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On ENVIRONMENTAL LAW

Kermit the Frog was right: It's not easy being green.

The last few years have seen an explosion in green marketing claims for products as diverse as automobiles and cigarettes, toys and bottled water, shoes and hand lotion. At one end are companies built around a core of green claims. At the other are those whose interest seems more fleeting: "minty freshness" appears on the label more prominently than "made from sustainable materials." But in most industries, competitors are attempting to outdo each other in the quest to acquire a green halo.

Generations ago, Madison Avenue learned that consumer purchases are a matter of identity. Buying a Pepsi doesn't just satisfy your thirst; it makes you a part of the Pepsi Generation. Add the learnings of the civil rights movement plus a healthy dose of moral suasion, and consumer purchases have become opportunities to associate with a cause, like signing a petition. And today, thanks to the environmental movement, the most prominent cause in consumer marketing is to reduce the impact of consumer products on the planet.

But what does it mean to be green? Isn't it a matter of degree? Paper may be "recycled," but also produced with harsh chemicals that burden air and water. Coffee may be grown "sustainably," but in building the plantation important habitat may have been destroyed. Complicating matters, in comparison to most marketing claims, green claims are almost impossible for a consumer to evaluate based on the product. There is no way to know if carbon offsets were purchased, for instance, by tasting the bottled water. And every product manufacturer has *some* environmental impact. The lines are not at all clear, and for these reasons, companies making green claims — no matter how well substantiated — are vulnerable to accusations of "greenwashing," *i.e.*, misleading consumers about the company's environmental practices or its products' environmental benefits.

Those accusations may be made not only in the press, but also in court. There are several laws and standards explicitly addressing environmental marketing claims. But general principles of false advertising law also apply. For example, it is possible for a literally truthful claim (*e.g.*, "CFC-free") to be misleading (*e.g.*, because most uses of CFCs were banned long ago). Likewise, the touchstone is the consumer's perception and not the advertiser's intent.

The most far-ranging of the specific standards are the Federal Trade Commission's "Guides for the Use of Environmental Marketing Claims," commonly known as the Green Guides. Issued in 1992 and updated in 1996 and 1998, the Green Guides are widely acknowledged to be out of date with the current marketplace and consumer understanding. The FTC has been reviewing them since November 2007. Their revision is anxiously awaited this spring.

Although the FTC views the Green Guides as non-binding, California has given them the force of law. The Environmental Advertising Claims Act outlaws any claims that are not consistent with the Green Guides. It applies to any advertiser (including a retailer) who represents that a product is good for the environment (or at least not bad for it) by using terms such as "environmentally friendly," "ecologically safe," or "green." These terms are not defined, except by reference to the Green Guides, so their enforceability is questionable. In fact, the Act originally defined "recyclable" as anything that can be "conveniently recycled" in a county with more than 300,000 people, a definition ultimately struck down as vague. *Ass'n of Nat'l Advertisers v. Lungren*, 809 F. Supp. 747, 761-62 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (9th Cir. 1994).

But the main force of the Environmental Advertising Claims Act is its requirement that companies making green claims maintain comprehensive and specific documentation substantiating their claims, including documentation of "[a]ny significant adverse environmental impacts directly associated with the production, distribution, use, and disposal of the consumer good" and any violations of permits used in making or selling the product. Cal. Bus. & Prof. Code § 17580(a)(2)& (4). Such a substantiation file is common among advertisers. What is not common is the California law's requirement that, for environmental claims, the documentation "be furnished to any member of the public upon request." *Id.* at § 17580(b).

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Enforcement of standards for environmental advertising has varied at the federal level. Of the 22 cases ever brought by the FTC, most were brought shortly after the Green Guides were issued early in the Clinton Administration. None were brought in the George W. Bush Administration, but seven were brought in the first year of the Obama Administration. More can be expected, with state and local prosecutors becoming more active in this area. Competitors have also been known to challenge claims using the federal Lanham Act or similar state laws.

The last year has seen a spate of such accusations in the form of consumer class actions brought by private plaintiffs, some of whose lawyers may take a more aggressive view than the FTC or other public enforcers have historically taken. Despite efforts to limit California's consumer protection laws, the state remains a magnet for such suits. And with a state law providing broad, general standards and public disclosure, California appears to welcome consumer lawsuits over green marketing claims.

It certainly has never been easy being green. But now it takes a lawyer.

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