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**This Week's Double Feature**

**The Coming Wave of Greenwashing Class Action Lawsuits**

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"Going green" with your company's products is both a positive corporate value and the commercially smart thing to do, but it also can be an invitation for litigation. Unfortunately, the confusion over what it means to be "green" and enhanced enforcement by the Federal Trade Commission (FTC) is beginning to fuel the next wave of consumer class actions. Your company should take a hard look at its environmental claims before that consumer class action lawyer takes issue with your "earth-friendly" advertising.

**"Green" Is Gray**

Because of the consumer tendency to purchase "green products," most consumer-facing businesses and many commercial suppliers have felt pressure to advertise the "green" aspects of their products. But while the marketplace has no shortage of green products available, there is no consensus on a universal objective standard for defining what makes a product green. As a result, companies that advertise their products as "green," "natural," "biodegradable," "eco-friendly," or "earth friendly" sometimes have inconsistent bases for using such labels, leaving consumers questioning whether their purchase was as environmentally friendly as they expected.

One emerging trend is the development of accepted independent indicia of "greenness" – the 21st Century equivalent of the Good Housekeeping Seal of Approval. Although there is no defined leader in green product certification, some popular options have emerged, including "Green Seal," "Greenguard," "USDA Organic," "Energy Star" and "Ecologo." These and other certification options focus on everything from the recyclability of product packages to the type and extent of chemicals that are emitted from the product. Perhaps in response to the lack of consensus as to what is a "green" product, some companies have even created their own, internal certification process for identifying particular products as environmentally friendly.

**The FTC's Efforts to Clarify the Appropriate Scope of Environmentally Friendly Advertising**

In an attempt to clarify an otherwise uncertain green marketing

landscape, the FTC has taken steps to provide companies with guidance regarding the proper scope of their green marketing. Specifically, the FTC currently is finalizing the long-awaited update to its "Green Guides" (16 C.F.R. Part 260), which provide companies with recommended parameters for their environmental advertising. The Green Guides are administrative interpretations of FTC law and a statement of its enforcement intentions, not full-blown administrative rules. However, failure to conform environmental advertising to the Guides could result in the FTC taking civil action against the company pursuant to the Commission's authority under Section 5 of the FTC Act, which declares unlawful "unfair or deceptive acts or practices in or affecting commerce." *See* 15 U.S.C. § 45(a)(1).

The Green Guides provide several practical examples of forms of marketing that could be viewed by the FTC as misleading. For example, the Green Guides warn against overstating the environmental attributes of a product. If a package is labeled "50% more recycled content than before," but the manufacturer merely increased the recycled content of its package from 2% recycled material to 3% recycled material, the claim is deemed misleading because it is likely to convey the false impression that there has been a significant increase in the recycled material used in the product. *See* 16 C.F.R. Part 260.6(c). The Green Guides also provide examples of deceptive forms of advertising the recyclability of your products. If a product is simply advertised as "recyclable" without further explanation, consumers are likely to assume that the entire product and package are recyclable. If the product and package that typically remain after use of the product are not recyclable, this form of advertising would be considered misleading by the FTC. *See* 16 C.F.R. Part 260.7(d).

In addition to its efforts to provide guidance regarding the appropriate scope of green marketing through the Green Guides, the FTC recently has taken a more aggressive stance by filing civil lawsuits against companies that it perceives have improperly advertised the environmentally friendly nature of their products. For example, the FTC announced in June 2009 that it was charging three companies with making false and unsubstantiated environmental claims in violation of Section 5 of the FTC Act. Each of the claims relates to advertisements by retailers that certain products they sell are "biodegradable." According to the FTC, the subject products are improperly advertised as biodegradable because the products do not comply with the Green Guides, which state that advertising a product as biodegradable requires proof that the entire product or package will completely break down and return to nature within a reasonably short period of time.

These high profile steps by the FTC to reign in green marketing confirms its intention to hold companies to a higher standard when it comes to green advertising. Green marketing that is determined to be deceptive or misleading, known as "greenwashing," also was recently highlighted by environmental marketing firm TerraChoice, when it published a study called "The Six Sins of Greenwashing," which was updated in April 2009 to include a seventh "sin." The study, which follows a strict view of what constitutes deceptive green advertising, found that

*more than 99% of 1,018 common consumer products randomly surveyed exhibited one or more forms of greenwashing, including advertising that a product is “certified organic” even if there was no verifiable certification, and advertising that a product is “100% natural” even though many naturally-occurring substances are hazardous. While TerraChoice’s position regarding greenwashing is extreme, it was given consideration by Congress in June 2009, when TerraChoice’s Vice President testified before Congress’ Subcommittee on Commerce, Trade and Consumer Protection.*

### **State Law Class Actions Pick Up Where the FTC Leaves Off**

While a company may have honest intentions when manufacturing and advertising environmentally friendly products, the crackdown by the FTC on green marketing, the broad definition of greenwashing described by TerraChoice, and a market that is already skeptical of perceived corporate marketing ploys, create an environment where the manufacturer must tread carefully to avoid modern commercial class action litigation.

There is no private cause of action for violations of the FTC Act. However, every state has adopted some form of consumer protection statute, allowing a private cause of action for fraudulent or deceptive advertising. Since many of these state consumer protection statutes mirror the FTC Act, in whole or in part, the efforts of the FTC to prevent greenwashing may be used by plaintiffs’ attorneys to bring private causes of action, on a class action level, against the same or similar companies. Further, plaintiffs’ attorneys are in a position to “ride the coattails” of the FTC as it continues to file greenwashing lawsuits. FTC actions can provide a roadmap for filing putative greenwashing class actions, and Freedom of Information Act requests can actually provide plaintiffs with valuable pre-suit discovery.

In fact, this scenario already has appeared in other non-“green” FTC enforcement actions. In a recently filed action, plaintiffs are seeking certification of a nationwide consumer class arising from a well-known drug store’s allegedly fraudulent marketing of a product that it marketed based on the product’s purported ability to prevent or reduce the risk of catching the common cold. According to plaintiffs, the product is deceptively marketed because there is insufficient evidence that the product can actually prevent colds. Not coincidentally, plaintiffs filed the lawsuit seeking class certification just months after the FTC settled its case against the defendant for the same purportedly false and deceptive advertising.

Likewise, class action litigation arising out of perceived greenwashing already has commenced. In California, a class action lawsuit was filed that involved advertising related to a granola bar that was described as “100% Natural.” Plaintiffs in that lawsuit alleged that the advertising is false, misleading and deceptive because the product contains ingredients that they consider “artificial,” such as high fructose corn syrup. According to the plaintiffs, use of the term “natural” implies that the

product is not highly processed and, otherwise, is a superior product to a non-natural alternative. Since high fructose corn syrup does not occur in nature and, instead, is man-made, the plaintiffs alleged that use of the term “natural” was false and misleading. Similar claims for alleged deceptive “green” advertising have already been filed and more will almost certainly be filed in the years to come.

These claims are typically based on state consumer protection statutes. While each state's version of consumer protection may vary, consumer protection statutes typically require proof of a deceptive act or practice by defendant (either statutorily defined or interpreted by case law) that causes injury or damage to the plaintiff. Since advertising is intended to induce large numbers of consumers to purchase products, a product that purportedly violates a consumer protection statute is often targeted as a potential class action lawsuit. If plaintiffs succeed in establishing a consumer protection violation, the remedies include the recovery of compensatory damages and, often, multiple and/or punitive damages. Because most consumer protection statutes allow successful plaintiffs to recover attorneys' fees and costs, there is plenty of incentive for plaintiffs' lawyers to pursue questionable claims of little value to any individual consumers.

The granola bar case mentioned above provides a glimpse of the types of claims the plaintiffs' bar has begun to assert, focusing on ambiguous terms such as “100% natural.” In much the same way, the marketplace now has become replete with green terminology which has not been commonly defined. Unfortunately, the plaintiffs' bar is beginning to make a living in this gray area that surrounds what it means to be green.

### **How to Avoid Becoming a Greenwashing Target**

Until the terminology used in green marketing is objectively defined, virtually every company that advertises a green product is at risk for potential litigation, which will likely come in the form of a consumer class action. However, taking the following steps to prepare a comprehensive marketing strategy can greatly reduce your vulnerability to this type of litigation.

Step One – Follow the Green Guides: To the extent you want to use green buzz words, such as “biodegradable,” “organic,” or “100% Natural,” the FTC provides a general outline of what standard should be followed. *See* 16 C.F.R. Part 260. While the Green Guides are not law, they provide objective guidance to follow when developing your advertising terminology. Should your advertising violate one or more of the guidelines that the Green Guides provide, plaintiffs' attorneys will likely rely heavily on the Green Guides to show that you, like other companies, were warned by the FTC that certain forms of advertising are misleading to consumers. By strictly following the Green Guides, you will potentially reduce plaintiffs' attorneys' ability to use one of the few objective benchmarks for environmentally-friendly advertising.

Step Two – Use Credible Third-Party Certification: Until the FTC, extensive case law, or the marketplace develop a clear

definition of the scope of environmentally-friendly advertising, the burden will be on product manufacturers to use plain terminology in product labels and advertising. While self-certification is not precluded, the most objective way to certify your “green” product is to use a nationally recognized, neutral, third-party certification process. While there are many credible third-party certification options (including “Green Seal,” “Greenguard” and “Energy Star”), the meaning of “green” is unsettled and evolving, and there is no clear-cut industry “green” standard-setting entity. It will be important to continue to monitor the marketplace to make sure that your certification option has not changed its standards, and that it still enjoys support from the current marketplace.

Step Three – Substantiate: Most green claims amount to assertions of fact concerning environmental or health benefits. When making such a claim, the company should have available to it reasonable scientific or equivalent evidence supporting the truth and relevance of the claim. If, for example, a company advertises that its new product reduces greenhouse gas emissions by 25%, it should have reliable evidence, obtained through valid tests replicating actual conditions of use, demonstrating that reduction.

Step Four – Keep in Mind “The Seven Sins of Greenwashing”: Clearly, TerraChoice’s exceptionally broad classification of virtually all green product marketing as committing one or more “sins” creates the impression that there is no safe form of green marketing. In fact, this vision of green marketing appears untenable to most companies. While some of its suggestions (such as the “sin of fibbing,” which essentially says that you should not lie about your products) make sense and should be followed, other “sins” should be taken with a grain of salt. Ideally, you should review TerraChoice’s “sins” to get a sense for the types of marketing that plaintiffs’ attorneys will likely seize on as the basis for potential future class action lawsuits. After that, you should strongly consider whether these strict “standards” are realistic for the marketplace, and consider them in collaboration with the Green Guides and advice from your legal counsel to determine the appropriateness of your intended marketing.

Step Five – Get a Second Opinion: The best way to limit your likelihood of enduring green class action litigation is to have your legal counsel review your marketing plan prior to rolling it out. While it is easy to think that your advertising could never be perceived as false or misleading, even those with the best intentions can be attacked for poor marketing decisions. Your legal counsel can review your marketing plan in advance, identify common green marketing pitfalls, and greatly increase your chance of avoiding litigation or, at the least, increase your chances of successfully defending a greenwashing class action lawsuit should one be filed.

## **Conclusion**

Although most would agree that the availability of “green” alternatives to today’s consumers is a positive step toward meeting earth-friendly consumers’ purchasing expectations,

companies need to be wary of a hasty step into green marketing without careful planning. Based on past class action litigation, including the granola bar case discussed above, it is apparent that the plaintiffs' bar is looking to green marketing as an opportunity to cash in on a currently undefined marketplace. While the FTC has taken steps to aggressively pursue greenwashing causes of action, it also has created a roadmap for future private causes of action pursuant to state consumer protection statutes. In light of the uncertainty regarding what makes a product "green," companies must be careful in preparing a thoughtful and objectively verifiable marketing plan that will minimize the risk of being a greenwashing class action target. Through well-planned marketing, a company will be able to prepare itself to defend the coming wave of greenwashing class action litigation.

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