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GREEN PRODUCTS UPDATE**More Cops on the Green Beat**

The “green police” are out. Companies manufacturing, selling, marketing or distributing products they identify as green or some variation of green (e.g., sustainable, recyclable, biodegradable, energy efficient, environmentally friendly) can face enforcement actions brought by federal and state agencies as they exercise their respective jurisdictions to test the verifiability of “green” claims. A recent United States Department of Energy (DOE) action enforcing labeling standards illustrates this point.

On January 18, the United States District Court for the District of Columbia upheld the DOE’s decision to order the removal of the ENERGY STAR label from refrigerator-freezers manufactured by LG Electronics U.S.A., Inc. (LG) in *LG Electronics U.S.A., Inc. v. United State Department of Energy*, United States District Court for the District of Columbia, No. 09-2297. The DOE had previously ordered LG to remove the ENERGY STAR energy efficiency label from approximately 40,000 of its refrigerators on or before January 20, 2010. ENERGY STAR, one of several eco-label programs available for products, is a voluntary joint program of the U.S. Environmental Protection Agency (U.S. EPA) and the DOE. The certification indicates that a product delivers the same or better performance as comparable models while using less energy. A manufacturer must test the product in accordance with U.S. EPA/DOE standard procedures and report the findings in order to qualify for using the label.

This dispute arose out of an agreement between LG and the DOE concerning the procedures LG used to test the energy efficiency of certain french door refrigerator models. In November 2008, LG and the DOE entered into an agreement that detailed how these refrigerator models were to be tested. After *Consumer Reports* conducted independent tests to validate LG’s energy claims, the DOE received reports from two additional independent laboratories indicating that certain LG refrigerators bearing the ENERGY STAR label did not meet the ENERGY STAR criteria, and that some did not even meet statutory minimum efficiency standards. Because the tests confirmed that the agreed-upon testing protocol underestimated the amount of energy used by these refrigerators, the DOE terminated the agreement and ordered the removal of the ENERGY STAR label from approximately 40,000 units.

On December 4, 2009, LG filed suit in the District of Columbia seeking injunctive relief to prevent the removal of the ENERGY STAR label and seeking a declaratory judgment that the DOE’s actions were arbitrary and capricious. LG claimed that it would suffer irreparable harm because forcing it to remove ENERGY STAR labels from thousands of refrigerators would discredit its reputation. The District Court disagreed and said that the harm that LG would suffer would be “relatively trivial” considering the wide variety of consumer goods that it produces and the fact that the decision only affects a limited number of units from a single product line. The Court also

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stated, “[t]he public interest factor supports DOE, as the public undoubtedly has a strong interest in ensuring that products bearing the ENERGY STAR label have met the rigorous energy efficiency standards prescribed by law.” (Memorandum Opinion, p. 27)

Although LG’s issues with its use of the ENERGY STAR certification arose from competitors identifying its potential failure to meet the relevant standards, the DOE is planning to target resources toward such efforts. In fact, the agency has said that it plans to tighten enforcement of the ENERGY STAR program, promising “aggressive action to ensure manufacturers deliver the energy and cost savings” promised by their green claims (<http://www.energy.gov/news2009/8529.htm>).

To date, the Federal Trade Commission (FTC) has taken a leading role in regulating environmentally oriented advertising claims by administrative rule and by civil enforcement. The FTC currently is preparing revised Guides for the Use of Environmental Marketing Claims (commonly known as the “Green Guides”), which will address the standards governing the representations of products as “environmentally beneficial” or “green” in advertising and marketing material. Thus, in light of increased enforcement by the DOE and new guidelines from the FTC regarding advertising claims, it is recommended that companies conduct detailed analyses, ideally using independent third parties, to verify any representations they are making that a product is in any way “green.”

FOR MORE INFORMATION

For more information, please contact:

Heidi B. Goldstein	216.566.5559	Heidi.Goldstein@ThompsonHine.com
Thomas F. Zych	216.566.5605	Tom.Zych@ThompsonHine.com
Christopher J. Klasa	216.566.5921	Chris.Klasa@ThompsonHine.com

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