ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

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WASHING AWAY THE TRUTH: THE RISE OF AI SPIN

Michael L. Mallow

Tory A. Martin

This article was not drafted by artificial intelligence (AI), but today it seems like countless products and services are touting some connection with AI: Products created by AI, products that use AI, and the efficiency of services through AI. Companies are now leveraging AI by claiming it increases productivity, increases ease to the consumer, and removes human error. It seems too good to be true, and sometimes it is.

Exaggerating AI's capabilities—otherwise known as AI washing—can have serious risks. Both the FTC and

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— INSIDE —

HOW INSIDE AND OUTSIDE COUNSEL CAN BEST COLLABORATE IN MEDIATION LIKE THEIR JOBS DEPEND ON IT – BECAUSE THEY DO

Edward J. Weiss, Esq.

The partnership in mediation between inside and outside counsel poses challenges for both counsel to manage and opportunities for them to seize. Effective collaboration can improve the odds of achieving favorable settlements and avoiding problems in mediation. Inside and outside counsel should approach their partnership by recognizing from the outset what their partner needs and expects, and what they can offer them and their common client. Through nearly 20 years and dozens of mediations as a senior in-house counsel at Ticketmaster – as the world's leading ticketing company's General Counsel, Chief Counsel, and head of litigation – I learned important lessons about how inside and outside counsel can most effectively collaborate for the good of their common client. Doing so not only serves their common client's best interests, but also serves their best interests.

Understanding Each Other's Roles and Needs

Outside and in-house counsel should be aware of each other's needs, skills, expectations, assets, and limitations. Outside counsel should understand in-house counsel's experience, expertise, and position in their business or organization. This includes not only what information in-house counsel needs to communicate to supervisors and decisionmakers, but also the form and substance of that information. Conversely, in-house

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2024 PRESIDENT'S MESSAGE

Michael Mallow

As we reflect on our accomplishments since our last Report publication this Spring, I am filled with immense pride and gratitude for the remarkable achievements and milestones we have reached together. The year 2024 has been a testament to our collective dedication to advancing the practice of law and fostering a vibrant legal community.

One of the highlights of the latter part of the year was our 50th Annual Meeting in Napa. This statewide milestone event was not only a celebration of our rich history but also a forward-looking gathering that brought together some of the brightest minds in our field. The discussions, networking opportunities, and camaraderie experienced in Napa, along with stellar wine tastings, will undoubtedly leave a lasting impact on all who attended.

Our Los Angeles ABTL programs this year have been both diverse and enriching. We closed our Spring season with the Dinner Program: Tales from the Trial Table – Successful Storytelling, Voir Dire, and the Power of Pithy Themes. This program provided invaluable insights into the art of storytelling in the courtroom, emphasizing the importance of concise and compelling narratives.

The Annual Members-Only Judicial Reception was another standout event, offering our members a unique opportunity to engage with the judiciary in an informal setting. This reception continues to be a cornerstone of our efforts to build stronger relationships between the bench and the bar.

In our Dinner Program: Behind the Gavel – Meeting the Federal Judiciary, we had the privilege of hearing directly from the newer federal judges about their experiences and perspectives. This program fostered a deeper understanding of the judiciary's role and the challenges they face, enhancing our appreciation for their work.

The Young Lawyers Division (YLD) MCLE Event: Mediation—Preparation, Advocacy and Outcome was particularly impactful for our younger members. This event focused on the critical skills needed for effective mediation, from preparation to advocacy and achieving favorable outcomes. It was a fantastic opportunity for our young lawyers to learn from seasoned practitioners and enhance their professional development.

We concluded our program series with the Dinner Program: The Role of Strategic Communication in High-Profile Litigation. This event underscored the significance of strategic communication in managing high-profile cases, providing practical advice on navigating the complexities of media relations and public perception.

I am also thrilled to announce our new alliance with Team Prime Time. This strategic partnership aims to promote and sponsor the Team Prime Time Trials, an innovative program designed to empower at-risk youth through positive exposure to our legal system. The Prime Time Trials program provides students with the opportunity to participate in mock trials, developing their critical thinking, public speaking, and teamwork skills. By supporting this initiative, we are not only giving back to the community but also inspiring the next generation of potential lawyers and diversifying our legal pipeline. A special thanks to the Honorable Andre Birotte for presiding over the mock trial and to our inaugural

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firm sponsors, Gibson Dunn, Hogan Lovells, Shook, Hardy & Bacon and Weinberg Gonser. It is with great hope that this list of sponsor firms will grow exponentially in the future.

As I move through the waning days of my presidency, it is with great pride that I pass the gavel to incoming President Kahn Scolnick and officers Amy Lucas, Alice Chen Smith and Stephanie Yonekura. This extraordinary team, who I met through ABTL and now consider dear friends, will no doubt accomplish even more this coming year than we did in 2024. I am confident that the Los Angeles ABTL will continue to thrive and make meaningful contributions to our Los Angeles and California legal community. I hope that all of you take full advantage of everything our wonderful organization has to offer.

Thank you for your support, commitment to our organization and for giving me the honor of being your ABTL President.

Michael Mallow

Partner, Shook, Hardy & Bacon L.L.P.

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8502 E. Chapman Avenue, Suite 443
Orange, California 92869
(323) 988-3428
Email: abtl@abtl.org • www.abtl.org

BETTER SAFE THAN SORRY: WHEN TO CHALLENGE A GOOD FAITH SETTLEMENT DETERMINATION

Tina Kuang

For decades, the question of whether a writ petition is the exclusive means to challenge a trial court's good faith settlement determination under California Code of Civil Procedure section 877.6 ("section 877.6") has split appellate courts.

It seemed like the California Supreme Court would finally resolve this split when it granted review of the issue in *Pacific Fertility Cases* (2022) 78 Cal.App.5th 568 (*Pacific Fertility*), in August 2022. But in 2023, after fully briefing the case, the *Pacific Fertility* parties moved to dismiss review, and the Supreme Court granted the motion. So, for now, this important practical question remains open—despite the serious consequences a good faith settlement determination can have in cases where less than all of the joint tortfeasors or co-obligators settle with the plaintiff.

Why challenge a good faith settlement determination?

If the trial court determines that a settlement was made in good faith, section 877.6, subdivision (c), bars non-settling defendants from asserting future claims against their settling co-defendants for equitable indemnity or contribution. This rule incentivizes settling defendants to resolve cases on terms warranting a good faith determination and rewards them with immunity from future liability.

Meanwhile, non-settling defendants will want to protect their indemnity and contribution rights by challenging the good faith settlement determination, if there is a proper basis to do so. To prevail, "[t]he party asserting [a] lack of good faith" must meet the "burden" of proving "that the settlement is so far 'out of the ballpark' in relation to" the following factors "as to be inconsistent with the equitable objectives of" section 877.6: (1) "a rough approximation" of the plaintiff's eventual recovery after trial, (2) the settling defendant's proportionate liability for those estimated damages; (3) the settlement amount; (4) the settling defendant's financial condition and insurance policy limits; and (5) "the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.)

The split in authority.

After the trial court makes a good faith settlement determination, section 877.6, subdivision (e), provides that "any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate." But with the Supreme Court's dismissal of *Pacific Fertility,* the courts of appeal remain split on whether this means a writ of mandate is the *exclusive* means to challenge a good faith settlement order or whether litigants can raise the issue later, on appeal from the final judgment.

Some courts have held that the plain language of section 877.6, subdivision (e), provides a *permissive* procedure to challenge a good faith settlement determination that doesn't eliminate the right to pursue the challenge on appeal, regardless of whether a writ petition was ever filed. (See, e.g., *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 951-956 (*Cahill*); *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627, 634-637 (*Wilshire*); *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413, 1420-1426 (*Maryland Casualty*).)

As the *Cahill* court explained, section 877.6, subdivision (e), states that an aggrieved party "*may*" petition for writ review, and the word "may" demonstrates that writ review is "a permissive, not mandatory, means of challenging a good faith settlement determination, and the availability of writ review, or the summary denial of a writ petition, does not preclude an appeal after a final judgment." (194 Cal.App.4th at pp. 955-956, italics added; see *Maryland Casualty*, *supra*, 81 Cal.App.4th at p. 1420 [section 877.6(e)'s "use of the words '*may* petition,' together with 'shall be filed,' suggests that a writ petition might not be the exclusive means of reviewing a good faith settlement determination"]; *Wilshire, supra,* 86 Cal.App.4th at p. 636 ["agree[ing] with the analysis and conclusion of *Maryland Casualty"* to conclude that "section 877.6(e) does not foreclose postjudgment review"].)

Other courts have construed section 877.6, subdivision (e), as completely eliminating the right to appeal for policy reasons including finality. (See, e.g., *Pacific Fertility, supra,* 78 Cal. App.5th at pp. 574-585; *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 498-499 (*O'Hearn*);

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BE WARY OF BANKRUPTCY COURT ASSIGNMENTS

Terry Bates

In the last 20 years, bankruptcy filings have increase by about 16 percent. If you have a matter that turns on a contract that was assigned in the Bankruptcy Court, you should examine the assignment early in the litigation. For plaintiffs, it may reveal problems in what you thought was a strong claim. For defendants, it may reveal the winning defense.

The Bankruptcy Code requires that a party in bankruptcy list all its debts, as well as its assets. This allows creditors to file claims in bankruptcy proceedings and secure a portion of all their debt, depending on priority.

For example, in a state court case in Alhambra, Plaintiff plead a single breach of contract claim based on a Power Purchase Contract for a cogeneration facility. Plaintiff claimed to be an assignee of rights under the agreement based on bankruptcy proceedings it which it was a creditor. But surprisingly, the Plaintiff had not perfected the assignment in the Bankruptcy Court.

We were retained by in-house counsel about two years after the litigation had commenced and it went to trial shortly thereafter. We moved for nonsuit after Plaintiff's opening statement, and we prevailed. The case boiled down to a single concept: whether the assignment from the Bankruptcy Court had been approved. Further, that concept depended on a single authority—*Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1233—as well as its predecessors and progeny. (Neptune Society lost its claim and the cross-defendant prevailed on its cross-complaint—receiving its attorneys' fees to boot.)

There are several considerations when assessing whether a plaintiff can assert rights based on a purposed assignment that occurred in Bankruptcy Court. They include the following: (1) whether the bankruptcy trustee assigned the contract to the proper party; (2) whether the Bankruptcy Court itself should decide if there was a proper assignment; (3) whether there are contractual limitations on assignability; and (4) whether the assignor's knowledge or action raise statute of limitations issues.

So let us look at the issues, not necessarily in chronological order.

1. Whether the Bankruptcy Trustee Assigned the Contract to the Proper Party.

The bankruptcy trustee is an administrator appointed by the court to oversee the debtor's estate in a bankruptcy proceeding. Whether the trustee assigned the contract to the proper party is critical. In our situation, the Trustee did not. Plaintiff argued it held the Power Purchase Agreement through an assignment in the Bankruptcy Court from an entity that had submitted Chapter 11 proceedings. But the Trustee neither assigned the contract specifically, nor recognized the assignment in the existing bankruptcy as it was not pled in the proceedings. Requesting that the opposing party produce the assignment does not take much effort. However, you need to see the assignment to evaluate it in the context of the Bankruptcy Court's rules to determine whether a purportedly assigned contract was actually assigned.

2. Whether the Bankruptcy Court, itself, should decide the contract was properly assigned.

During Plaintiff's argument in our case, he claimed that the assignment was valid because the Bankruptcy Court itself completed the assignment, even if the Trustee did not. After evidence was heard before the trial court made its decision, Plaintiff noticed a hearing before the Bankruptcy Court so that it could decide whether an assignment took place before the state court entered its judgment. The California court then rendered judgment in our favor before the Bankruptcy Court hearing but stayed the matter until the Bankruptcy Court hearing took place. Fortunately for our side, the Bankruptcy Court ultimately agreed that the assignment had been improper.

You might not have a comparable situation, but it is important to consider whether to seek a hearing in the Bankruptcy Court, as that could clear up ambiguity and help you to evaluate your options. In our situation, the Bankruptcy Court held the hearing after the trial court made its decision. If you are going to seek the Bankruptcy Court's guidance, earlier is better.

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THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD: WHERE ABC LICENSEES PLEAD THEIR CASE

Taryn Kinney

The California Alcoholic Beverage Control Appeals Board may be a lesser-known state entity to some, but it has real significance for alcoholic beverage licensees who may at some point face disciplinary action from the California Department of Alcoholic Beverage Control (ABC). The Board is an entirely separate state entity from ABC. The three-member Board provides quasi-judicial administrative review of ABC decisions regarding issuing alcoholic beverage licenses, license conditions, protests against a license, and violations of law by a licensee. Common appeals heard by the Board involve licensees selling alcohol to minors, drug sales or illegal gambling by a licensee, and protests against the issuance of licenses involving noise ordinances or other community concerns.

If a licensee receives a final decision from ABC, they may have a right to appeal with the Board. The questions that may be considered by the Board are limited by the California Constitution and by statute.

The Board hears appeals at monthly hearings, and it decides matters based upon a review of the administrative record, legal briefs, and oral argument presented by the parties. The Board issues written decisions with orders affirming, reversing, and/or remanding ABC decisions. Judicial review of the Board's order may be obtained by filing a petition for writ of review with the California Supreme Court or the Court of Appeal.

Appellants range from billion-dollar corporations to mom-and-pop shops. The same ABC laws apply to all, and all licensees have the same right to an independent review by the Board.

The timeline to file an appeal with the Board is quick—40 days from ABC's decision (unless the decision is effective immediately, then an appeal must be filed 10 days following ABC's decision). Licensees choosing to file an appeal may represent themselves or be represented by an attorney.

The Board provides all Californians who appeal with an efficient, timely, and approachable appeals process with fair and transparent legal review. The Board's decisions have broad impacts on business owners, public safety, and across California.

For more information on filing an appeal, guides, forms, videos, and informational materials translated into several languages, please see the Board's website.

Disclaimer: Information contained in this article is not legal advice and should not be relied upon as legal advice. Before making any personal or business decisions, please consult with a private attorney.

***Taryn Kinney** is an executive officer in the Alcoholic Beverage Control Appeals Board.*

YOUNG LAWYERS DIVISION UPDATE

Dylan Noceda

Nalani Crisologo

Matthew Kaiser

During the last half of 2024, the YLD focused on presenting exciting and informative programming, as well as providing opportunities for younger lawyers to interact with the judiciary, network with fellow (young) lawyers, and deepen connections with the broader legal community. In 2025, we aim to continue that tradition with more programming and social events, along with organizing a community-impact project to join the YLD members together in service to the broader Los Angeles community. As always, we will also strive to continue planning brown bag lunches with members of the judiciary. Be sure to keep an eye on the ABTL Report and your email inboxes for updates about upcoming YLD events. And if you are interested in helping plan YLD events, please reach out to YLD co-chairs Nalani Crisologo and Dylan Noceda, or YLD vice-chair Matthew Kaiser, about getting involved.

Dylan Noceda *is an associate at Gibson, Dunn & Crutcher LLP.*

Nalani Crisologo *is an associate at Shook, Hardy & Bacon L.L.P.*

Matthew Kaiser *is counsel at O'Melveny & Myers LLP.*

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the SEC have taken staunch positions against AI washing. But, is this really new news? Not so long ago, greenwashing—that is, overpromising on environmental impact claims—was a hot topic. What did we learn from the greenwashing lessons that we can apply to AI washing? This article will examine just what AI washing is, how various regulators and legislatures have reacted, and how to avoid greenwashing mistakes in AI marketing.

1. What is AI Washing?

The term "AI," itself, seems ambiguous. Broadly, AI is defined as a machine's ability to perform cognitive functions, like perceiving, reasoning, learning, interacting, problem-solving, or exercising creativity. It can refer to advanced technology such as generative AI—for example, ChatGPT and IBM Watson. Or, it can refer to basic technology such as reactive AI. Netflix's viewing recommendations are one example.

With such an expansive definition of AI, it's no surprise that AI washing is a trending topic. "AI washing" refers to companies making false or misleading statements about their purported use of AI. AI washing can come in many different forms, ranging from making flatly false claims of AI usage or capability, to overstating AI's role, to misrepresenting AI-driven results. For example, a major beverage company was accused of AI washing when marketing one of its beverage products as "co-created with AI" despite not having any information about the real role AI played.[1] Another example is in Amazon's marketing of its Just Walk Out stores. It claimed the stores use "computer vision, sensor fusion, and deep learning."[2] But Amazon neglected to mention that it hired over 1,000 workers in India to watch and label the videos.[3] The public criticized Amazon for AI washing since it never mentioned that its stores still required human intervention and analysis, not just "computer vision, sensor fusion, and deep learning."[4]

2. FTC Perspective of AI Washing

The Federal Trade Commission (FTC) has not been silent on companies' use of AI in marketing and advertising. In February 2023, the FTC published an article titled "Keep your AI claims in check."[5] The FTC warned "marketers should know that—for FTC enforcement purposes—false or unsubstantiated claims about a product's efficacy are our bread and butter."[6] The FTC continued, "when you talk about AI in your advertising, the FTC may be wondering . . . [1] Are you exaggerating what your AI product can do? . . . [2] Are you promising that your AI product does something better than a non-AI product? . . . [3] Are you aware of the risks [of using AI]? . . . [4] Does the product actually use AI at all?"[7] Companies should keep these questions in mind when making AI claims in their marketing and advertising to ensure FTC compliance; or at least avoid FTC scrutiny and litigation wrath.

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[1] Bernard Marr, *Spotting AI Washing: How Companies Overhype Artificial Intelligence, Forbes* (Apr. 25, 2024) https://www.forbes.com/sites/bernardmarr/2024/04/25/spotting-ai-washing-how-companies-overhype-artificial-intelligence/.

[2] Parmy Olson, *Amazon's AI Stores Seemed Too Magical. And They Were., Bloomberg* (Apr. 3, 2024) https://www.bloomberg.com/opinion/articles/2024-04-03/the-humans-behind-amazon-s-just-walk-out-technology-are-all-over-ai.

[3] *Id.*

[4] *Id.*

[5] Michael Atleson, *Keep your AI claims in check, Federal Trade Commission* (Feb. 27, 2023), https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check.

[6] *Id.*

[7] *Id.* (emphasis omitted).

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The FTC's message here is not new. Back in 2021, in an FTC article regarding AI and racial bias, the FTC warned that companies must use AI "truthfully, fairly, and equitably."[8] The FTC cautioned companies to "be careful not to overpromise what your algorithm can deliver."[9]

Now, the FTC has created Operation AI Comply—a new law enforcement sweep targeting AI washing.[10] The FTC took action against companies claiming to offer AI lawyering services, AI-backed online storefronts, and AI-generated fake reviews.[11] According to the FTC, these companies either totally lacked the AI technology they claimed to use or exaggerated their promised outcomes.[12]

These enforcement actions "make clear that there is no AI exemption from the laws on the books."[13] Thus, when a company mentions its use of AI in marketing or advertising its products or services, the message must not be overstated, overambitious, or unfounded, and its AI claims or promises must also have data-driven results backing them up. If not, the FTC may come knocking.

The FTC's policing isn't the only concern. It's only a matter of time until consumer class actions are filed alleging that AI washing unreasonably inflates prices charged for products or services across an entire class of customers.

3. SEC Perspective on AI Washing

The Securities and Exchange Commission (SEC) has also weighed in on AI washing. In March 2024, the SEC charged two investment advisers, Delphia (USA) Inc. and Global Predictions Inc., with AI washing.[14] The investment advisors settled their anti-fraud charges, Marketing Rule violations, and policy violations, paying a combined fine of $400,000.[15] The SEC found Delphia made false and misleading statements in SEC filings, press releases, and on its website about its use of AI and machine learning models to incorporate client data in its investment process.[16] According to the SEC, Delphia implemented no AI and machine learning capabilities whatsoever.[17] As for Global Predictions, the SEC found AI washing on its website and social media where the company claimed it was the "first regulated AI financial investor," and that it provided "[e]xpert AI driven forecasts" when it had no evidence to substantiate those claims.[18]

In the SEC's press release, it noted "today's enforcement actions make clear to the investment industry—if you claim to use AI in your investment processes, you need to ensure that your representations are not false or misleading."[19]

Before these enforcement actions, the SEC had already warned that "[i]nvestment advisers and broker-dealers . . . should not mislead the public by saying they are using an AI model when they are not, nor say they are using an AI model in a particular way but not do so."[20] According to the SEC, "[s]uch AI washing . . . may violate the securities laws."[21]

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[8] Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI, Federal Trade Commission* (Apr. 19, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai.

[9] *Id.*

[10] FTC *Announces Crackdown on Deceptive AI Claims and Schemes, Federal Trade Commission* (Sept. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence,* U.S. Securities and Exchange Commission (Mar. 18, 2024), https://www.sec.gov/newsroom/press-releases/2024-36.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Gary Gensler, *AI, Finance, Movies, and the Law, U.S. Securities and Exchange Commission* (Feb. 13, 2024), https://www.sec.gov/newsroom/speeches-statements/gensler-ai-021324.

[21] *Id.*

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4. State Statutes

Although state laws don't focus on AI washing per se, most state AI legislation requires companies to make their use of generative AI clear and conspicuous,[22] prohibit the use of AI in a discriminatory way,[23] and regulate the collection and possession of personal information and profiling.[24] Despite the lack of AI-washing-specific laws, state laws governing deceptive trade practices, fraud, and other consumer-protection laws are vehicles under which plaintiffs will file future AI washing claims.

5. Lessons Learned from Green Washing that can be Applied to AI Washing

Greenwashing—i.e., making false or misleading statements about how environmentally-friendly a company or product is—has been making headlines for a while and provides valuable lessons.

FTC. Like AI washing, the FTC regulates greenwashing. The FTC published its Green Guides for the Use of Environmental Claims, called the Green Guides.[25] The Green Guides were published to "set forth the [FTC's] current views about environmental claims," and "help marketers avoid making environmental marketing claims that are unfair or deceptive."[26] While the Green Guides are more recommendations than mandates, they still provide guidance to companies making green claims, courts analyzing greenwashing lawsuits, and—of course—FTC enforcement actions.[27]

Litigation. Most lawsuits based on greenwashing claims involve companies using ambiguous, widely used terms and promises that lack adequate support. Plaintiffs often allege violations of state consumer protection statutes, breaches of warranty, unjust enrichment, and fraud. A 2023 survey of greenwashing class actions found that 35% of the suits were against home and garden companies, 23% were against food and beverage companies, 15% were against personal care and cosmetic companies, and 10% were against textile companies, with the remainder unknown.[28] The survey also found that almost half of all greenwashing class actions were filed in California.[29] While many greenwashing class actions are dismissed for failure to state a claim upon which relief can be granted,[30] the threat of trial or settlement still looms large.

For example, *Smith v. Keurig Green Mountain Inc.* settled for $10,000,000 with an agreement that Keurig add a disclaimer about the product's recyclability.[31] Smith brought a putative class action against Keurig for making false and misleading statements regarding its "recyclable" labeling on some plastic single-serve coffee pods, alleging: (1) breach of express warranty; (2) violation of California Consumers Legal Remedies Act; (3) three violations of California Unfair Competition Law; and (4) unjust enrichment. Keurig moved to dismiss Smith's claims based on lack of standing and failure to state a claim. However, the Northern District of California denied the motion, holding Smith satisfied all standing requirements and plausibly pled her claim because (A) a reasonable consumer could read

[22] *See,* e.g., SB 942, 2023 Sess., Reg. Sess. (Ca. 2024); N.M. Stat. Ann. § 1-19-26.4.

[23] *See,* e.g., SB 21-169, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021); HB 3773, 103th Gen. Assemb., Reg. Sess. (Ill. 2024).

[24] *See,* e.g., SB 21-190, 73rd Gen. Assemb, Reg. Sess. (Colo. 2021); SB 6, 2021 Gen. Assemb., Reg. Sess. (Conn. 2022); HB 154, 152nd Gen. Assem., Reg. Sess. (Del. 2023); SB 5, 123rd Gen. Assemb., Reg. Sess. (Ind. 2023); HF 2309, 93rd Leg. Sess., Reg. Sess. (Minn. 2023); SB 384, 68th Leg. Sess., Reg. Sess. (Mont. 2023); SB 255-FN, 2024 Leg. Sess., Reg. Sess. (N.H. 2024); SB 332, 220th Leg. Sess., Reg. Sess. (N.J. 2024); SB 619, 82nd Leg. Assemb., Reg. Sess. (Or. 2023); HB 1181, 114th Gen. Assemb., Reg. Sess. (Tenn. 2024); HB 4, 88th Leg. Sess., Reg. Sess. (Tex. 2023); VA Code Ann. § 59.1-575 through 585.

[25] Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62124 (Oct. 11, 2012).

[26] *Id.* at § 260.1.

[27] *Id.*

[28] *By the Numbers: Greenwashing Class-Action Lawsuits,* Truth in Advertising (Oct. 30, 2023) https://truthinadvertising.org/articles/by-the-numbers-greenwashing-class-action-lawsuits/.

[29] *Id.*

[30] *See, e.g., Hill v. Roll Internat. Corp.*, 195 Cal.App.4th 1295 (Cal. App. 2011); *Lizama v. H&M Hennes & Mauritz LP,* No. 4:22-CV-1170-RWS, 2023 WL 3433957 (E.D. Mo. May 12, 2023); *Dwyer v. Allbirds,, Inc.,* 598 F.Supp.3d 137 (S.D. N.Y. 2022).

[31] *Smith v. Keurig Green Mountain, Inc.,* Case No. 18-cv-06690-HSG, 2022 WL 2644105 (N.D. Cal. Jul. 8, 2022) (order granting prelim. approval of class action settlement).

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the word "recyclable" to mean the item was in fact recyclable, (B) "recyclable"—when construed in Smith's favor—could constitute a specific and unequivocal statement, and (C) "recyclable" could form a quasi-contract.

Private parties are not the only people targeting greenwashing either. This year, the New York Attorney General brought a wave of greenwashing enforcement cases. For example, the Attorney General sued JBS USA Food Company and JBS Food Company Holdings for allegedly misleading the public about its environmental impacts and commitment to reduce its emissions to "Net Zero by 2040" without having a plan to meet that goal.[32] The defendants have filed a motion to dismiss and are currently awaiting an order from the court.[33] Other state attorneys general have also initiated greenwashing lawsuits. In *Commonwealth v. Exxon Mobil Corp*., the Massachusetts Attorney General sued Exxon Mobil for greenwashing representations made to investors.[34] The Massachusetts court denied Exxon's motion to dismiss, holding the Attorney General stated a plausible claim because Exxon's alleged greenwashing campaign was more than mere puffery and was designed "'to induce consumers to purchase its products.'"[35]

While the rate of greenwashing cases fell by 10% in 2023, greenwashing cases increased by 6% this year.[36] Further, high-severity cases skyrocketed 114%, while medium-severity cases fell by 15% and low-severity cases fell by 34%.[37] Thus, while greenwashing cases generally may be dying-down, it is still vital that companies are thoughtful about how they communicate their environmental efforts to the public.

The lessons from greenwashing applicable to AI Washing teach the following lessons:

a. Avoid using ambiguous, overly generalized, AI buzzwords in marketing and advertising.

b. Ensure any claims or promises made are substantiated by data.

c. Be transparent about how AI is and is not being used.

d. Avoid exaggerating or overstating AI capabilities.

As an aside, the title of this article was selected by AI, but everything else was human generated . . . and that's not Human Washing.

Michael Mallow *is a partner at Shook, Hardy & Bacon L.L.P.*

Tory A. Martin *is a senior law clerk at Shook, Hardy & Bacon L.L.P.*

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[32] *People of the State of New York v. JBS USA Food Co. et al.,* Cause No. 450682/2024, 2024 WL 992842 (N.Y. Sup. Ct. Feb. 28, 2024) (summons).

[33] *Id.*

[34] *Commonwealth v. Exxon Mobil Corp.,* No. 1984CV03333BLS1, 2021 WL 3488414 (Mass. Super. Ct. June 22, 2021).

[35] *Id.* at *2 (quoting the Commonwealth's Amended Complaint).

[36] Lamar Johnson, *Greenwashing cases fall for first time in 6 years, but high-severity filings surge,* ESG Dive (Oct. 10, 2024) https://www.esgdive.com/news/greenwashing-decreases-report-rep-risk-severity-increases-2024/729511/#:~:text=The%20oil%20and%20gas%20sector,scrutiny%20for%20their%20sustainability%20claims.

[37] *Id.*

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counsel should ensure outside counsel is well-informed about the organization's business, the structure of its legal department, its objectives, where the case resides in their portfolio of cases, and the nature of disputes and potential problems the company is facing. Both parties should ensure that the outside lawyer knows what might be unique about their business, the departmental reporting structure, and in-house counsel's style and expectations. Effective communication is crucial to navigate the client's risk tolerance and appetite. Good teamwork – preparation, communication, and coordination on strategy at the mediation – often can make the difference between success or missing an opportunity for a satisfactory outcome.

Below are some considerations and suggestions for how in-house and outside counsel can work well together during the mediation process.

Key Considerations for Collaboration

Identify the In-House Lawyer: In-house lawyers are not a homogenous group. The outside lawyer should learn about the in-house lawyer's experience, expertise, focus, responsibility, and seniority. Understanding whether they are working with a litigator, transactional lawyer, regulatory lawyer, or another type is crucial. Has in-house counsel been to mediation before and how often? How much do they want and expect to speak, contribute, and participate in the mediation? Additionally, knowing the in-house lawyer's level of involvement in the underlying situation at issue and any sensitivities around their involvement can help manage the process diplomatically.

Understand the Legal Department's Structure: Legal departments vary in size and structure. The in-house contact may be the entire department or one of dozens or even hundreds of lawyers. Knowing the in-house lawyer's position in the company, how much authority he or she has, and whether he or she needs to consult others is vital for effective mediation preparation.

Gauge Mediation Experience: How experienced, particularly in mediation, is the in-house lawyer? Depending on their experience, in-house counsel may need anything from a brief overview to a detailed explanation of mediation, how it works, and what to expect from the process.

Preparing Your In-House Client – Ultimately to Look Good

Meeting of the Minds: There should be a meeting of the minds between inside and outside counsel from the outset, or at least before getting too far into the process, and prior to the mediation. Discuss objectives and then formulate an opening settlement position to communicate to the mediator.

Effective Communication: Good communication between inside and outside counsel is fundamental. Outside counsel should figure out what the in-house counsel needs in terms of case evaluation and strategy. Prepare in advance and encourage the in-house representative to brief necessary internal stakeholders. Helping in-house counsel communicate effectively to their internal constituents is crucial for making informed decisions and granting settlement authority.

Look at the Big Picture: In order to make a good recommendation to your client, you need to understand where the case falls within the context of its other cases and litigation budget, and whether other similar cases are pending or on the horizon. Does the case need to be settled? What result could come out of a trial that could impact the organization? As an outside lawyer, this may be your only current case for the organization, but the in-house lawyer likely has a broader view and understanding of what the case represents. Access and view the situation through the in-house counsel's wider lens.

Strategy Development: Both lawyers should review the case and briefs together. They need to curate and manage the traveling squad – who is attending the mediation and, perhaps equally important, who should not be attending – while considering personalities and potential conflicts. Consider whether it would be advisable for your client to change a business practice, make a concession, or offer a public apology to facilitate a settlement. Do not wait until the mediation to figure this out. Consult with the necessary players and obtain the necessary authority and buy-in from decisionmakers.

Understanding the Business: Outside counsel should educate themselves about the business and any unique aspects that might affect the mediation. When I was at Ticketmaster, one of the first things often required during mediation was to

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educate outside counsel about unique aspects of Ticketmaster's business and its role in the industry to make sure that outside counsel was fully capable of explaining it to the mediator. This pre-mediation preparation ensures that the mediator's precious time and attention are not wasted on basic explanations.

Addressing Skepticism and Reluctance

Explaining the Benefits of Mediation: Outside counsel should explain the benefits of the mediation process even if there is a reluctance to participate or skepticism about the prospects of a satisfactory settlement. Even if the dispute does not settle, the client may benefit from the process. Use it as an opportunity to stress test and carefully examine your own case. What type of evaluation can your mediator offer? Ultimately outside counsel should help the in-house partner effectively communicate these objectives to his or her stakeholders. The mediator's evaluation can be an important part of shaping that message.

Navigating Pitfalls

Common pitfalls include overconfidence, arrogance, and failure to see the matter from the other side's perspective. Below are some other common pitfalls to avoid:

- Making or taking things unnecessarily personally;
- Failing to take the process seriously, such as by assuming the other side is not there in good faith or that the matter is unlikely to settle;
- Failing to prepare properly, which can include failing to file a robust mediation statement or failing to consider some of the points discussed above.

Post-Mediation

Follow-Up: After mediation, inside and outside counsel should have after-action discussions to adjust case strategy and expectations. What did you learn and what adjustments in case strategy and expectations need to be made? Communication with management should ensure all relevant information is conveyed accurately and in the right format.

Ways for In-House Lawyers to Contribute Meaningfully

Educating Outside Counsel: In-house lawyers should explain the business and any unique aspects of the business, organization, or industry in which it operates that is relevant to the dispute. Providing background and context helps outside counsel educate the mediator effectively.

Crafting Creative Solutions: In-house lawyers can help craft creative solutions beyond monetary settlements, such as business arrangements, changes in practices, or other innovative approaches to facilitate settlement.

Summary

Effective collaboration between inside and outside counsel in mediation can significantly enhance the chances of a favorable outcome. By understanding each other's roles, preparing thoroughly, and maintaining open communication, both parties can navigate the mediation process more effectively, ultimately serving the best interests of their common client.

Edward J. Weiss *is a mediator/arbitrator/referee at ADR Services, Inc.*

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Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency (1999) 73 Cal.App.4th 1130, 1134-1137 (*Main Fiber*).)

For example, the appellate court in *Pacific Fertility* reasoned that section 877.6's statutory language is ambiguous and rejected the interpretation "that the word 'may' necessarily makes the section 877.6 writ review procedure nonexclusive." (78 Cal.App.5th at p. 577.) Instead, by examining the statute's legislative history and its other features—i.e., section 877.6's 20-day deadline to seek writ review, 30-day deadline for a court to determine whether it will hear the writ, and the tolling of time periods for dismissal for want of diligent prosecution—*Pacific Fertility* concluded "that the Legislature wanted to provide settling tortfeasors with a *swift and final* procedure for reviewing a trial court's good faith settlement determination before the verdict or judgment in the underlying trial." (*Id.* at pp. 578-581, italics added, relying on *Main Fiber, supra,* 73 Cal. App.4th at pp. 1135-1136; see *O'Hearn*, *supra*, 115 Cal.App.4th at pp. 498-499 [following *Main Fiber*].)

When to challenge a good faith settlement determination?

Although some courts disagree "that the word 'may' necessarily makes the section 877.6 writ review procedure nonexclusive" (see *Pacific Fertility, supra,* 78 Cal.App.5th at p. 577), the plain language interpretation is the best view because all litigants—regardless of whether they are represented by able counsel—should be able to rely on the plain language of section 877.6, including its use of "may," without worrying about forfeiture. Furthermore, there can be powerful strategic or economic reasons in a particular case for litigants to avoid the expense and distraction of a writ petition, deferring any challenge to a good faith settlement determination until after they learn whether the case will produce any liability judgment at all.

But without an answer from our Supreme Court, it's better to be safe than sorry. Where circumstances allow, litigants and counsel should avoid potential forfeiture by challenging a good faith settlement determination via petition for a writ of mandate. Under section 877.6, such a petition must be filed within 20 days after service of written notice of the determination—extendable by the trial court up to an additional 20 days.

Tina Kuang *is an associate at Greines, Martin, Stein and Richland LLP.*

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3. Whether there are contractual imitations on assignability.

The contract at issue might have language in it that restricts a party's ability to assign it. You should carefully review the contract to determine if there are any limitations on assignability, as that might influence how you craft your claims or defenses.

4. Whether the statute of limitations issues is presented by the assignor's knowledge or actions.

Assessing the limitations period and whether suit was brought within that period is another important consideration. In our situation, the Plaintiff filed the action more than five years after the statute of limitations expired, making it time bared under the four-year statute of limitations for contract actions. Importantly, a former officer of the bankruptcy party admitted that he had spoken to senior management about a potential claim five years before the lawsuit was filed.

Terry Bates *is a partner at Reed Smith LLP.*

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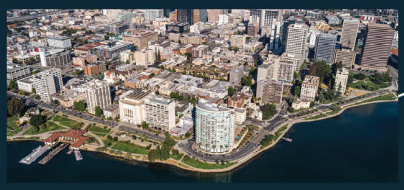

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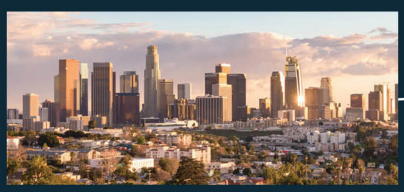

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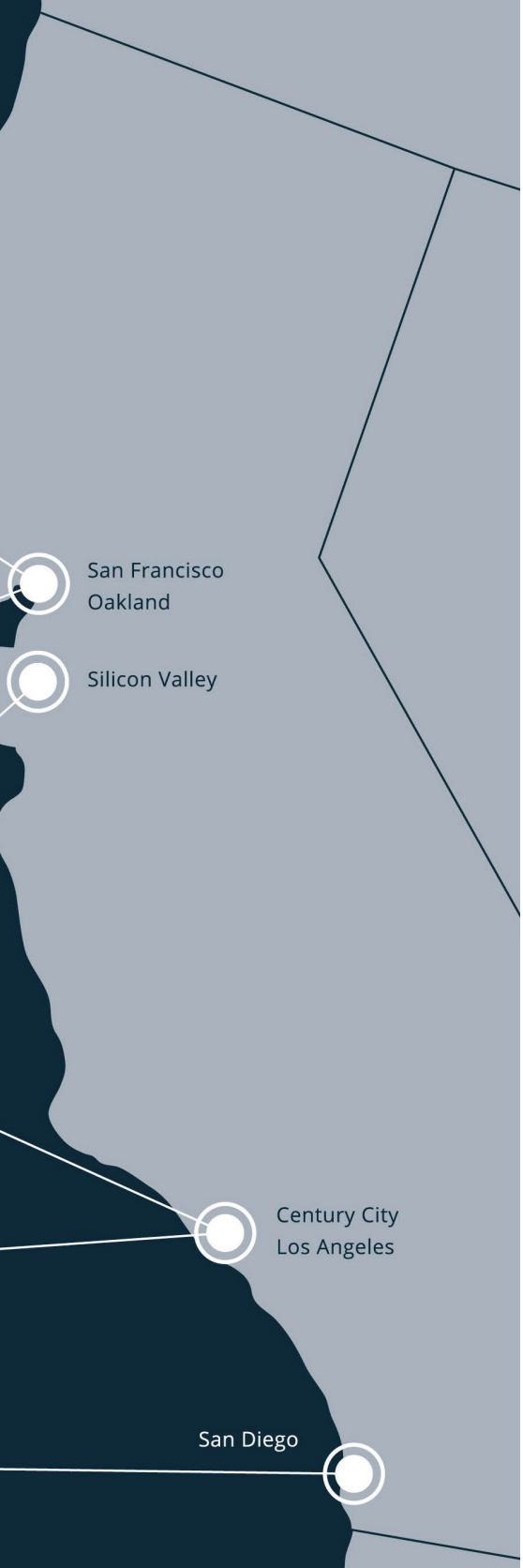
Suite 350
San Diego, CA 92130



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ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl REPORT
8502 E. CHAPMAN AVENUE
SUITE 443
ORANGE, CA 92869

CONTRIBUTORS TO THIS ISSUE:

Michael Mallow is a partner at Shook, Hardy & Bacon L.L.P.

Tory A. Martin is a senior law clerk at Shook, Hardy & Bacon L.L.P.

Edward J. Weiss is a mediator/arbitrator/referee at ADR Services, Inc.

Tina Kuang is an associate at Greines, Martin, Stein and Richland LLP.

Terry Bates is a partner at Reed Smith LLP.

Taryn Kinney is an executive officer in the Alcoholic Beverage Control Appeals Board.

Dylan Noceda is an associate at Gibson, Dunn & Crutcher LLP.

Nalani Crisologo is an associate at Shook, Hardy & Bacon L.L.P.

Matthew Kaiser is counsel at O'Melveny & Myers LLP.