

The Legalese of “Green”

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Arthur Siegal

Full Service Business Law Firm

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Environmental Law

- Brownfield redevelopment
- Risk allocation
- Regulatory compliance
- Wetlands
- Litigation
- Administrative disputes



Legalese of Green

- Green Claims and Federal Regulation
- Private Contracts/Disputes

Federal Laws Governing Environmental Marketing

- Lanham Act, 15 USC 1125(a)
 - Prohibits the use of any word, term, name symbol or device which
 - Is likely to cause confusion as to the affiliation, connection or association of one person with another person, or as to the origin, sponsorship or approval of goods, services of commercial activities
- OR
 - In commercial advertising, misrepresents the nature, characteristics, qualities or geographic origin of goods, services or commercial activities
- There is no current case law

Federal laws, cont'd

Section 5 of the FTC Act, 15 USC 45

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

- Deceptive Practice – likely to mislead reasonable consumers and material to their decision to buy or use products
- Unfair Practice – causes substantial consumer injury; not reasonably avoidable; not outweighed by countervailing benefits to consumers or to competition." 15 USC 45(n)

Seven Deadly Sins

Terrachoice Group developed seven sins of environmental marketing:

1. Hidden trade-off (paper isn't necessarily better than plastic)
2. No proof (% of post recycled content)
3. Vagueness (“all natural” “up to 70% recycled content”)
4. Worshiping false labels (“eco-safe”)
5. Irrelevance (CFC or lead free)
6. Lesser of two evils (“most efficient in its class”)
7. Fibbing – flat out lying.

FTC GUIDANCE

- Tell the Truth and Be Able to Back up your claims
- Federal Trade Commission Guides 16 CF 260
 - Issued to help marketers avoid making environmental claims that are unfair or deceptive under Section 5 of the FTC Act
 - General Principles that apply to all environmental marketing
 - Applicable to business-to-consumer claims and business-to-business claims
 - Provide guidance on specific green claims
- The FTC is working on new Green Guides for 2009 including green building and textiles is evaluating the Green Guides (Carbon offsets; “renewable” and “sustainable”)


FTC Guidance

- **General Principles:**
 - **Be clear**
 - A box of plastic wrap is labeled “recyclable”
 - If any part of the box or the wrap (other than minor incidental components) cannot be recycled – this is deceptive
 - The solution – clarify and limit the claim
 - **Be specific**
 - Label package “50% more recycled content than our prior package” vs “50% more recycled content”
 - **Don’t overstate product benefits**

FTC Guidance Cont'd

- Distinguish between the produce, package or service
 - Soft drink bottle labeled recyclable (but cap isn't)
- Do not overstate the environmental attribute
 - “recyclable” garbage bags
- Do not make confusing comparative claims
 - Most recycled content vs more recycled content than other national brands
- Do not make claims of general environmental benefits
 - “environmentally friendly” “eco-safe” “earth smart”

FTC Guidance Cont'd

- Do not claim degradability without support
 - “degradable” vs “will degrade in the presence of light”
- Do not claim compostability without support
 - “this diaper can be composted where composting facilities exist”
- Do not claim recyclability unless it can be processed through an established recycling program.
 - Package including the logo on the bottom is fine; 
 - Package including the logo on the label when there are no recycling centers “taking” this plastic, is deceptive

FTC Guidance Cont'd

- Do not claim recycled content when it contains recycled raw materials or reused parts
- Do not claim less “source” materials or less toxicity unless you can back it up
 - “10% less plastic than our old package” may be fine;
 - Disposal of package “generates 10% less waste” is ambiguous
- Do not claim refillable when there is no mechanism to actually refill the container
- Do not claim “ozone friendly” – be specific

Two Cases of Note

- **In Re: Benckiser Consumer Products, Inc. – EarthRite, 121 FTC 644**
 - They claimed that 1% of their proceeds were donated to non-profits working to restore and preserve our natural environment
 - They didn't and FTC found their ad claim to be false and misleading
- **In Re: Safe Brands Corp – Sierra Antifreeze, 121 FTC 379**
 - They claimed that used antifreeze could be mixed with conventional antifreeze in recycling processes.
 - This antifreeze was not recyclable and because a few recycling facilities actually accepted Sierra brand, that co

Other Resources

- **Better Business Bureau's National Advertising Division** – provides a private process for resolving advertising disputes
- **ISO** – Environmental labeling; 3 different types of environmental labels depending on specificity and independent validation; ISO 14021, 14024, 14025
- **Ecologo** – canadian origin; develops standards and certifies over 120 product and service categories
- **Green Seal** – sets standards for over 40 categories of products and services
- **Energy Star** – from a US EPA and US DOE partnership – voluntary program relating to a “seal” of energy efficiency
- **Electronic Product Environmental Assessment Tool** – for computers and monitors and has three tiers
- **Greenguard** – third party certification program for indoor air standards for various products (indoor air; children & schools and building construction)
- **Green-e** – independent program for offsets of ghg reductions

Labeling, rating, etc.

- It makes sense to differentiate oneself in the market and to provide some comfort that the claims are supportable and defensible
- Why not?
 - Research to support claims
 - Costly and time intensive (including annual followups in some cases)
 - Potential liability if one gets it wrong
 - You still have to substantiate your claims

Green Cause Marketing

- Buy from us and we will benefit some charitable organization with environmental ties
- Many states have their own laws on this including requirements for the contract between the company and the charity; requirements for registration with the State; Surety bonds; filing of financial statements upon completion
- Michigan has at MCL 14.303 a requirement for registration and filing financial statements which may apply to such causes

Contracts and Disputes

- *Southern Builders v Shaw Development LLC*, Md Circuit Court – case never went to trial
 - Shaw Development contracted with Southern Builders to build an environmentally friendly condo development.
 - The USGBC did not grant the silver certification and Shaw sued because it lost \$635,000 in tax credits
 - The Case settled but it was the first case reported where failure to achieve a desired LEED certification formed the basis for the litigation

Shaw Case

- Shaw and Southern relied on a standard AIA form agreement between owner and contractor – no green building requirements
- The green requirements were added through a Project Manual referring to LEED
- Contractor sued to foreclose a \$54,000 mechanics lien
- Owner counterclaimed for \$1.3 Million

Why is this important?

- It has been reported that 14% of cities with at least 50,000 residents have some form of green building programs
- Some offer tax breaks or zoning variances for projects that meet LEED standards
- The problem with this versus other building codes is that third party certification is required under LEED

Best Practices

- For an architect/design professional:
 - Use heightened scrutiny when selecting products, materials and systems
 - Watch for patented systems
 - Ensure availability
 - Ensure performance
 - Ensure that contracts are drafted clearly and specifically – do not rely on form agreements

Potential Litigation

- Green roof damages
- Mold
- Greenwashing
- Unintended Consequences
- Unfulfilled expectations
- Fraud
- Damages caused by “new, green” products

Contract Concerns

- Piecemeal approach – take a holistic approach; ensure that what is included works and will work together
- Define the “green” goals in advance
- Recognize that promises of specific deliverables may be fodder for litigation
- Builders may promise high hopes that also may be fodder for litigation

Green Lease Issues

- Standards to be applied
- Ensure that operation and management requirements are viable and costs calculated
- Ensure that competing tenant requirements are harmonized
- Ensure that if tenants make demands for certain “green” materials/products that they take responsibility if they don’t work

What the future holds

- Potential tax incentives to “green” buildings
- Potential financing incentives or preferences for “green buildings”
- Advantages for “green” developments in terms of zoning and permitting
- Potential stimulus funding

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