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Risks And Rewards Of Greening Your Product

Law360, New York (September 23, 2009) -- Wasn't violet the most popular color in the rainbow at one point? Now green has certainly claimed the top spot, and there are no pots of gold or leprechauns involved. Rather, it seems that all businesses must move toward "greening" their products just to stay competitive in the marketplace.

The good news is that this green wave is leading to the production of new products made from natural materials, products with fewer chemical emissions and products that conserve natural resources.

In fact, the number of "green" products on the market has increased steadily in recent years, leading 43 percent of companies to increase spending on green marketing in 2009.[1]

Eighty-seven percent of polled consumers are concerned about the environmental and social impacts of the products they buy, and 33 percent of those polled indicated a willingness to pay a premium for "green" products.[2] The "green building" industry alone is projected to be a \$60 billion industry in 2010, up from \$7 billion in 2005.[3]

How a company makes the leap into green though can either lead to great success and an increased presence in this environmentally conscious marketplace, or it can lead to additional problems and more liability.

Thus, it is essential to understand what it means to "green" your product and consider the risks of "going green" up front in order to avoid ending up in the courtroom down the road.

What Makes a Green Product "Green?"

There are almost as many definitions of "green products" out there as there are colors in the rainbow. There is no single standard for determining whether a product qualifies as "green."

Rather, the analysis focuses on the materials used to produce a product and where those materials originated, with special consideration given to the manufacturing, use and disposal of the product. Additionally, products may be considered "green" based on multiple characteristics or overall environmental performance.

There seem to be five main categories of "green" products. First, green products are made with salvaged, recycled or agricultural waste content. This is pretty much self-explanatory and focuses on the composition of the product itself.

Second, green products conserve natural resources. These products may reduce material use, which means that products do not need to be distinctively green on their own as long as they reduce the materials needed for a project.

The second category also includes products with exceptional durability or low maintenance, as well as rapidly renewable products (e.g. biodegradable, low in chemical emissions or produced from agricultural crops).

The third, and perhaps most easily definable category, includes those products that avoid certain chemical emissions. These products are not always "good" for the environment, but they are superior to like products on the market (e.g. a sealant with less volatile organic compounds (VOCs) than its competitors).

Fourth, products can be green if they contribute to a safe, healthy building environment, such as reducing or blocking the spread of indoor air pollutants (e.g. zero or low VOC paints), and fifth, green products include those that save energy or water (e.g. energy efficient clothes washers and dryers).

A product, however, can be considered "green" for more than one reason. For example, an adhesive that is manufactured to emit less VOCs than market competitors may be considered green pursuant to the definitions in categories (2), (3) and (4) above.

So not only are the definitions broad and somewhat intangible, but the determination of how to meet these qualifications can vary as well.

Labeling the "Green" in the Product

So once you define your product as "green," the challenge becomes determining the best way to communicate this fact to the marketplace in a way that accurately represents its characteristics and potential benefits.

Thus, it is important to consider green certification, which is the voluntary eco-labeling of a product. Eco-labels present a claim of an environmental benefit, either self-declared or pursuant to one of these certifications.

The certification landscape, however, is broad and it is easy to confuse a valid, independent third-party certification with a simple self-reporting directory that has no external mechanism to ensure the validity of the party's representations.

In short, the various green certification programs operate by comparing products or services that fall within the same industry sector against other like products, evaluating whether the product in question meets the identified scientific criteria for the lifecycle of that product (from initial production to final disposal).

Although the scientific criteria that serve as the cornerstone of these certifications may vary, the strongest certification programs have examined the scientific aspects of the relevant categories of products to identify these criteria, and/or have adopted the International Organization for Standardization (ISO) criteria, which set forth voluntary standards for environmental management systems, including labeling, which is part of ISO 14000.

Whether it is Green Seal, Eco Logo, Green Guard or some other certification, overall, the goal is to identify those products with the highest level of protectiveness of human health and the environment. In order to obtain the certification, the manufacturer actually tests its product to see if it meets the applicable scientific criteria.

In the case of the strongest, most reliable certifications, the organization providing the certification independently verifies that the requirements have been met. Otherwise, the validity of the representations are left to the competition to evaluate.

New certifying entities and labeling programs continue to emerge daily. For example, Wal-Mart recently announced that it will launch a program that will include "green" ratings on all goods it sells.

To compile this information, Wal-Mart plans to send a list of questions to suppliers so that it can make a preliminary determination of the environmental impact of the supplier's manufacturing process (e.g. carbon dioxide emissions, water usage).

Thus, the Wal-Mart consumer will see a "green" label on many of the products in its stores, but must keep in mind that the label is limited to how the product was made and provides no representation regarding the performance of the product.

Thus, it is essential to understand the scope and impact of each of these certifications before identifying which one best fits your product.

Some of these certifications require an audit of the applicable manufacturing facility, and all certifications require payment of a fee, ranging on average from \$1,500 to \$10,000 per product, with a yearly cost for renewal of the certification.

Since there is no general consensus regarding the best third-party certification program, companies should talk to relevant trade associations, consumers and business

partners to determine what type of label or certification will have the most impact in their "green" corner of the market.

The Legislative Landscape for Green Product Manufacturers

Confusion regarding how to define a product as "green" and how best to market it as "green" is further confounded by the fact that legislation pertaining to green products varies significantly, on the local, state and national levels, and seems to be changing daily.

It is, therefore, imperative up front to consider all legislation and regulations that could affect the manufacture, sale or distribution of the green products in order to best minimize potential liabilities.

The majority of laws and regulations in place focus on requiring federal, state and local agencies to purchase "environmentally preferable products" and services, or requiring the use of "green products" in government projects.

The complication with implementing these requirements circles back to how "green products" are defined and whether obtaining a certification is sufficient.

Most of the remainder of the legislation that is not marketing-focused, provides tax abatements or incentives to promote "green building" or for using "green" products in government projects.

Perhaps, one of the most significant areas of the legislative landscape to consider is the Federal Trade Commission's "Green Guides," which regulate the marketing of green products by defining acceptable "green" advertising.

The Green Guides currently require advertisers to be clear about environmental attributes and not overstate their "green" claims, however, they are under review to address emerging technology and changing consumer expectations.

It is anticipated that there will be significant FTC enforcement actions through the Green Guides in the near future.

Avoiding Colorful Green Litigation

As with any emerging area of law, claims arising from "green" products did not appear until some time after the introduction of the products themselves.

Nonetheless, as consumer expectations rise, courts across the country are beginning to see claims pertaining to whether "green" means a product is safe, and what "sustainable" means in terms of useful life and required maintenance.

Most claimants in this area are adapting traditional legal theories to this new market, and manufacturers are finding that the "green" certifications discussed above do not provide immunity against these claims.

"Green" products manufacturers are likely to face the traditional product liability claims, such as breach of warranty, failure to warn, negligence and strict liability, from plaintiffs ranging from consumers to builders to developers to distributors.

Does marketing a product as "green" create a warranty? Can a manufacturer be liable for failure to warn or for providing a product claimed to provide certain benefits that does not live up to these representations?

What if a manufacturer is selling its product for use in a "green" building and represents it will obtain a certain certification, but is unable to do so? Many of these questions may end up being resolved in the courtroom.

Perhaps the biggest risk to "green" product manufacturers is the consumer class action, which may provide for punitive damages and attorneys' fees in addition to traditional litigation costs.

Class actions also increase the scope and complexity of litigation, ratcheting up discovery costs and complicating the settlement evaluation process.

Companies already have seen this issue emerge in connection with "greenwashing" claims, where the suit alleges that a manufacturer provided misleading, inaccurate, unsubstantiated or deceptive advertisements, usually pursuant to federal or state laws or regulations that prohibit such deceptive marketing practices.

Such claims provide a good incentive to exercise caution in advertising practices. Phrases such as "environmentally friendly" or "good for the environment" should be avoided and marketing campaigns should be narrowly tailored to the particular environmental benefit that is accurately attributable to the product in question.

The issue of "greenwashing" is compounded by the fact that manufacturers may expedite the process to get a "green" product to market, and although some testing may be done, the consequences of all of these new product formulations over their entire lifecycle remain an unknown.

For example, a new formulation of an adhesive may mean less VOC emissions right now, but will it hold together the roof on a building 20 years from now just like the old VOC-filled adhesive did?

Thus, manufacturers should consider these "green" claims as traditional product liability claims with a twist, and those that have defended such claims recognize that they are expensive and often lengthy propositions.

The choice to look at all aspects of going "green" up front and to fully evaluate the risks and benefits of greening a product, whether it is by manufacturing, selling or distribution, can lead to a tremendous savings at the end of the rainbow.

--By Heidi B. Goldstein (pictured) and Emily S. Huggins Jones, Thompson Hine LLP

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[1] See The Green Outlook 2009, available at www.sustaincommworld.com/pdfs/The_Green_Outlook_Brochure_Appleton.pdf

[2] See Cultivating the Green Consumer, Stanford Social Innovation Review, Fall 2008, available at www.ssireview.org/articles/entry/cultivating_the_green_consumer/

[3] McGraw Hill Construction Report, 2008