

# POINT OF SALE

Updates from Benesch's **Retail, Hospitality & Consumer Products** Industry Group

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## Deceptive or Misleading Marketing



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Consumer activism and conscious consumerism are on the rise, with consumers [expected](#) to spend upwards of \$150 billion on sustainable products by 2021 in the U.S. alone. Though consumers are willing to pay a premium for environmentally friendly products, they are also becoming more critical and leveraging their [purchasing power](#) to express their views, beliefs and lifestyles. As the [consumer base](#) becomes more educated and knowledgeable, they are not only preoptimizing price, product and convenience, but also evaluating how brands and products align with their core values. Both government regulators and consumers themselves are taking action against businesses that overstate the ethical or environmental attributes of a product, service or brand. At the same time, environmental and consumer rights groups are [stepping in](#) to unmask misleading claims.

Ethical behavior is becoming increasingly vital as consumers become more skeptical of corporate conduct and demand heightened transparency from brands. According to the [Edelman Trust Barometer](#), people's trust of a business is based on two distinctive features – competence (delivering on promises) and ethical behavior. While businesses rank highest in competence (when compared to government, NGOs and media), consumers nonetheless do not rank businesses high in terms of ethics. In fact, none of the four institutions tracked by Edelman ranked as both competent and ethical. According to Edelman, ethical drivers such as integrity, dependability and purpose drive 76% of the trust capital of business.

In an era of [hyper personalization](#), consumers are demanding transparency just as they would demand luxury, ingenuity, or quality. [Transparency standards](#) are consequently increasing as stakeholders become better equipped to hold companies accountable for their actions and consumers demand more [authenticity](#) from brands. Brands are [taking stands](#) on issues such as animal welfare and climate change, but as consumers look more deeply at the companies they purchase from, brands need to ensure they follow through on commitments – or risk legal action.

These consumer-driven developments come amid increasing accusations of so-called [“woke-washing.”](#) as it relates to how companies approach political and social subjects. While some brands are being more cautious in how they approach political and social subjects, pairing their campaigns only with causes that align closely with their core product, others see being too cautious as a lost opportunity. While 54% of consumers believe it is easier to get businesses to address social issues than government regulators, according to Edelman, brands need to carefully consider how to ensure marketing claims can be supported. This necessarily requires a full understanding of where their products are coming from, how they are produced, and how they are represented to avoid any potential consumer misunderstanding.

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# Deceptive or Misleading Marketing

## Environment and Climate



Consumers, government regulators and advocacy groups are becoming more critical of greenwashing, which involves a discrepancy between a business environmental claims and their actual performance – or “eco-exaggeration.” Greenwashing has accelerated following the adoption of the Sustainable Development Goals in 2015, as the vague wording and targets for the SDGs lend themselves to [manipulation and embellishment](#). It is also becoming more of a [concern](#) as the market for [ESG investment](#) and [green bonds](#) grow, driving heightened regulatory pressure, and not to mention stronger public interest in reducing environmental impact. Greenwashing is increasingly being targeted in lawsuits and regulatory enforcement efforts. These lawsuits typically target deceptive claims as climate change-related lawsuits [surge globally](#) and as investors press harder for companies to disclose risks to their business. Claims are being pursued by investors, activist shareholders, cities

and states, NGOs and individuals. Brands should be cautious in how they present their green behavior, as research [indicates](#) that “only true green behavior will have the desired positive effects on reputation,” whereas partial truths or outright untruths adversely impact reputation. Research also shows that when consumers detect greenwashing they institute a [“greenwash penalty.”](#) meaning that their willingness to pay for the company’s product actually decreases.

## Recent Cases

Case	Key Claims	Status
<a href="#">Massachusetts v. Exxon Mobil Corporation</a>	Massachusetts AG alleges ExxonMobil deceived investors about climate-change related risks to its business, deceived consumers about how its fossil fuel products contribute to climate change, and misled consumers with “greenwashing” advertisements that position the company as environmentally responsible. The lawsuit alleges claims under the Massachusetts Consumer Protection Act.	ExxonMobil filed a notice of removal to federal court, arguing the suit involves federal statutory, regulatory and constitutional issues. In response, the state said the case does not make any tort claims, seek any damages, assert and violations of federal law or involve any federal or legislative policy.
<a href="#">ClientEarth complaint to the OECD against BP</a>	ClientEarth <a href="#">argues</a> BP advertisements that claim a commitment to a low carbon future are misleading and violate international guidelines on corporate conduct. The legal NGO said the advertisements should be prohibited unless BP adds a health warning indicating that the company’s oil and gas products create greenhouse gas emissions that contribute to climate change. ClientEarth contends that while the advertising focuses on clean energy, more than 96% of the company’s annual capital expenditure is on oil and gas. As such, it argues the advertisements create a potentially misleading impression of the company’s renewable energy investments, given that the majority of its business is in oil and gas. The complaint also raises concerns about statements suggesting gas is “cleaner” and statements suggesting that increasing energy demand, including heightened use of gas in the coming decades, is vital to human progress.	ClientEarth is asking BP to cease its advertising campaign until it complies with the OECD guidelines, issue a correction and ensure all future advertising complies with the rules. BP denies the allegations that its ads are misleading.

**Animal Welfare**



Like environmental concerns, consumers are becoming increasingly concerned with animal welfare and are consequently holding companies accountable when marketing does not align with the actual treatment of animals by that company. As demand grows for animal products produced in less abuse conditions, consumers and nonprofits are taking aim at so-called “[humane washing](#),” when companies misleadingly suggest animals are humanely treated. Animal welfare groups are also [leveraging](#) consumer protection claims as a means to champion animal welfare issues through the courts rather than through legislation.

While most recent suits have been filed under state consumer protection laws, consumers and advocacy groups do still rely upon regulators to hold businesses accountable. Although marketing claims are primarily within the wheelhouse of the FTC, recent complaints have also been filed with SEC alleging investor harm and claiming that the cases fall within the SEC’s jurisdiction because an informed consumer based is central to a free and fair marketplace and protects investors from risks related to misinformation. State attorneys general have similarly intervened. For instance, the New York attorney general in May 2019 [settled](#) with the owner of a pet store accused of falsely advertising that it specializes in selling “responsibly bred animals.”

While complaints may not necessarily result in enforcement efforts, the complaint alone may be enough for brands to respond. For instance, Canada Goose [allegedly removed](#) ethical sourcing claims from its website after a complaint filed by PETA prompted an FTC investigation. The company reportedly took down statements suggesting that its standards “ensure” its sources don’t abuse animals and removed a “down traceability” video that featured a former supplier whose workers were filmed by PETA treating geese inhumanely. Canada Goose [denied](#) the claims that it changed its marketing language about ethical sourcing “at the behest of the FTC,” saying the language on the website is routinely updated. The FTC [determined](#) that enforcement action wasn’t needed, citing “corrective action” taken by Canada Goose, such as removing the advertising claims at issue.

**Recent Cases**

Case	Key Claims	Status
<a href="#">Food &amp; Water Watch Inc. et al. v. Tyson Foods Inc</a>	Food & Water Watch Inc. and the Organic Consumers Association filed a lawsuit <a href="#">alleging</a> that Tyson Foods mislead consumers by proclaiming its commitment to sustainable practices, despite being the second biggest polluter in the U.S. and routinely permitted the abuse of its chickens. According to the complaint, Tyson portrays itself as “stewards of animals” and committed to “environmental stewardship and protecting the planet,” but its processing plants regularly violate federal environmental laws and the company’s treatment of birds is inhumane. The complaint alleges violations of the District of Columbia’s Consumer Protection Procedures Act.	The complaint was filed in Washington, D.C., Superior Court in July.
<a href="#">Ehlers v. Ben &amp; Jerry’s Homemade Inc. et al</a>	Vermont resident James Ehlers <a href="#">filed</a> a proposed class action against Unilever, which bought Ben & Jerry’s Homemade Inc., its ice cream don’t come from “happy cows,” as the labeling suggests. He said that despite the claims on the packaging and statements on the website that suggest the cows come from “caring dairies” that adhere to environmental and animal welfare specifications, most of the milk used in the products come from large, factory-style dairy operations. He is seeking to represent a national and Vermont class of Ben & Jerry’s consumers. The complaint alleges violations of the Vermont Consumer Protection Act, breach of warranty and unjust enrichment.	Ben & Jerry’s filed a motion to dismiss, saying statements on its products are harmless opinions and “fluffery.” The motion contends that the “happy cow” line challenged in the suit appears in a speech bubble tied to a cartoon cow and, while the cow says Ben & Jerry’s uses milk and cream from happy cows, it doesn’t use the word “exclusively.” The motion also contends that “happy cows” is obviously marketing fluff that can’t reasonably mislead a normal consumer.

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## Deceptive or Misleading Marketing

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Case	Key Claims	Status
<p><a href="#">In Re: fairlife Milk Products Marketing and Sales Practices Litigation</a></p> <p><a href="#">Michael v. Fairlife</a></p> <p><a href="#">Schwartz et al v. Fairlife, LLC</a></p> <p><a href="#">Salzhauer v. The Coca-Cola Company et al</a></p> <p><a href="#">Sabeehullah et al v. Fairlife LLC et al</a></p>	<p>Four class actions have been <a href="#">filed</a> seeking compensation for false advertising against Fair Oaks, individual owners Mike and Sue McCloskey, Coca Cola and fairlife, after videos appeared online showing alleged abuse of calves at Fair Oaks dairy farm. The suits take issue with advertising on fairlife cartons of milk stating that they provided “extraordinary care and comfort to our cows,” as well as online statements indicating that “nothing is as important to us as the health and wellbeing of our animals.” The complaints were filed in the Northern District of Illinois, Northern District of Georgia, and Northern District of Indiana.</p>	<p>In response to the lawsuits, fairlife <a href="#">said</a> it would conduct an audit of all 30 of its supplying farms and will require all employees be recertified in animal welfare training each year. Coca-Cola said it was conducting an independent investigation into fairlife’s dairy suppliers to “ensure they uphold the highest standards of animal welfare”</p>
<p><a href="#">Barnes v. Tillamook</a></p>	<p>The Animal Legal Defense <a href="#">filed</a> a lawsuit in Multnomah County Circuit Court alleging the Tillamook County Creamery Association (TCCA) mislead consumers with deceptive marketing campaigns that misrepresented milk sources and conditions under which dairy cows live. The <a href="#">lawsuit</a> alleges violations of the Oregon consumer protection laws and claims that consumers paid more for Creamery Association products based upon the false belief that they were supporting small, pasture-based dairies. Instead, consumers allegedly did not realize that the majority of milk sourced for Tillamook products came from a large factory farm where cows aren’t allowed to graze on grass, in direct contrast to TCCA’s. advertisements claiming the products were sourced from small, family-run farms. The lawsuit challenges <a href="#">two specific marketing campaigns</a>—“Dairy Done Right” and “Goodbye Big Food”—which set Tillamook apart from large-scale food producers and promote its family farm.</p>	<p>The suit has gained support from environmental and family farm advocacy groups. Three similar cases filed by other organizations are pending in other states, as attention is drawn to the disconnect between marketing claims and how “humanely produced” animal products are actually produced.</p>

Case	Key Claims	Status
<p><a href="#">Humane Society complaints against Pilgrim's Pride</a></p> <p><a href="#">Food &amp; Water Watch v. Pilgrim's Pride</a></p>	<p>Following complaints to the FTC and state attorneys general, the Humane Society of the United States <a href="#">filed</a> an administrative complaint with the SEC alleging that Pilgrim's Pride and its parent Brazilian meat processing giant JBS SA are using misleading advertisements to sell chicken. The complaint alleges the misleading language calling the chicken "100% natural" and "humanely raised" is hurting investors. The complaint alleges that the company is "deceiving stakeholders concerned about the suffering of animals with false assurances of the animals' living conditions and treatment." The complaint alleges the misleading statements are violations of the Securities Exchange Act of 1934 and Commission Rule 10b-5 because they constitute untrue statements of material fact.</p> <p>Separately, the Food &amp; Water Watch and Organic Consumers Association <a href="#">sued</a> Pilgrim's pride in Washington, D.C., Superior Court for misleading consumers by marketing its chicken products as humane and environmentally friendly. The <a href="#">suit</a> challenges advertisements suggesting chickens are raised humanely and sustainably fed only "natural ingredients." It alleges violation of the District of Columbia's Consumer Protection Procedures Act.</p>	<p>The FTC declined to take formal action, stating the company told the agency it had removed the claims. The company maintained that changes to its website were unrelated to the complaint. The Humane Society has sent letters to state attorneys generals in 14 states, plus the Department of Consumer and Regulatory Affairs in the District of Columbia. The SEC complaint and FWW and ORA's lawsuit are ongoing.</p>
<p><a href="#">Voters For Animal Rights v. D'Artagnan, Inc. et al</a></p>	<p>Voters for Animal Rights <a href="#">filed</a> a lawsuit against D'Artagnan alleging deceptive marketing and misleading advertising of "humane" foie gras products. The suit alleges that while D'Artagnan claims to be "committed to free-range, natural production and sustainable, humane farming practices," video shows suppliers treating animals cruelly. The suit alleges violations of New York General Business Law provisions prohibiting business from taking part in deceptive acts or false advertising.</p>	<p>The complaint follows a similar suit in 2013 in which Hudson Valley Foie Gras was prohibited from using the term "humane" in its advertising on the grounds that forced-fed foie gras cannot be labeled humane or cruelty free. The litigation is ongoing.</p>

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## Deceptive or Misleading Marketing

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### Food Marketing



Consumers and regulators remain critical of how companies promote food products. From promoting products as vegan to organic and preservative free, lawsuits exposing allegedly deceptive food products remain commonplace. The FTC has also been active in targeting companies promoting food and personal care and beauty products as organic. For instance, in September 2019, the regulator agreed to a \$1.76 million [settlement](#) with Truly Organic Inc. to settle allegations that it nationally marketed its bath and beauty products as “100% organic” and “certified organic” though they aren’t. The regulator also charged the company with advertising its products as vegan, though they contain non-vegan ingredients. The FTC used the case as an example to [urge brands](#) to be cautious in using terms that resonate with consumers, such as “organic” or “vegan,” noting that such terms should only be used if “you’re on firm factual footing.”

### Recent Cases

Case	Key Claims	Status
<a href="#">WILLIAMS v. Burger King Corporation</a>	Consumer Phillip Williams <a href="#">filed</a> a proposed class action in Florida federal court alleging that a Burger King mislead consumers by advertising that its Impossible Whoppers are “0% beef and 100% Whopper. The lawsuit alleges that consumers suffered due to Burger King’s false and unfair business practices, paying a premium for Impossible Whoppers as a meat-free alternative even though they were contaminated because they were cooked on the same grill as traditional patties and covered with meat byproducts. The complaint alleges breach of contract, violation of Florida’s Deceptive and Unfair Trade Practices Act, and unjust enrichment.	The suit was filed in November 2019 and is ongoing. Burger King has not responded to the litigation, which is seeking an order forcing Burger King to make restitution to the class by returning all profits received from the allegedly deceptive marketing and sales of Impossible Whoppers.
<a href="#">Tarzian et al v. Kraft Heinz Food Company</a>	A proposed class action was <a href="#">filed</a> in Illinois federal court alleging Kraft Heinz Co falsely advertised its Capri Sun juice as containing “no preservatives,” even though it contains citric acid. The suit argued that by representing the products as preservative free, Kraft was trying to capitalize on consumer preference for healthier foods. The proposed class included anyone who bought a Capri Sun within the applicable statute of limitations under common law fraud. It also proposed actions for customers in Illinois and New York through the states’ false advertising and deceptive practices laws.	The proposed class action was <a href="#">dismissed</a> , as the judge ruled the complaint failed to demonstrate that Kraft used an artificial form of citric acid.

Case	Key Claims	Status
<a href="#">Clark v. The Hershey Company</a>	Two proposed classes in New York and California <a href="#">filed suit</a> against The Hershey Co alleging that dark chocolate was deceptively labelled as containing no artificial flavors. The plaintiffs allege that the products feature a “no artificial flavors’ label though they include malic acid, which is a synthetic substance.	A California federal judge ruled that the buyers didn’t rely on the labels when they bought the candy, granting Hersey’s motion for summary judgement. The judge said depositions didn’t support the claim that the buyers depended on the “no artificial flavors” label when they bough the chocolate. The judge also held that “artificial flavors” and “artificial ingredients” are distinct terms.
<a href="#">Lisowski v. Henry Thayer Company, Inc.</a>	A proposed class action <a href="#">filed</a> in Pittsburg federal court alleges that the Thayers Natural Remedies line of personal care products violate state and federal law because the products are marketed as “natural” and “preservative free” but actually contain synthetic chemicals and preservatives. The suit seeks to present consumers in Pennsylvania and across the U.S. who bought the products because they believed they were purchasing an all-natural product. It claims breach of warranty, fraud, negligent misrepresentation and unjust enrichment, along with violations of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law and the federal Magnuson-Moss Warranty Act.	The lawsuit follows enforcement activity by the FTC and FDA against marketers claiming their products are “natural.” The suit is ongoing and is seeking refunds or statutory damages (whichever is greater), along with punitive damages, interest and attorney fees. It is also seeking a declaration baring the company from continuing to advertise its products as “natural.”

### International Regulation and Enforcement

Deceptive and false advertising cases pertaining to environmental and ethical claims are not confined to the U.S., however. Regulators and watchdogs across the globe are becoming increasingly critical of marketing claims and calling companies to account when positioning doesn’t match actions:

- In the EU, lawmakers [agreed](#) to enact rules aimed at curtailing misleading claims made by the financial services industry pertaining to the alleged sustainability of their investment products. The rules would require these institutions to disclose any threats their offerings may pose to the environment. The rules are [designed](#) to reduce greenwashing by implementing transparency requirements on the social consequences of investment decisions.
- In the U.K., the Advertising Standards Authority (ASA) [warned](#) Canadian vegan accessories brand Matt & Nat not to “exaggerate” its use of recycling material after a consumer complaint about an advertisement claiming the line was “Vegan. Cruelty Free. Recycled.” The complaint [alleged](#) that the advertised bag was not in fact eco-friendly because only the bag’s lining was actually recyclable, whereas the rest of the bag was made of non-recyclable plastic.
- In Norway, the government body responsible for enforcing the Marketing Control Act [criticized](#) H&M over its Conscious collection, which it promotes as made with sustainable materials and methods. The Consumer Authority, Norway’s enforcement body,accused H&M of “not being clear or specific enough in explaining how the clothes in the Conscious collection and their Conscious shop are more ‘sustainable’ than other products they sell.” As such, it determined the company was creating a misleading impression of the products. H&M and Consumer Authority are in talks. The Consumer Authority says it is too early to determine whether it will proceed with the case. If a violation of the law is found, however, it can impose sanctions or fines and has the authority to prohibit certain types of marketing by H&M.

## Deceptive and Fictitious Pricing

Consumers remain dubious of pricing claims, particularly the [practice](#) of marking up a product to subsequently mark it down to advertise the product as a bargain. Consumer class actions have emerged in response to such “fictitious” pricing, with consumers alleging the advertised sales are fake and duped them into purchasing items. A string of lawsuits have been filed against retailers accused of deceiving customers with fake prices and phantom sales.

Regulators have also stepped in to address deceptive pricing practices. For instance, the Vermont attorney general [reached](#) a \$1.75-million settlement with Dollar General over violations of the state’s consumer protection act. The settlement resolved claims that Dollar General sold products that were advertised on the shelf at a lower price than the price at the register, despite being warned by state inspectors to rectify pricing inaccuracies. In July 2019, the attorney general for the District of Columbia [sued](#) Marriott International for using “deceptive” resort fees, accusing the company of covering up the real

price of rooms with misleading advertisements. The suit challenges the practice of “drip pricing,” wherein a hotel advertises only part of a room’s price online and later reveals other charges when guests receive their bill. The suit follows a 50-state investigation of the hotel industry’s pricing practices. It also follows a warning from the FTC in 2012 that hotel companies’ pricing practices for resort fees may violate federal consumer protection laws by misrepresenting the true price of hotel rooms. Subsequently, the FTC’s Bureau of Economics issued a report indicating the practice of separately disclosing room rates and mandatory resort fees is likely harming consumers since they cannot accurately compare room prices.

Challenges to pricing are also arising outside the U.S. For instance, the Australian Competition & Consumer Commission (ACCC) [began proceedings](#) against Kogan over a false and misleading promotional strategy. The ACCC maintains that Kogan deceived customers by advertising false sales. The company allegedly

boosted prices for more than 600 products by 10%, then offered a tax-time promotional code that claimed to save them 10%. When the promotion ended, the company reduced prices to their normal levels. Elsewhere, Canada’s competition watchdog in May 2019 [reached](#) a \$4.5-million settlement with Hudson’s Bay to resolve a deceptive pricing investigation. The Competition Bureau took legal action against the company alleging it used deceptive regular price claims and clearance promotions to mislead consumers.

Consumer watchdogs are also monitoring pricing issues. For instance, the consumer group Which? [found](#) that supermarkets in the U.K. were disregarding government pricing guidelines by using misleading discount, special offers and multi-buy deals that ultimately cost consumers more. The government issued the guidelines to ensure retailers complied with consumer law governing pricing practices after the Which? filed a complaint with the Competition and Markets Authority (CMA) over the issue in 2015.

### Recent Cases

Case	Key Claims	Status
<a href="#">Casio et. al. v. Vineyard Vines, LLC</a>	A group of consumers <a href="#">filed</a> a lawsuit in the U.S. District Court for the Eastern District of New York alleging that Vineyard Vines’ outlet pricing is misleading. The <a href="#">suit</a> alleges negligent misrepresentation, breach of express and implied warranty and breach of the Magnuson-Moss Warranty Act, fraud and unjust enrichment. The complaint contends that Vineyard Vines’ pricing for outlet products is misleading as it doesn’t display the real suggested retail price for the comparative product in the retail store. The plaintiffs argue that the “invented price disparity” induced them to purchase the outlet products by creating an illusion of savings.	The <a href="#">proposed class</a> action is seeking a trial by jury, monetary damages, punitive damages, attorneys’ fees, court costs, interest and just relief.
<a href="#">Tripicchio v. PVH Corporation</a>	A consumer in <a href="#">filed</a> a class action suit in the U.S. District Court for the Southern District of New York alleging Tommy Hilfiger used fake reference prices to dupe people into buying clothing. The suit alleges that price tags contain a “reference” price that the store implies is what the item is sold for at other locations, along with a reduced sales price. The plaintiff maintains that the reference prices are false as the items are never offered for sale at the higher prices.	The suit was filed in July 2019 and is ongoing.



Case	Key Claims	Status
<a href="#">King v. Nordstrom, Inc.</a>	A class action lawsuit U.S. District Court for the Eastern District of Missouri <a href="#">alleges</a> Nordstrom Rack, the discount version of Nordstrom, uses false reference prices to advertise their “sales.” According to the complaint, the store offers discounted items advertised with a “compare at” or “comparable value” price, suggesting to consumers that they are buying Nordstrom products at a discounted price though the prices are not the actual prices the products are sold at.	The suit was filed in July 2019 and is ongoing.
<a href="#">Schertzer v. Barneys New York, Inc. et al</a>	A class action filed in the Southern District of California <a href="#">alleges</a> that Barneys New York advertises fictitious sales prices and “phantom discounts” on items sold at Barneys Warehouse outlet stores. According to the <a href="#">complaint</a> , the company labels items with made up reference prices and offers an item a supposedly discounted price, misleading consumers into believing they are saving money and inducing them to purchase the products.	The suit was filed in February 2019 and is ongoing.
<a href="#">Fisher v. Eddie Bauer, Llc et al</a>	A proposed class action filed in Southern District of California <a href="#">alleges</a> Eddie Bauer labels its outlet store merchandise with fake reference prices that dupe consumers into believing the items are discounted, even though they’re paying full price. According to the complaint, the “direct to outlet” products are advertised as on sale for a certain percentage of reference prices, though the products were never actually sold at the prices listed.	Eddie Bauer filed a motion to dismiss in July 2019. The suit is ongoing.
<a href="#">Tripicchio v. Ralph Lauren Corporation</a>	A proposed class action lawsuit filed in the Southern District of New York <a href="#">alleges</a> that Ralph Lauren mislead customers into believing the prices paid for products were sale prices, when in actuality they weren’t. The suit alleges unlawful sale practices, violation of the New Jersey Consumer Fraud Act and breach of contract. The plaintiff <a href="#">alleges</a> that Ralph Lauren’s factory stores use reference prices purported to be either a comparison price for the item or the item’s former price, though they don’t reflect any real prices the items were sold at.	The suit was <a href="#">filed</a> in April 2019 and is ongoing.
<a href="#">Barba et al v. Old Navy, LLC et al</a>	A proposed class action filed in the Northern District of California <a href="#">alleges</a> the retailer used fake reference prices to advertise misleading sale prices. The plaintiffs <a href="#">contend</a> that Old Navy advertises its items with a regular list price and sale price, creating the illusion that consumers are saving during a “sale” event, even though the reference list price is fake. The complaint alleges violations of California’s Unfair Competition Law and False Advertising Law, as well as a violation of federal regulations prohibiting the advertising of false former prices and false discounts	A notice of voluntary dismissal was filed by the plaintiffs in November.
<a href="#">Hennessey v. Kohl’s Corporation</a>	A proposed class action filed in the Eastern District of Missouri <a href="#">alleges</a> that Kohl’s department stores sells “private and exclusive” items at a supposedly discounted rate, though the advertised “original” prices are not real. The suit alleges that the sales and discounts are illusory, fictitious and in violation of state law. According to the suit, the items that were on sale have never been offered at their so-called original prices.	The suit was filed in July 2019 and is ongoing.



## FTC Disclosure Rules for Social Media Influencers

In line with the overall trend toward increased transparency, the FTC recently issued [disclosure rules](#) for social media influencers who are engaged to endorse products and brands. The rules come as brands are [increasingly](#) moving away from working with big influencers and instead collaborating with micro- or nano-influencers, who can have as few as 100 followers. These social media users typically seem more trustworthy, authentic, and relatable than those with massive followings and may help brands exert their messaging in a more natural-feeling way.

The [disclosure guide](#), which “breaks the compliance message down to the well-established basics,” provides influencers with insight into when an advertisement disclosure is needed, along with examples of effective and ineffective types of disclosures. The FTC clarified that the [onus](#) is on influencers to disclose when

they have a “material connection” to a brand during product endorsements, which can include financial ties, employment ties, and personal or family relationships. The guide also makes clear that influencers cannot assume that their followers are aware of their connections to brands. The FTC [notes](#) that tags and similar ways of showing an influencer likes a brand represent an endorsement. It also points out that if posting abroad, U.S. laws are still applicable “if it’s reasonably foreseeable that the post will affect U.S. consumers.”

Per the guide, disclosures should be placed within the endorsement itself, rather than only in an “About me” or profile page. The disclosure must be up front and should not be included at the end of posts or mixed with a group of hashtags and links. When appearing in a picture on a platform such as a Snapchat or Instagram story, the FTC directs influencers to superimpose

the disclosure over the picture to ensure it is noticeable and readable. When an endorsement is included in a video, the disclosure should be included in the video itself, rather than just in the description of the video. Similarly, when live streaming, the disclosure should be repeated periodically. The guide recommends influencers use simple and clear languages, such as terms like “advertisement” and “sponsored.” If placed in a way that is “hard to miss,” such simple terms may be sufficient. It also cautions influencers that they can’t “make up claims about a product that would require proof the advertiser doesn’t have,” such as evidence of a product can treat a health condition.

The guide follows [joint enforcement action](#) by the FTC and FDA for influencers promoting vaping. The regulators sent warning letters to four sellers of e-liquids used in vaping, in which the FTC indicates that disclosure of material connections between an endorser and the marketer of a product needs to be unambiguous and easily noticeable. The FTC also notes that Instagram users on mobile devices generally only see the first two lines of longer posts, unless they click “more.” As such, disclosures of material connections should appear above the “more” button at the beginning of the endorsement. The letter further discusses what the FTC calls “hashtag overload,” when multiple tags or links are used, which readers may skip over, particularly at the end to a long post. Per the FTC, hashtags disclosures displayed in such a way are unlikely to meet the “clear and conspicuous” standard.

## Summary Findings

Development	Summary	Implications
<b>Deceptive or misleading marketing lawsuits, regulatory action on the rise amid concerns of green, humane and ‘woke’-washing</b>	Whether it’s claims of sustainable practices, the reduction of a carbon footprint or the humane treatment of animals, consumers, watchdogs and regulators alike are becoming more skeptical of marketing that may overstate the environmental or ethical impact of products. As they bolster their scrutiny of marketing and advertising claims, these groups are taking action when they detect a disconnect between a company’s representation of itself or its products and its actual practices.	While taking a stand on social issues presents an opportunity for brands to stand out, brands still need to ensure they can support their claims and have a clear understanding of where their products are coming from and how they are produced.
<b>Class action lawsuits targeting fictitious pricing</b>	Is it really a bargain? Retail pricing claims have resulted in a surge of class action lawsuits challenging allegedly deceptive or fictitious pricing practices. Several recent cases have been filed in connection with alleged fictitious pricing which led consumers to believe a product was (falsely) on sale.	As with environmental or humane advertising claims, retailers need to be transparent in their pricing practices. Failure to do so may result in actions on behalf of watchdogs and regulators as these groups become more mindful of potentially misleading pricing.
<b>FTC disclosure guide outlines responsibilities of influencers to disclose endorsements</b>	As brands turn to micro- and nano-influencers to share their brand messaging, the FTC issued guidelines outlining how these influencers need to disclose material connections with brands they endorse. The FTC guidelines make clear that the onus is on influencers to disclose in a “clear and conspicuous” manner that they have financial, employment, personal or family relationships with a brand.	Influencers are at risk of FTC enforcement in instances of egregious violations of the guidelines. For instance, warning letters were issued to influencers for failing to disclose material connections to vaping companies.

**For more information, please contact**

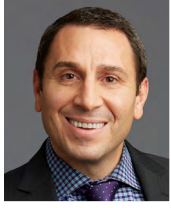
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## Your Brand Has Become a Media Target. Now What?



J. Erik Connolly

No marketing executive wants to see their company become the subject of a negative news story. The very thought of it—and, if it happens, what they should do about it—keeps chief marketing officers up at night.

No matter the industry, a negative portrayal in the media can damage a company's brand. And once that happens, a tsunami of problems can wash over the organization, impacting your reputation with customers, suppliers, investors, employees and regulatory authorities.

A negative news story can lead to cancelled contracts and lost sales, forcing the company to scale back operations. Angry consumers, galvanized by fast-moving and sometimes inaccurate social media posts, might sign petitions and file class-action lawsuits. As all of this happens—and it usually happens fast—company decision makers often struggle to think clearly and strategically about how to respond.

Hand-wringing about what might go wrong will get you nowhere, but a detailed plan for what to do before, during and after a media storm will ensure that your marketing team has an umbrella ready for that rainy day.

### Before

The best time to prepare for a public relations nightmare is when your brand is on the ascent and your consumers are happy with the product. Put in the time to build good relationships with the trade publications and reporters who cover your industry, and designate a crisis spokesperson who has received media training. Every brand has vulnerabilities. Know what yours are and do everything you can to get out ahead of them.

### During

Companies usually get a heads-up that a negative story is about to break, typically when

a reporter offers your spokesperson the chance to comment. During that brief window of time, it's critical to mobilize your trusted advisors to prevent a bad situation from becoming a media disaster. If the story includes false information about your product, reach out to industry or trade associations for support, and identify third-party experts who can provide objective information to counter the claims. Use all the communication channels available to you—website, social feeds and press releases to the media—to distribute this information publicly.

### After

If your efforts to quell the storm fail and the story goes to press, it's time to fight back against the misinformation to restore your brand reputation. Respond fast to get your story out, but stay calm and on message: you are committed to truth, transparency and customer satisfaction.

Behind the scenes, track and document media and consumer reactions to the story. Contact the reporter to call out the false claims and refute them with well-sourced evidence. Request that the news outlet take down the inaccurate story or run a correction. Most importantly, work with your attorney to identify the financial or reputational injury your brand may suffer as a result of the published claims.

### Should you sue?

In the aftermath of a negative news story, company leadership may consider pursuing legal actions, such as claims of defamation (damage to a person or company's reputation), disparagement (damage to the reputation of products, goods or services) or tortious interference (damage to current or prospective business relationships). If you are considering litigation, there are three facts you will need to establish:

**The story is specifically about your company or product.** The story may mention your company by name or show pictures of its product, or it may merely give identifying information that would lead third parties to understand that the report is about your product.

**The story contains information about your company or product that is false.** Look for specific statements and overall messages in the report that are demonstrably false, and consider sections where a lack of context for statements or a failure to disclose information on sources creates a false impression. Is the information presented as opinion (known as "pure opinion" in defamation law) or a fact about the product? Most critically, can you prove that the statement is false?

**The publisher knew the information was false and published it anyway.** Your company should establish what communications about the product were sent to the media outlet ahead of publication, as well as what content was available publicly, on your website or elsewhere, that would have shown the published information to be false.

Even if the unfortunate news story about your product satisfies all three of these requirements, your company will want to consider the potential media and social media reaction to a lawsuit, and the lingering impact on your brand, before deciding whether to pursue legal action. Sometimes the best course is to mitigate, not litigate, the damage.

A negative news story can undoubtedly damage your company's brand. But careful preparation for the worst-case scenario will help you navigate public opinion and potential legal avenues to restore your reputation and move forward.

### For more information, please contact

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## Upcoming Event

**David Almeida**, Chair of Benesch's Retail, Hospitality & Consumer Products Group, will be presenting at the **Class Action Law Forum** in San Diego on March 5th.

His panel is discussing *Leveraging Big Data & Microtargeting in Consumer Class Actions*.

To register, please visit <https://litigationconferences.com/class-action-law-forum-2020/> and use the Benesch code **bem50** for a discount on registration.

Western Alliance Bank and University of San Diego School of Law present

# Class Action Law Forum 2020

March 4-5, 2020 | University of San Diego School of Law

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