

Even Courts Are Going Green.

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HOW TO PROTECT YOURSELF FROM GREENWASHING LITIGATION

This article was printed on biodegradable, post-recyclable paper with chemical-free ink, and produced in a carbon-neutral fashion by an energy-efficient printing company that uses only sustainable resources. Got your attention? Although untrue here, it is probably not the first time that you have heard an over-the-top, too-good-to-be-true line as it seems everyone is rushing to be “green” in the hopes of capitalizing on the environmentally-savvy consumer and his or her purchasing power. If such assertions stretch the truth or are not capable of sufficient authentication, however, they also may catch the attention of governmental officials or enterprising class-action attorneys.

Dubbed “greenwashing” or “eco-fraud,” these actions are brought against companies that engage in misleading or deceptive advertising regarding the environmental practices of the company or the green benefits of a product or service. As consumers have become more environmentally conscious and companies tout their “green” credentials in marketing and branding efforts, so has the scrutiny on companies whose promotional assertions might not be supported by the facts. Because of this heightened sense of environmental awareness, a company should be wary of screaming “green” without first performing the necessary due diligence on the product or service it is selling. If it does not, consumer class actions and federal and state enforcement of advertising and marketing regulations may be waiting around the corner.

TYPICAL GREENWASHING CLAIMS

Greenwashing litigation generally falls into one of three types of actions: (1) the public-enforcement action, (2) the consumer class action, and (3) the unfair-competition action. The “public enforcement action” is usually brought by the FTC and seeks injunctive relief to force offending companies to revise or cease deceptive marketing programs pursuant to Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. First written in 1992, and updated in 1996 and 1998,¹ the FTC’s Guides for the Use of Environmental Marketing Claims (16 C.F.R. pt. 260), or “Green Guides,” as they are commonly known, provide guidance as to how the FTC interprets Section 5 of the FTC Act with regard to environmental advertising and marketing practices. Although the “Green Guides” are administrative in nature, holding no force of law, the guidelines establish environmental-marketing criterion for American products to protect consumers. They also may provide compliant advertisers with a safe harbor to help avoid litigation and a potential defense to liability but, on the other hand, can provide the impetus for litigation if consumers recognize corporate-marketing practices are not in step with the regulations’ rules and illustrations. In sum, the Guides set the “rules

of the road” for what can (and cannot) be asserted about certain environmental attributes of product, and, along with illustrative examples, they set forth the evidence companies must be able to produce if they intend to make such green-marketing claims.

The second vehicle for greenwashing claims, and the one that creates the most financial concern for companies that tout their products as “green,” is the consumer product class action. Recent examples of greenwashing lawsuits include a consumer class action brought against Fiji Water, who marketed itself as “The World’s Only CARBON NEGATIVE bottled water.” In the action, consumers alleged that they were misled into paying more for Fiji water than competing brands because it was a carbon-negative product when, in fact, the company’s use of a practice called “forward crediting” meant it was rewarding itself for carbon-reducing actions that it had not yet taken. American Honda Motor Co. is another example, having recently found itself the target of a suit alleging that the Civic Hybrid consumed too much gas to live up to the company’s fuel-efficient description of the vehicle. And S.C. Johnson & Son, Inc., was also sued over the use of its “Greenlist” trademark, which consumers claimed was deceptive because it was actually a mark owned by the company itself, rather than a third-party endorsement.

Finally, some companies have confronted their competitors directly, seeking injunctive or declaratory relief for misleading or deceptive “green” advertisements in order to maintain parity in the marketplace. For example, Sony Corporation challenged Panasonic’s claims that its plasma televisions were “environmentally friendly” when it was known that plasma televisions used more electricity than LCD televisions. Dell, similarly, complained that Apple’s advertising, touting “the world’s greenest family of notebooks,” was deceptive and misleading,



which prompted Apple to change its marketing campaign to “the world’s greenest lineup of notebooks.” And, in New York, the manufacturer of a portable handheld steam cleaner was hauled into court by a competitor because the infomercial the manufacturer ran falsely claimed its product was “EPA tested so you know it’s safe” when the EPA had no testing or approval mechanisms for such a product.

HOW TO AVOID GREENWASHING LIABILITY

Although we live in a more eco-conscious society with consumers seeking out environmentally safe products and willing to pay a premium for such products, companies planning to market their products as “green” need to be vigilant and take the necessary precautions to prevent a greenwashing accusation. Below are some tips on how to avoid liability from greenwashing or “eco-fraud” claims, while still tapping into the new “green” consumer market.

- **Always Tell The Truth.** Although telling the truth in any marketing or advertising campaign should go without saying, the truth is sometimes ignored and stretched, hurting not only your company’s credibility with consumers but also opening yourself up to liability in litigation.
- **Be Relevant.** Do not make an environmental claim about your product that is unimportant or not helpful to the consumer. For instance, do not claim that a product is free from a chemical banned by the government for decades. This is misleading because every product is going to be free from a banned chemical.
- **Document, Document, Document.** Study, evaluate, and document the environmental impact of your product or service before you begin a “green” advertising and marketing campaign. Scientific and empirical studies help determine your product’s potential environmental benefits and risks, leading to a more focused advertising and marketing campaign and being a valuable resource if greenwashing or eco-fraud litigation is ever filed against you.
- **Be Precise and Avoid Vagueness.** If possible, absolute and vague terms in environmental advertising and marketing campaigns should be avoided because

they are difficult to substantiate and may mislead consumers. Refrain from touting your product as “environmentally friendly” and instead use the term “environmentally friendlier” because it is a claim that is easier to substantiate. Other terms from which you may want to shy away include, but are not limited to, earth friendly, eco-conscious, carbon neutrality, energy efficient, sustainable, renewable, organic, non-toxic, chemical free, all natural, recycled, and biodegradable.

- **Consult Guidelines.** You should consult and review environmental marketing guidelines before you begin your advertising and marketing campaign, like the “Green Guides.” Other third-party organizations that publish best practices for “green” advertising and marketing campaigns are the American National Standards Institute (“ANSI”), the International Organization for Standardization (“ISO”), the United States Environmental Protection Agency (“EPA”), and Consumer Unions (“CU”). In using these guides, you may be able to establish a “safe harbor” for your advertising if the government, consumers, or a competitor knocks at your door.
- **Seek Certification From Reputable Programs.** Environmental-certification programs provide consumers and companies with the assurances that the product they are buying or selling meets stringent environmental standards established by the program itself or an independent, unbiased third-party. Although a certification will not insulate a company from greenwashing or eco-fraud liability entirely, it may reduce the potential for liability. A few of the reputable programs that certify a product’s environmental footprint are Green Seal, Co-op America, MBDC: Cradle to Cradle, and EcoLogo.
- **Be Consistent And Diligent.** With the explosion of the Internet as a news and entertainment source along with other digital media forums, the possible avenues for environmental advertising and marketing are endless. These endless possibilities, however, also lay traps for today’s businesses. For example, if a product is not marketed as “green” but is placed on a television or radio show that publicizes itself as environ-

mentally-conscious, the product’s manufacturer may face some liability for implicitly greenwashing its product. As a result, companies should routinely and carefully review their environmental advertising and marketing plans for consistency to avoid potential claims.

CONCLUSION

Although honesty, consistency, and research are the cornerstone of any marketing campaign, this has become especially true in today’s green-focused economy. A company must do its homework and stay true to its product if it wants to avoid the pitfalls of litigation with government regulators, consumers, and competitors because today, like Kermit said, “it’s not easy being green.” However, if they follow the rules outlined above and avoid the traps into which other companies have fallen, there is nothing to stop any company from successfully marketing the “green” aspects of its products or services.



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¹ Noting a rise in complaints concerning greenwashing and misleading advertising campaigns, the FTC is currently revising the Green Guides.