

Avoiding Greenwashing Litigation

In the past several years, environmentally friendly products and services have become a popular and lucrative alternative for many industries. Not surprisingly, as the “green” industry trend continues to grow, so too are lawsuits and false-advertising claims relating to a particular product or service’s environmentally safe attributes.

Clients with ambitions of incorporating the green industry into a new or existing business must therefore be well advised on their marketing decisions before embarking on a green-based advertising campaign. Failure to do so could result in an action for false advertising for what is more commonly known today as “greenwashing.”

TerraChoice Group Inc., an environmental marketing agency, describes “greenwashing” as “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.”



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However, simply making a false claim may not be the only manner by which a client can potentially be accused of greenwashing. Indeed, TerraChoice has identified several pitfalls that a client should be aware of to help avoid becoming the unenviable subject of greenwashing litigation:

- Suggesting that a product is “green” based on an unreasonably narrow set of attributes. For example, suggesting that paper from a sustainably harvested forest is not necessarily environmentally friendly without considering the process involved in manufacturing the paper.
- Making environmental claims that cannot be substantiated by accessible supporting information or by third-party certification. For example, making a claim that a product is comprised of certain percentages of post-consumer recycled content without providing any evidence to support these percentages.
- Poorly defining an environmental claim or broadly defining a product’s attributes. For example, stating that a product is “all natural” without regard to the fact that an environmentally “unfriendly” product can still be considered “all natural.”
- Convoluting irrelevant claims with purported environmental benefits of the product. For example, advertising an aerosol product as “CFC-free” when CFC’s have been banned by law.
- Asserting an environmental claim that may be true about a particular product category or industry, without considering or addressing the risk that the particular category or industry presents as a whole. For example, promoting the “fuel efficiency” of a sport utility vehicle, without addressing the fact that sport utility vehicles are generally regarded as environmentally unfriendly alternatives to other automobiles and modes of transportation.
- False labeling a product to give the impression of third-party endorsement where no such endorsement exists.

When these points are considered, it becomes apparent that many forms of client advertising or marketing are at risk of being declared to be “greenwashing.” TerraChoice estimates that over 95 percent of the products surveyed exhibited at least one of the foregoing greenwashing pitfalls. See TerraChoice’s “2010 Report on Environmental Claims Made in the

North American Consumer Market” for details regarding the survey.

It is therefore not only important for green industry clients — or clients hoping to expand into the green industry — to understand what should be avoided, but furthermore, what the potential penalties are for engaging in advertising or marketing that may be considered greenwashing.

Both the Federal Trade Commission Act and the Lanham Act provide statutory violations and penalties that may be applied to marketing and advertising efforts which may be declared to be greenwashing.

On the regulatory side, Section 5 of the FTC Act provides that “unfair or deceptive acts or practices” and “unfair methods of competition” in commerce are unlawful.

This provision has been used in the past against companies like K-Mart Corp., Tender Corp. and Dyn-E International, in connection with advertising the environmental attributes of their respective products. Penalties for violating the FTC Act can include cease and desist orders, civil penalties and fines.

On the civil side, the Lanham Act provides that companies can be held liable for advertising that misrepresents “the nature, characteristics, qualities, or geographic origin” of goods and services.

Moreover, civil penalties for violating the Lanham Act may include injunctions, disgorgement of profits, payment of the plaintiffs’ damages and costs, and, in exceptional cases, payment of the plaintiffs’ attorney’s fees as well as up to three times the amount of plaintiffs’ damages.

In addition to avoiding specifically identified marketing and advertising pitfalls detailed above, there are other actions clients can take to help minimize the risk of being accused of greenwashing. Familiarity with the FTC’s guidance document, “Complying with the Environmental Marketing Guidelines” is a good starting point. These FTC guidelines help explain how a consumer is likely to interpret environmental marketing claims so that clients/marketers can avoid making false or misleading claims.

The guidelines, however, do not establish enforceable standards for environmental performance claims or prescribed testing protocols; for example, the guidelines broadly define a “substantiated environmental claim” as a reasonable basis for a claim supported by competent and reliable scientific evidence in the form of “tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area conducted and evaluated in an objective way by qualified people using procedures generally accepted in the profession to yield accurate and reliable results.”

Thus, in addition to acquiring some familiarity with the FTC’s guidelines, clients may also wish to consider applying for a recognized compliance organization such as Green Seal or EcoLogo.

The certifications offered through these and similar programs help reduce the risk of engaging in greenwashing by allowing a client to assert that its product has gone through an ISO (International Organization for Standardization) recognized process that its product has less impact on the environment and human health than other noncertified, competing products.

With the rising popularity of environmentally friendly products and services among consumers and businesses alike, it is inevitable that clients will desire to incorporate the green industry into their future or existing business. Given this inevitability, clients must be advised to become familiar with the concept of greenwashing and take all necessary precautions to avoid becoming a party to any such litigation.

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