Greenwashing: What Your Client Should Know to Avoid Costly Litigation and Consumer Backlash

Michelle Diffenderfer and Keri-Ann C. Baker

There is no doubt that eco-friendly products have an edge in our "eco-conscious" society. We are drawn to products that make us feel good about buying them. After a hectic day at the office we are drawn to the opportunity to buy baby food, laundry detergent and socks that allow us to feed, clean and clothe our kids while saving a rain forest in some obscure part of the world at the same time. Put simply—green is good for business. Nonetheless, consumers are becoming skeptical of these eco-friendly product claims, prompting environmental and consumer rights groups to take steps to expose misleading claims. Further, as regulators are becoming wise to the practice of marketing with misleading green environmental claims, policies and procedures have been implemented to protect consumers from advertisements that exaggerate a product's environmental attributes.

The term "greenwashing" has been coined to refer to the phenomenon of eco-exaggeration. Many companies are using green messages to label and advertise their products as ones that are good for the environment when their products have little or no positive environmental benefits. Greenwashing also includes instances when the marketing claims are so vague it is difficult to determine what, if any, environmental benefits exist. At its heart, greenwashing is the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service. The federal government, state governments and consumers are taking action to combat those persons and entities that engage in exaggerated marketing of the environmental attributes of products, services and companies. Increasingly, greenwashing can result in public enforcement actions, civil lawsuits arising under federal and state law, consumer backlash, and a public relations nightmare.

The Federal Trade Commission's Green Guides

The Federal Trade Commission (FTC) is revising its "Guides for the Use of Environmental Marketing Claims," more commonly referred to as "Green Guides," a year earlier than planned due to the rise in consumer complaints about greenwashing. The Green Guides detail what companies that engage in eco-marketing should do in terms of substantiation, specificity, general claims, seal of approval and eco-seals/certification. Ultimately, the revised Green Guides will assist companies to avoid greenwashing and will protect consumers by establishing environmental marketing criterion for products in the United States. The Green Guides were created by the FTC in conjunction with the EPA in 1992. 57 Fed. Reg. 36,363 (July 28, 1992) (codified at 16 C.F.R. pt. 260). They were revised in 1996, 61 Fed. Reg. 53,311 (Oct. 11, 1996), and in 1998, 63 Fed. Reg. 24,240 (May 1, 1998). The Green Guides are the FTC's administrative interpretation of section 5 of the Federal Trade Commission Act (FTC Act) as applied to environmental marketing. 15 U.S.C. § 45(a)(1).

While the Green Guides do not have the force of law, they provide advertisers with a safe harbor to avoid lawsuits for unfair or deceptive environmental advertising. The Green Guides will be, at a minimum, extremely persuasive in a court of law addressing greenwashing issues. Once the revised Green Guides are adopted, lawyers can advise their clients to advertise within the boundaries set forth in the revised Green Guides to avoid any negative legal ramifications. The FTC's publication "Complying with the Environmental Marketing Guides" assists in understanding the FTC's interpretation of section 5 of the FTC Act and the currently adopted Green Guides. *See* Federal Trade Commission, *Complying with the Environmental Marketing Guides*, www.ftc.gov/bcp/edu/pubs/business/energy/bus42.shtm.

In 2007, the FTC began the rulemaking process to revise the Green Guides for a third time. 72 Fed. Reg. 66,091 (Nov. 27, 2007). As part of its rulemaking process, the FTC conducted three public workshops in 2008 to discuss Carbon Offsets and Renewable Energy Certificates, Green Packaging Claims, and Green Building and Textiles. As a result of these workshops, the FTC determined that several additional revisions to the Green Guides were necessary. Accordingly, on October 6, 2010, the FTC released another version of the Green Guides on its website and later published notice of the proposed changes in the Federal Register. 75 Fed. Reg. 63,551 (Oct. 15, 2010). The new proposed changes include additional guidance on marketing and product claims related to renewable energy, renewable materials and carbon offsets. *Id.* Public comment on the Green Guides closed December 10, 2010.

Ms. Diffenderfer is a shareholder and Ms. Baker is an associate with the Florida law firm of Lewis, Longman & Walker, P.A. They may be reached at mdiffenderfer@llw-law.com and kbaker@llw-law.com.

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The Green Guides help businesses that want to market their products as green to understand the limits of what can be claimed in an advertisement and what substantiation for environmental claims is necessary. The Green Guides provide many examples for consideration of what should and should not be done to market products, services or companies environmentally and are the centerpiece of the FTC's environmental marketing program. The Green Guides help companies marketing their products as green to avoid making "unfair or deceptive claims" that violate section 5(a) of the FTC Act. 15 U.S.C § 45(a). "The current Green Guides explain how consumers understand commonly used environmental claims, such as recyclable and biodegradable and describe the basic elements needed to substantiate those claims." FTC Statement, *It's Too Easy Being Green: Defining Green Marketing Principles*, at 2–3, Before the Committee on Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection, United States House of Representatives (daily ed. June 9, 2009) (internal citations omitted), *available at* www.ftc.gov/os/2009/06/P954501greenmarketing.pdf . In discussing the new Green Guides, Lesley Fair of the FTC's Division of Consumer and Business Education commented that "What the headline giveth, the footnote cannot taketh away." *FTC Holds its First Workshop on Green Advertising*, Environmental Leader: Energy & Environmental News for Business (Jan. 9, 2009), *available at* www.environmentalleader.com/2008/01/09/ftc-holds-first-workshop-on-green-advertising.

The revised Green Guides are likely to have a positive effect on consumers by establishing green marketing norms and allowing consumers to make educated decisions about the environmental attributes of the products they purchase. "The FTC has sought comments on whether they should address green claims, such as carbon neutral and sustainable, that were not common when the Commission completed its last review." *It's Too Easy Being Green: Defining Green Marketing Principles*, at 2–3. In addition to revising its Green Guides, the FTC has also increased enforcement under the currently adopted Green Guides and other available FTC rules to combat greenwashing.

State Laws

Individuals and companies that engage in greenwashing may also face legal liability under state laws. Many states have enacted so-called "Baby" or "Little" FTC Acts. Florida, for example, has adopted the Florida Deceptive and Unfair Trade Practices Act which prohibits unfair or deceptive acts or practices in commerce. *See* Fla. Stat. § 501.201 *et seq*. Additionally, Florida has adopted laws that prohibit all misleading advertisements and allows successful plaintiffs to recover both attorney fees and punitive damages. *See* Fla. Stat. § 817.41. Other states, such as California, have adopted strong consumer protection laws which can be used to address misleading greenwashing. California has adopted the Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 (2009), and the Unfair Competition Law, Business & Professional Code § 17200 (2008). The CLRA provides for: (1) actual damages; (2) injunctive relief; (3) restitution; (4) punitive damages; (5) other relief deemed proper; (6) potential additional monetary damages for senior citizens and disabled persons; (7) treble damages; and (8) attorney fees. Cal. Civ. Code § 1780. Further, it is likely that plaintiffs could bring common-law claims for greenwashing including, among others, fraudulent misrepresentation and breach of warranty claims. Several consumers have brought their greenwashing claims under California state law. *See Appliance Recycling Cts. of Am., Inc. v. Jaco Envtl., Inc.*, No. 09-55168, 2010 WL 1767313 (S.D. Cal. May 4, 2010) (claims asserted by plaintiff did not rise to the level of actionable claims); *Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453 (Cal. Ct. App. 2009); *KOH v. S.C. Johnson & Son, Inc.*, No. C-09-00927, 2010 WL 94265 (N.D. Cal. Jan. 6, 2010).

Litigation

To prevail under section 5 of the FTC Act, a plaintiff must show that either an advertisement is facially or literally false or that while the advertisement is not literally false the advertisement is likely to mislead or confuse consumers. In the former case, consumer deception is presumed. In the latter, a plaintiff must present proof of actual consumer deception or confusion. The FTC has increased its enforcement activities regarding the advertising of green products recently. In 2009, the FTC filed complaints against companies that allegedly made deceptive, misleading, false or unsubstantiated green claims regarding the makeup of products or the degradability of certain products. *See, e.g.*, *In the Matter of Kmart Corp.*, FTC File No. 082 3186, Complaint, Docket No. C-4263 (July 15, 2009); *In the Matter of Tender Corp.*, FTC File No. 082 3188, Complaint, Docket No. C-4261 (July 13, 2009); *In the Matter of Dyna-E Int'l, Inc.*, FTC File No. 082-3187, Complaint, Docket No. 9336 (May 20, 2009); *In the Matter of Pure Bamboo, LLC.*, FTC File No. 082 3193, Complaint, Docket No. C-4278 (Aug. 11, 2009); *In the Matter of Sami Designs, LLC,* FTC File No. 082 3194, Complaint, Docket No. C-4279 (August 11, 2009); *In the Matter of CSE*, FTC File No. 082 3181, Complaint, Docket No. C-4280 (Aug. 11, 2009); *In the Matter of the M Group*, FTC File No. 082 3184, Complaint, Docket No. 9340 (Aug. 7, 2009). These FTC complaints were followed shortly with a letter campaign of warning letters to another group of companies in 2010. All of these FTC complaints and warning letters were based on existing laws and rules such as the FTC Act, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, (Textile Act), the Textile Rules, 16 C.F.R. pt. 303, and the currently adopted Green Guides.

In late 2009, the FTC charged K-Mart, Tender Corp., and Dyna-E International with making false and unsubstantiated statements by the companies' alleged labeling and marketing of paper products as "biodegradable." *In the Matter of Kmart Corp.*, Complaint, Docket No. C-4263; *In the Matter of Tender Corp.*, Complaint, Docket No. C-4261; *In the Matter of Dyna-E Int'l, Inc.*, Complaint, Docket No. 9336. The FTC alleged that the companies' products were generally disposed of in landfills, incinerators and recycling facilities that made the paper

products impossible to biodegrade in a reasonable time. The FTC charges involved K-Mart's labeling of its "American Fare" brand of disposable plates, Tender Corp.'s labeling of its "Fresh Bath-brand" of moist wipes, and Dyna-E International's labeling of its "Lightload" brand compressed dry towels. *In the Matter of Kmart Corp.*, Complaint ¶¶ 6–7; *In the Matter of Tender Corp.*, Complaint ¶¶ 6–7; *In the Matter of Dyna-E Int'l, Inc.*, Complaint, ¶¶ 7–8. All three companies had labeled these products "biodegradable." *In the Matter of Kmart Corp.*, Complaint ¶ 4; *In the Matter of Tender Corp.*, Complaint ¶ 4; *In the Matter of Dyna-E Int'l, Inc.*, Complaint ¶ 5. Both K-Mart and Tender Corp. immediately agreed to orders that barred them from making deceptive biodegradable claims and required them to have competent and reliable evidence to support their environmental product claims. While at first it appeared that Dyna-E International, Inc. would litigate the proceeding, the parties ultimately entered into a consent agreement.

In August 2009, the FTC charged four companies selling clothing and other textiles with deceptive labeling and advertising. *In the Matter of Pure Bamboo, LLC,* Complaint, Docket No. C-4278; *In the Matter of Sami Designs, LLC*, Complaint, Docket No. C-4279; *In the Matter of CSE et. al.*, Complaint, Docket No. C-4280; *In the Matter of the M Group*, Complaint, Docket No. 9340. The FTC alleged that these companies made false and unsubstantiated "green" claims by claiming that their textile products were manufactured using an environmentally friendly process, that the products retained the natural antimicrobial properties of the bamboo plant, and that the products were biodegradable. *Id.* The FTC complaints noted that several claims related to rayon clothing being labeled as "100% bamboo fiber" and being marketed under names such as "ecoKashmere," "Pure Bamboo," "Bamboo Comfort," and "BambooBaby." FTC Press Release, (Feb. 3, 2010), *available at* www.ftc.gov/opa/2010/02/bamboo.shtm. The companies charged by the FTC entered into settlement agreements. These agreements bar the companies from claiming that any of their textile products are made of bamboo or bamboo fiber, that they are manufactured using an environmentally friendly process, that they are antimicrobial or retain antimicrobial properties, or that they are biodegradable unless the claims are true, not misleading and substantiated by competent and reliable evidence. FTC Press Release, (Feb. 3, 2010), *available at* www.ftc.gov/opa/2010/02/bamboo.shtm. Moreover, the settlements prohibit these companies from making any claims about the benefits or performance of their textile products unless the claims are true, not misleading and substantiated by competent and reliable evidence.

In early 2010, pursuant to the authority of the Textile Act and Rules and section 5 of the FTC Act and the Green Guides, the FTC sent letters to seventy-eight well-known companies with warnings that their respective advertisements could subject them to a public enforcement action. The FTC warning letters arose over the companies' alleged marketing practices of labeling and advertising their rayon textile products as "bamboo." Products made of bamboo are generally considered environmentally friendly, whereas rayon is a manmade product fiber created from plant-based cellulose and processed with chemicals that allegedly release harsh air pollutants. The FTC warning letter stated that "[r]ayon, even if manufactured using cellulose from bamboo, must be described using an appropriate term recognized under the FTC's Textile Rules and the FTC Act. . . . Failing to properly label and advertise textiles misleads consumers and runs afoul of both the Textile Rules and the FTC Act." *See* FTC's *Model Letter Requesting Companies to Review Labeling and Advertising for Textile Products and Requesting That They Remove or Correct Any Improper "Bamboo" Labeling or Advertising*, (Jan. 27, 2010), *available at* www.ftc.gov/opa/2010/02/bamboo.shtm; *see also* "Avoid Bamboo-zling Your Customers," *available at* www.ftc.gov/bcp/edu/pubs/business/alerts/alt172.shtm (FTC's staff's interpretation of the Textile Act and Rules). The companies that received the warning letters included: Amazon.com, Barney's New York, Bed, Bath & Beyond, BJ's Wholesale Club, Bloomingdales, Costco Wholesale, Garnett Hill, Gold Toe, Hanes, Isotoner, JC Penney, Jockey, K-Mart, Kohl's, Land's End, Macy's, Maidenform, Nordstrom, Overstock.com, QVC, REI, Saks Fifth Avenue, Sears, Shop NBC, Speigal, Sports Authority, Target, The Gap, the Great Indoors, Tommy Bahama, Toys"R"Us, Wal-Mart, and Zappos.com. *See* www.ftc.gov/os/2010/02/100203company-letter-recipients.pdf. It seems clear that the FTC will continue to use the FTC Act and the Green Guides, independently and in combination with other federal laws and rules, to bring public enforcement claims against companies making false or misleading green claims about their products or the environmental attributes of their products. Defendants who enter into a settlement agreement with the FTC or who have an order issued against them can face a civil penalty of $16,000 for each future violation of the settlement agreement or order.

It seems clear that the FTC will continue to use the FTC Act and the Green Guides to bring public enforcement claims against companies making false or misleading green claims about their products.

Private Enforcement in the Courts

In addition to FTC enforcement actions for greenwashing, companies can also face civil litigation from private parties such as consumers and competitors under federal and state law. Several

recent cases demonstrate how federal and state consumer protection laws are being applied to claims of alleged greenwashing. For example, in *Paduano v. American Honda Motor Company*, a consumer brought a claim for alleged violations of federal and state laws including the Song-Beverly Consumer Warranty Act, 15 U.S.C. § 2304(a)(4) (2009), the Magnuson-Moss Warranty Act, 49 U.S.C. §§ 32904, 32908(d) (2007), the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 (2009) and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et. seq.* (2008) over alleged greenwashing. 169 Cal. App. 4th 1453, 1461. In *Paduano*, the plaintiff alleged that Honda made the following green claims about its hybrid vehicle: (1) "With impressive fuel economy of up to 51 mpg you save money, the planet conserves resources and the air is just a little bit cleaner," *id.* at 1469; (2) "Is there anything special I need to do [to get up to 51 mpg]? You just have to love saving money and getting terrific gas mileage" *id.* at 1472; and (3) "Just drive the hybrid like you would a conventional car and save on fuel bills," *id.* at 1471. The plaintiff alleged that the hybrid vehicle only obtained half of the advertised 51 mpg and that he had "read and relied on the statements Honda made in an advertising brochure. *Id.* at 1459–60. The plaintiff drove the car for one year and became increasingly dissatisfied with the fuel economy of the vehicle. *Id.* at 1460. The plaintiff repeatedly complained about the vehicle's fuel economy. *Id.* Finally, after being informed by a Honda representative that "it is very difficult to get MPG on [the] highway and to drive with traffic in a safe manner," and that without changing his driving habits or otherwise driving in a specialized manner he would not obtain estimate mileage, the plaintiff requested the Honda repurchase the vehicle. *Id.* at 1460–61. The trial court granted Honda's summary judgment on all of its claims. *Id.* at 1459. The California appellate court held that while the car's failure to achieve the mileage estimate did not make the car defective under the warranty claim, the plaintiff could bring a claim against Honda under state law for unfair and deceptive advertising as to its hybrid vehicle and that such claims were not preempted by federal law. *Id.*

> Consumers are wary of companies' overstated or vague claims of their products environmental attributes and have shown the will to use the courts and social media to combat environmental exaggeration.

A consumer class action lawsuit was filed in federal court in California over alleged greenwashing pertaining to common cleaning products Windex® and Shout®. In *KOH v. S.C. Johnson & Son, Inc.*, the plaintiffs brought a civil class action lawsuit under California's Unfair Competition Law, California's False Advertising Law and the Consumer Legal Remedies Act, claiming that the labeling of the cleaning products was misleading. 2010 WL 94265, at *1. The cleaning products contained a trademarked "Greenlist" seal and stated that "Greenlist is a rating system that promotes the use of environmentally responsible ingredients." *Id.* The *KOH* court denied defendant's motion to dismiss finding that the plaintiffs had alleged a cause of action based on the allegedly misleading advertising through the use of the Greenlist seal which appeared to be a third-party rating seal but was actually an internally created marketing seal.

Consumers have also sued to require companies to disclose the ingredients contained in certain products that are advertised as having certain desirable environmental attributes. In *Women's Voices for the Earth, Inc. v. The Procter & Gamble Company*, No. 102035-09 (N.Y. App. Div. Feb. 9, 2009), six environmental and public interest groups filed suit in New York state court to obtain the ingredient and chemical list for cleaning products such as Ajax® and Tide®. *Women's Voices for the Earth* et al, Petition for Mandamus, ¶¶ 1–2. The plaintiffs sued under the Environmental Conservation Law (ECL) and regulations enacted to enforce the ECL. McKinney's ECL § 35-0107 (2009). The complaint alleged that consumers had absolutely no way of verifying the information claimed in the marketing of the cleaning products without access to the ingredient list. *Id.* This case was ultimately dismissed when the court held that the plaintiffs did not have a private cause of action to enforce the ECL or regulations passed pursuant to the ECL. *Women's Voices for the Earth, Inc.*, 2010 WL 299219, at *2 (N.Y. Sup. July 30, 2010).

In the New York federal court, a portable handheld steam cleaner manufacturer was sued by its competitor over its products' environmental claims. *Euro-Pro Operating LLC v. Euroflex Americas*, No. 08cv6231, 2008 WL 5137060 (S.D.N.Y. Dec. 8, 2008). The defendant claimed in its infomercial that its product was "EPA tested so you know it's safe" even though the EPA has no testing or approval mechanisms but merely requires the manufacturer to register the pesticide used in its products. *Euro-Pro*, 2008 5137060, at *2. The court held that the manufacturer's claim that its product was "EPA tested" was literally false because, while the manufacturer was required to register the pesticide contained in its product, such registration did not constitute an endorsement by EPA that the pesticide was safe. *Id.* at *5–6. The court granted the competitor's request for an injunction even though the infomercial included a disclaimer that the "EPA tested" claims only applied to the cleaning solution. *Id.*

Competitors have an additional venue to challenge greenwashing claims made by competitors. A competitor can commence an industry self-regulatory proceeding before the National Advertising Division of the Council of Better Business Bureaus. In July 2007, the Sony Corporation challenged Panasonic's advertising claims that its plasma televisions were

"environmentally friendly." *Panasonic Corp. of North America*, NAD Case No. 4697 (July 16, 2007). Panasonic's advertisements claimed "No Lead. No Mercury. No Worries." *Id.* The National Advertising Division held that Panasonic could not describe its big screen plasma televisions as "environmentally friendly" because the plasma televisions used more power than LCD televisions. *Id.* Panasonic could, however, advertise its plasma televisions as lead and mercury free. *Id.* Dell successfully challenge Apple's environmental claim that it had "the world's greenest family of notebooks" before the National Advertising Division. *Apple Inc.*, NAD Case No. 5013 (June 3, 2009); *see also Dell Challenges Apple's Greenness*, Wall Street Journal, June 19, 2009. The National Advertising Division recommended that Apple refrain from using "world's greenest family" because that claim was too broad and thus potentially misleading even though Apple relied on recognized industry ratings in making these claims. *Id.* Apple promptly changed its advertising from "the world's greenest family of notebooks" to "the world's greenest lineup of notebooks." *Id.*

Grassroots Consumer Action

Greenwashing can give rise to grass roots campaigns aimed at debunking the exaggerated environmental claims and even legal action. A greenwashing report conducted by TerraChoice Environmental Marketing, Inc., estimated that ninety-eight of the products it surveyed engaged in at least one greenwashing sin as defined in its "Greenwashing Report 2009." *See* http://sinsofgreenwashing.org/findings/greenwashing-report-2009. TerraChoice has defined seven sins of greenwashing that have been used throughout the industry: (1) the hidden trade-off ("suggesting a product is 'green' based on an unreasonably narrow set of attributes without attention to other important environmental issues"); (2) no proof; (3) vagueness; (4) irrelevance; (5) fibbing; (6) the lesser of two evils ("claims that may be true within the product category, but that risk distracting the consumer from the greater environmental impacts of the category as a whole"); and (7) false labels. *Id.* Consumers have developed websites and blogs devoted to revealing and debunking greenwashing claims. *See, e.g.*, www.greenwashingindex.com; *see also* Eric Lane, *Consumer Protection in the Eco-Mark Era: A Preliminary Survey and Assessment of Anti-Greenwashing Activity and Eco-Mark Enforcement*, 9 J. Marshall Rev. Intel. Prop. L. 742, 747–48 (2010) (discussing the rise of unaffiliated bloggers loudly decrying instances of greenwashing). Bloggers visiting the greenwashing index blog are encouraged to vote on the worst offenders of greenwashing and submit the offending advertisement to the website. Conversely, bloggers also vote on most environmentally friendly products and practices. In this era of technology, it is best to refrain from overstating the environmental attributes of a product not only to deter litigation but also to avoid harmful public relations battles.

In Conclusion

Federal and state agencies, state attorneys general, competitors, and consumers are increasingly using the courts to stop actual and perceived instances of greenwashing. Companies who wish to market the environmental assets of their products should be guided by two key principles: transparency and documentation. Consumers are wary of companies' overstated or vague claims of their products' environmental attributes and have shown the will to use the courts and social media to combat environmental exaggeration.

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