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When Green Advertising May Leave You Black and Blue

Today, many products that target household consumers tout some sort of environmental benefit—that a product is recyclable, biodegradable, or that it has a seal of approval from a third-party organization. These products often command a premium in the market. To win over consumers seeking these “green” products, marketing tactics are becoming more and more creative. On occasion, however, a company may go too far and engage in “greenwashing,” the practice of making a product seem environmentally friendly when, in reality, it is not. Deceptive and unsubstantiated “green” advertising may not only invite an investigation by the Federal Trade Commission (FTC), but as the discussion of two cases below demonstrates, it could also lead to a civil lawsuit and, potentially, monetary liability.

The FTC Green Guides

The FTC *Guides for the Use of Environmental Marketing Claims*,¹ also known as the “Green Guides,” were last issued in 1998. The Green Guides are not enforceable regulations, but do provide the Agency’s view of the application of Section 5 of the FTC Act, which targets unlawful deceptive commercial acts and practices. Following the explosive trend in environmentally friendly products and related marketing in 2007, the FTC issued proposed revisions² to the Green Guides in 2010. Among other things, the proposed revisions caution companies not to use unqualified certifications or seals of approval. Two recent cases demonstrate that a company’s product packaging may run afoul of this guidance and invite a deceptive trade practice lawsuit by a consumer.

Koh v. S.C. Johnson & Son, Inc. (N.D. Cal.)

In this federal lawsuit, seeking class certification, the plaintiff asserted various California unfair competition and false advertising claims against S.C. Johnson, alleging that the company’s Windex® and Shout® products prominently display a Greenlist™ label,³ which is an example of greenwashing—a logo deceptively designed to look like a third-party seal of approval and falsely representing that the products are environmentally friendly.

S.C. Johnson moved to dismiss the complaint, arguing primarily that no reasonable consumer could have found the Greenlist™ label misleading because it makes no mention of a third party, describes Greenlist as a “rating system” not a seal of approval, and directs consumers to the company’s own website for further information. The district court, however, denied the motion to

- . 1 <http://www.ftc.gov/bcp/grnrule/guides980427.htm>
- . 2 <http://www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf>
- . 3 <http://ecochildsplay.com/wp-content/uploads/2008/01/greenlist-logo.gif>

dismiss in an unpublished decision. Citing the Green Guides' example of an environmental seal that could be found deceptive without substantiation, the court held that the issue was a question of fact.

The suit, along with an identical suit pending in Wisconsin, were recently settled. As part of this settlement, S.C. Johnson agreed to stop using the Greenlist™ logo on its Windex® products, stating in a press release that it did not “want consumers to be confused [...]”

Hill v. Roll Int'l Corp. (Cal. App. 1 Dist.)

In this lawsuit, also seeking class certification and asserting identical California false advertising and unfair competition claims as those in *Koh*, the plaintiff alleged that a “Green Drop” logo⁴ placed on bottles of Roll's Fiji® spring water was deceptive greenwashing. The plaintiff asserted that the logo, created by Roll itself, was similar to “seals of approval” used by several, independent third-party organizations, misleading consumers into believing that Fiji® water was environmentally superior to other brands of water.

Unlike the court in *Koh*, the court in this case dismissed the complaint. Adopting the “reasonable consumer” standard from the Green Guides relied upon by the plaintiff, the appellate court held that the “Green Drop” logo did not convey to a *reasonable* consumer that the product was endorsed for environmental superiority by a third party. In its analysis, the court noted that the logo bore no name or recognized logo of any group, nor any trademark symbol. The court also noted that the logo was not analogous to the earth environmental seal example in the Green Guides. Rather, the court found that the “Green Drop” was a logical icon for touting the green features of the product being sold—water.

Contrary to *Koh*, the court found that the *www.fjigreen.com* website printed next to the “Green Drop” logo made it clear that the logo was not a third-party seal of approval, but rather the company's own creation. In distinguishing *Koh*, the court also noted that the Greenlist™ logo in that case was very different, in that it used a trademarked name and identified a rating system, which suggested that it was plausibly a third-party certification.

What This Means for You

We likely will see more lawsuits like these as companies continue to ramp up their “green” marketing efforts. As these two contrasting decisions demonstrate, however, there is no clarity as to what type of marketing will be found to be non-deceptive. As a result, if your company engages in “green” advertising, it should undertake a thorough review of any related marketing plans and strategies to ensure that they do not run afoul of the Green Guides or applicable federal and state statutes. To minimize the risk of a lawsuit or FTC action, a core principle for any marketing strategy should be to ensure that the message to the consumer is both clear and substantiated.

⁴ http://www.adpulp.com/archive/2008/06/01/fiji_green.jpg

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