

Consumer Protection Advisory: FTC Alleges Some “Green” Marketing Claims Are Dirty

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In the words of the Federal Trade Commission (FTC), there has been a “virtual tsunami of environmental marketing” in the past few years. “Green” marketing, or the marketing of products that are presumed to be environmentally safe and sustainable, has become a core part of business strategy for many companies. But failure to comply with the FTC’s consumer protection rules regarding green marketing claims can result in civil prosecution, consumer lawsuits, and the potential loss of any competitive advantage initially gained from such claims.

On June 9, 2009, the FTC announced three separate actions alleging false and unsubstantiated claims of “biodegradability.” *In the Matter of Kmart Corp.* (FTC File No. 082-3186), *In the Matter of Tender Corp.* (FTC No. 082-3188), and *In the Matter of Dyna-E Int’l, Inc.* (Docket No. 9336) represent the agency’s most recent actions to ensure that environmental marketing is truthful, substantiated, and not confusing to consumers. Kmart and Tender each agreed to settle the cases against them; the case against Dyna-E will be litigated.

The FTC also recently presented testimony before Congress on its continuing and vigilant efforts to protect consumers from unfair and deceptive practices in the environmental marketing arena. Furthermore, the risk for companies making unsubstantiated green claims goes beyond potential government sanctions to consumer product class actions alleging “greenwashing.”

The FTC’s “Biodegradability” Cases

The FTC’s Guides for the Use of Environmental Marketing Claims (Green Guides) permit unqualified “biodegradable” claims *only if* they are “substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal.”

In its complaints, the FTC alleged that the retailers had each made unqualified unsubstantiated claims of biodegradability for their paper products: Kmart marketed its American Fare brand disposable plates as biodegradable, Tender called its Fresh Bath brand moist wipes (and/or the packaging) biodegradable, and Dyna-E sold its Lightload brand of compressed dry towels as biodegradable. The FTC based its claims on the fact that 91% of total municipal waste in the United States is disposed of by methods (landfills, incinerators, or recycling facilities) that do not present conditions that would allow the products to completely break down and return to nature within a reasonably short period of time.

Under the consent orders, Kmart and Tender have agreed to refrain from making deceptive “degradable” product claims or any environmental product claims without competent and

reliable evidence to support such claims. Tender also agreed to clearly disclose whether such claims apply to the product or packaging. The consent orders additionally require that Kmart and Tender maintain for five years, and make available upon request by the FTC, all records relating to such advertising claims. The consent orders expire after 20 years.

Other Related FTC Activity

Business Guidance and Rulemaking

The FTC has emphasized that it does not establish environmental standards, but rather that it acts on such matters with its traditional consumer protection authority under several federal statutes. Pursuant to that authority, it has developed guidance for marketers to ensure truthful and substantiated environmental claims, requirements related to energy disclosures for home appliances and lighting products, and disclosure rules for automotive fuels.

The FTC is currently reviewing its Green Guides, which were last updated in 1998, to ensure that they accurately reflect and are responsive to today's market. As part of its review, the FTC will be conducting a study with a focus on consumer understanding of particular green marketing claims, such as "eco-friendly," "sustainable," and "carbon neutral." The FTC is also reviewing its required energy disclosures and labeling requirements for lighting products, and it has initiated a rulemaking regarding energy labeling for televisions and other consumer electronics. In addition, the FTC is reviewing its rule regarding labeling requirements for certain automotive fuels.

Additional Law Enforcement Actions

The FTC recently challenged a home insulation marketer for overstating the R-value of its products. The court order settling the claims required the defendant to pay \$155,000 in civil penalties, revise the challenged claims, and substantiate future energy-related marketing claims. *United States v. Meyer Enters., LLC*, No. 09-1074 (C.D. Ill. Mar. 2, 2009).¹

The FTC is also currently litigating actions against marketers of devices touted to dramatically increase gas mileage. One of the challenged advertisements claims that the marketed product will boost gas mileage by at least 50% and "turn any vehicle into a hybrid." *FTC v. Dutchman Enters., LLC*, No. 09-141-FSH (D.N.J. Jan 12, 2009). The other challenged advertisement claims that the defendant's product will allow ordinary passenger cars to harness nuclear fusion power and eliminate the need for gasoline. *FTC v. Five Star Auto Club, Inc.*, No. 99-cv-1693 (S.D.N.Y. Dec. 15, 2008).

Consumer Lawsuits

Class actions and other lawsuits on behalf of consumer plaintiffs and environmental groups alleging "greenwashing" claims are also on the rise. Recent consumer lawsuits have included

claims of misleading marketing regarding product environmental safety and fuel-efficiency, and demands for ingredient lists for products such as household cleaners.

An environmental marketing agency, TerraChoice, released a study indicating that of the more than 2000 purportedly green consumer products currently on the market, 98% of them had exaggerated or misleading claims. TerraChoice conducted its study by using best practices, including standards published in the FTC's Green Guides and similar standards published by Canada's Competition Bureau. With these types of statistics, and the continued expansion of the green products market, the popularity of these false advertising cases can also be expected to grow.

Endnotes

¹ Other recent home insulation actions include *United States v. Enviromate, LLC*, No. 09-cv-00386 (N.D. Ala. Mar. 2, 2009) and *United States v. Sumpolec*, No. 6:09-cv-379-ORL-35 (M.D. Fla. Feb. 26, 2009).

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