictly enforced the CPL's requirement that the deceptive statements be made "in connection with the sale" of a good or service in New York City. Finally, the court confirmed that New York applies an objective "reasonable consumer" standard — rather than the older "unthinking consumer" approach — when determining whether a practice challenged under the CPL is likely to mislead, placing New York City's CPL in line with federal consumer-protection law.

Consequently, plaintiffs alleging climate-based or greenwashing claims under this city law will face a high bar of showing that a statement meaningfully misled a reasonable consumer about a tangible product sold in that forum.



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