

CLIENT ALERT

DC's Consumer Protection Law Presents Risks for Companies Advertising Clean Energy Efforts: Just Ask Exxon

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Companies who make ambitious marketing claims about purported clean energy efforts may find that they are exposed to litigation under the District of Columbia Consumer Protection Procedures Act (DCCPPA). The DCCPPA is an expansive consumer protection law that confers standing on any person, or nonprofit organization, to sue either on behalf of herself or “in the public interest” for false advertising. A recent DCCPPA lawsuit against energy giant, Exxon Mobil Corporation, serves as the latest example of a swelling risk to corporate defendants who may be subject to suit in the Superior Court of the District of Columbia. Companies should thus carefully advertise their clean energy efforts, or other forward-leaning activities, in a manner that closely and accurately reflects the steps it is taking to achieve those goals.

Because the DCCPPA allows for a finding of harm without the need to show *actual* harm, federal courts often decline jurisdiction over cases that raise only DCCPPA claims. The Act allows plaintiffs to file suit in cases that would ordinarily be filed by the Attorney General, who has an interest in addressing false advertising claims in the public interest. The Act also allows an individual or nonprofit organization to demonstrate standing to sue without showing that it was specifically harmed by the defendant's practices. This is different than most state consumer protection statutes that provide a private right of action only to consumers who have relied on false advertising in the purchase of a product or service and can also prove that they suffered *actual* harm because of the alleged misrepresentation.

In the case mentioned above, an environmental nonprofit organization sued Exxon in the Superior Court alleging that Exxon's public statements concerning its clean energy investments and clean energy activities constituted deceptive advertising that was likely to mislead D.C. consumers into believing that those efforts amount to a much more significant proportion of Exxon's overall business than in actuality. *Beyond Pesticides v. Exxon Mobil Corp.*, No. 1:20-cv-01815. Exxon removed the case to federal court, but the case was remanded for lack of federal jurisdiction because it could not meet the amount in controversy requirement.

In remanding the case, the federal court explained that Exxon's calculation of its total costs of compliance was not a proper measure of the jurisdictional amount because it violated the non-aggregation principle—that each separate and distinct claim must meet the required jurisdictional amount alone. The federal court also twice denied Exxon's motion to stay the lawsuit while it appealed the remand order, which meant that Exxon would have to litigate the case in Superior Court. However, within hours of the second denial, Exxon filed a successful emergency motion to stay the remand with the U.S. Court of Appeals for the D.C. Circuit, affording Exxon the ability to litigate its appeal of the remand without simultaneously having to defend itself on the merits in Superior Court. Exxon will now argue on appeal that it can demonstrate compelling grounds for federal jurisdiction and will suffer irreparable harm absent a stay of the case while the appeal is pending.

Given the increasing public focus on corporate responses to environmental and social responsibility issues and plaintiffs' reliance on state law consumer protection acts like the DCCPPA to challenge those responses, the federal court's remand order serves as notice to companies that they should pay heightened attention to the accuracy of their clean energy advertising.

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