

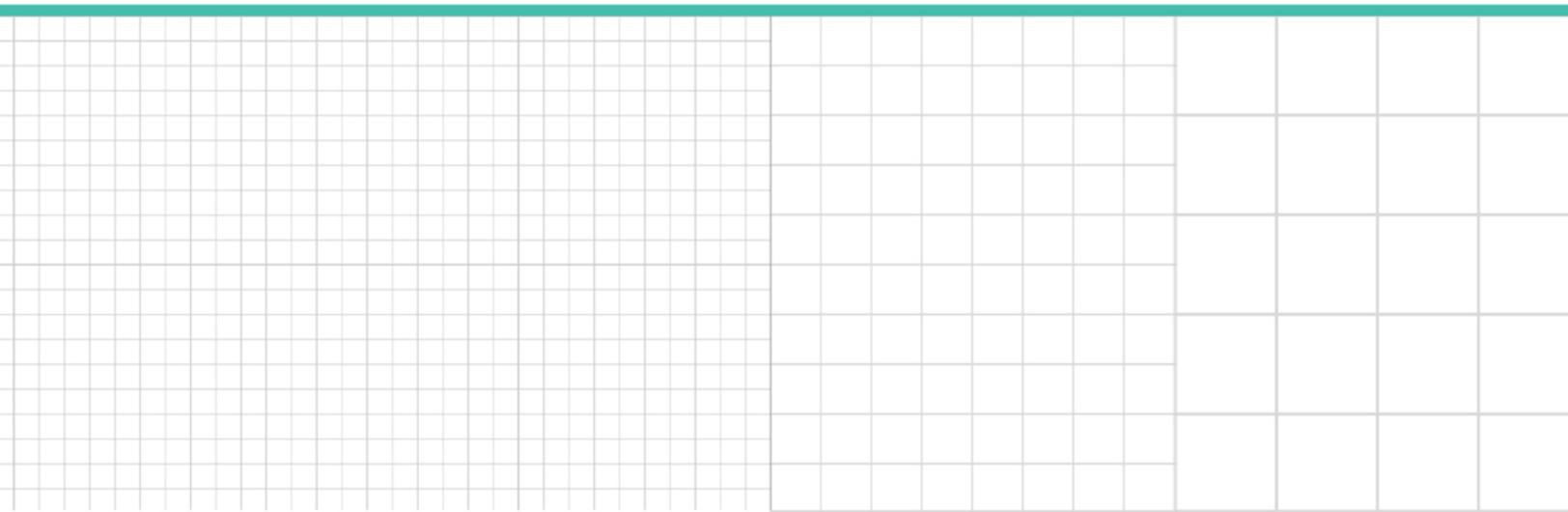


Professional Perspective

Navigating FTC Guidance and Green Marketing Litigation

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Navigating FTC Guidance and Green Marketing Litigation

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Retailers and manufacturers have increasingly been advertising products with descriptors such as “eco-friendly,” “green,” “organic,” and “sustainable.” Predictably, plaintiffs and government enforcers have targeted businesses for “greenwashing”— a term coined to describe the act of exaggerating a company's or product's environmental benefits. While the Federal Trade Commission first issued guidance on green marketing more than 20 years ago, greenwashing suits have proliferated in recent years. Below, we summarize FTC guidance, relevant state laws, and the current state of litigation.

FTC Green Guides

The FTC's “Guides to the Use of Environmental Marketing Claims,” or “Green Guides,” are the most frequently cited source of guidance for green marketing in the U.S. 16 C.F.R. § 260 et seq. Initially published in 1992 and most recently updated in 2012, the Green Guides advise advertisers on the kinds of practices that the FTC considers deceptive, and thus subject to its authority under Section 5 of the FTC Act, which broadly prohibits all persons from making “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1).

In general, the Green Guides promote the same advertising principles set forth throughout other FTC guidance, and in court decisions involving false advertising litigation: advertisements should be truthful and transparent, and should use disclosures as needed to prevent deception. The Guides explain the central theme: “A representation, omission, or practice, is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions.” 16 C.F.R. § 260.2. “To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement reasonably conveys.” After they have identified such claims, “marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claim.”

Several specific guidance principles appear throughout the Guides.

Don't Overstate or Deceive

The “environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication,” and “marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.” 16 C.F.R. § 260.6(c). Specific deceptive messages include misrepresentations that a product, package, or service offers a general environmental benefit, has been endorsed or certified by an independent third party, or is compostable, degradable, free-of a substance, non-toxic, ozone-safe or friendly, recyclable (or contains recycled content), refillable, or made of renewable materials.

Don't Omit Material Information

Even if technically true, a statement can be deceptive if it omits material information. For example, pursuant to the Green Guides, a claim that a product is “free-of” a particular substance may still be deceptive if the product, package, or service contains or uses a substance that poses the same or similar environmental risks, or the substance has never been associated with that product category. 16 C.F.R. § 260.9.

Avoid Broad, Vague, Unqualified, or General Claims

According to the FTC, businesses should avoid sweeping statements like “green” or “eco-friendly” without providing the specific bases for such claims. “[U]nqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings.” 16 C.F.R. § 260.4(b). The term “eco-friendly” is “likely to convey that the product has far-reaching environmental benefits ... and no negative environmental impact.”

Support Claims with Competent and Reliable Evidence

The Green Guides advise that express or implied claims of an objective assertion about an environmental attribute must, at the time the claim is made, have a reasonable basis. “[S]ubstantiation will often require competent and reliable scientific

evidence, defined as tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.” 16 C.F.R. § 260.5.

Follow Term-Specific Guidance

The Green Guides contain specific advice as to numerous environmental marketing buzzwords, such as “recyclable,” “compostable,” “ozone friendly” and “renewable.”

Warnings and Claims

The FTC has issued numerous warning letters and brought several enforcement actions against marketers over allegedly deceptive environmental claims. These suits have concerned a wide range of products (e.g., baby mattresses, diapers, light bulbs, paints, plastics) and issues (e.g., “biodegradable,” “recyclable,” “recycled materials,” “zero VOC,” “bamboo,” and certification representations).

Although the Green Guides are found in the Code of Federal Regulations, they do not have the force of law. Instead, they are “administrative interpretations of laws administered by the [FTC] for the guidance of the public in conducting its affairs in conformity with legal requirements.” 16 C.F.R. § 260.1. Failing to comport with the Guides is therefore not, in itself, sufficient for the FTC to establish a claim under its Section 5 powers.

In *ECM BioFilms, Inc. v. Fed. Trade Commn.*, 851 F.3d 599 (6th Cir. 2017), the FTC had brought claims against the maker of an additive that helps plastics biodegrade, concerning its claim that its products were “biodegradable.” The FTC claimed that the advertisements violated the Green Guides, which provide that the term should be avoided for products that do not biodegrade within a year. An administrative law judge held that the FTC could not simply rely on the one-year rule in the Guides, but had the burden of proving that reasonable consumers would be deceived. After a three-week trial, the ALJ [found](#) that the FTC had not met this burden.

On appeal to the FTC Commissioners, the Commissioners held that regardless of the Green Guides’ one-year rule, the “biodegradable” claim would deceive a “significant minority” of reasonable consumers, and thus violated the FTCA, because the product did not biodegrade in five years. This was both the time period advertised by ECM for a substantial portion of the time period at issue, and the amount of time the FTC claimed that reasonable consumers would believe it would take a product advertised as “biodegradable” to completely biodegrade. ECM appealed to the Sixth Circuit, arguing that, as with the one-year standard, a reasonable consumer would not share the new five-year standard.

On March 16, 2017, the Sixth Circuit rejected ECM's arguments and affirmed the Commissioners’ finding that the advertisements were deceptive. The Court held that substantial evidence—in the form of consumer surveys by both the FTC's expert and the manufacturer's expert demonstrating that adding the term “biodegradable” caused additional 20% of consumers to believe that plastic would fully decompose within five years—supported the FTC's determination that the manufacturer's representation that plastic containing its additive was biodegradable, without reference to any time frame, conveyed an implied claim that such plastic completely biodegraded within five years.

State Laws and Enforcement

All 50 states and the District of Columbia have laws prohibiting unfair or deceptive conduct, which public enforcers and private plaintiffs have used to bring greenwashing claims. Several states also have laws that specifically regulate green-marketing claims. Maine, Minnesota, New York, and Rhode Island have, to varying extent, adopted the Green Guides’ nonbinding standards as enforceable state law. Several other states’ laws, including California, incorporate compliance with the Green Guides as a safe harbor.

California's law provides that it is “unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied.” Cal. Bus. & Prof. Code § 17580.5(a). Compliance with the Green Guides is a defense to any claim brought under that section. California's law further requires that companies making environmental claims must maintain records to support those claims.

On May 4, 2018, the Florida Attorney General filed a complaint against restaurant Icebox Cafe, L.C., alleging that it violated Florida's Deceptive and Unfair Trade Practices Act by making misleading claims that its food products were “farm to table,”

"locally-sourced," and "sustainable." The AG alleged that Icebox charged a price premium because of these representations, when in fact very few of the items sold fit such descriptions. On July 25, 2018, the court entered a consent judgment, under which Icebox agreed to pay up to \$332,550 in penalties.

On Aug. 1, 2018, the Monterey County District Attorney, in conjunction with 22 other district attorneys throughout California, announced a \$1.512 million settlement in its case against Amazon, alleging that Amazon deceived consumers by advertising plastic products as "biodegradable" and "compostable." California law imposes an outright ban on the sale of plastics labeled "biodegradable" (or similar language), because, according to a press release from the district attorneys, "the ability of plastic to decompose depends greatly on the environment in which it is placed," and "Plastic can take hundreds of years to decompose in typical landfill conditions." As part of the settlement, Amazon agreed to cease advertising products as "biodegradable" or "compostable" without appropriate certification, and to pay CalRecycle \$50,000 to fund testing of plastic products marketed to consumers as compostable or degradable.

Consumer Class Actions

By far the most common source of litigation over green claims comes in the form of consumer class actions. These suits generally assert claims under state consumer protection laws, alleging false advertising. Not surprisingly, most of these suits are filed in California.

Typically, plaintiffs allege that they expect a green claim (such as "sustainable," "eco-friendly," or "fair trade") to mean XYZ, and that the product did not meet their expectations. Numerous suits follow this model:

- Many cases have alleged that various consumer goods (not just foods) marketed as "natural" are deceptive where the products contain any sort of synthetic ingredient or have been manufactured in some manner that requires technological processing.
- In *Walker v. Nestlé USA, Inc.*, Case No. 19-cv-723 (S.D. Cal.), the plaintiff claims that, "Notwithstanding knowing full well that its chocolate is primarily procured from farms using the worst forms of child labor, Nestlé slaps bogus 'seals' on its products claiming its cocoa is 'sustainably sourced' 'certified' and 'supports' or 'helps' farmers when it knows the opposite is true." According to plaintiffs, the cocoa comes from farms that use child and slave labor, and the company's supply chain has "virtually no environmental standards in place." Nestlé filed an anti-SLAPP suit on June 29, 2019, which has not been decided as of the time of publication.
- Consumer advocacy groups Food & Water Watch Inc. and the Organic Consumers Association have targeted two chicken processors in suits alleging that they deceive consumers through their statements concerning environmental responsibility. In the more recent suit, filed against Tyson Foods on July 10, 2019, the groups allege that Tyson deceives consumers by touting itself as "stewards of the animals" who are dedicated "to environmental leadership" and "protecting the planet," when in fact the company is the "second largest polluter" in the U.S. and abuses chickens. *Food & Water Watch Inc. et al. v. Tyson Foods Inc.*, Case No. 2019-CA-004547 (Sup. Ct. D.C.).

NAD Actions

Several actions have also been brought by the National Advertising Division of the Council of Better Business Bureaus. See, e.g. *Van Ness Plastic Molding Company, Inc. v. Olivet International, Inc.*, Case No. 6149 (concerning "compostable" coffee pods that were allegedly not suitable for composting at home, but instead could only be composted in industrial facilities); *Van Ness Plastic Molding Company, Inc. v. Olivet International, Inc.*, Case No. 6149 (concerning plastic containers "made of recycled materials"; the advertiser was able to substantiate its claims); *Nestle Nutrition USA, Inc. v. Beech-Nut Nutrition Company*, Case No. 6070 (concerning advertisements describing glass containers as "the ultimate in sustainability." NAD found that although the ad referred to the recyclability of the glass, the sustainability language was unqualified and could be deceptive).

Conclusion

Before touting the environmental benefits of a product, retailers and manufacturers should carefully scrutinize their claim substantiation, and how a consumer might argue that the product failed to meet her expectations. The more carefully advertisers qualify their claims, the better chance they will have of avoiding unwanted litigation.