

[Plaintiffs Attacking Fiji's Green Water Sing the Blues](#)

June 7, 2011 by [Sean Wajert](#)

A California appeals court last week affirmed the dismissal of a putative class action in which plaintiffs accused Fiji Water Co. LLC of improperly promoting its bottled water. [Ayana Hill v. Roll International Corp. et al.](#), No. A128698 (Cal. Ct. Appeal, 1st Appellate District).

Plaintiff Hill alleged she bought bottles of Fiji water, on the label of which was a green drop; she claimed that the drop somehow represented Fiji bottled water was environmentally superior to other waters and endorsed by an environmental organization. Hill filed a proposed class action on behalf of herself and other consumers of Fiji bottled water, asserting violations of California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), False Advertising Law (FAL) (§ 17500 et seq.), and Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), plus common law fraud and unjust enrichment.

Readers know that the term "green" is commonly used to describe the environmentally friendly aspects of products, and that concerned about over-use of such terms, the Federal Trade Commission (FTC) has issued standards known as "Green Guides" to describe the appropriate use of such labeling. The Federal Trade Commission last Fall [proposed revisions](#) to the guidance that it gives marketers to help them avoid making misleading environmental claims. The proposed changes were designed to update the Guides and make them easier for companies to understand and use. The changes to the Green Guides included new guidance on marketers' use of product certifications and seals of approval, "renewable energy" claims, "renewable materials" claims, and "carbon offset" claims.

Because the guides are not legislative rules under Section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law. They consist of general principles, followed by nonexclusive specific examples, and are intended to provide a safe harbor for marketers who want certainty about how to make environmental claims. However, a few states, such as California, have incorporated the FTC guides into their consumer fraud (here CLRA) definition of environmental marketing claims.

Hill's personal allegations were that, starting in 2008, she bought Fiji water about twice a week from Walgreens stores in San Francisco, relying on these alleged representations that the product was "environmentally friendly and superior." She would not have bought Fiji water had she supposedly known the truth that the Green Drop was the creation of defendants, not a neutral party or environmental group. Defendants accomplish this supposed elaborate "deception" through conspicuous placement of the Green Drop on the front of the product to allegedly look similar to environmental seals of approval. Further, plaintiff complained that in their packaging and marketing, defendants have "called their product FijiGreen" and, in stores and other public places, stated that "Every Drop is Green."

The trial court dismissed the claims, and plaintiff appealed. In that posture, the court assumed that Hill actually was, as she claims, misled in the context to believe that the green

drop symbol on Fiji water was a seal implicitly indicating approval by a third party organization, and thus believed that the Fiji product was environmentally superior to competitors' bottled water.

The problem was that Hill's beliefs, asserted and even assumed, do not satisfy the reasonable consumer standard, as expressed in the FTC guides (16 C.F.R. § 260.7(a) (2011) [material implied claims conveyed "to reasonable consumers"]) and as used in California's consumer laws. The court of appeals emphasized that the standard is not a least sophisticated consumer, nor the unwary consumer, but the ordinary consumer within the larger population. Importantly, the court noted that "it follows, in these days of inevitable and readily available Internet criticism and suspicion of virtually any corporate enterprise, that a reasonable consumer also does not include one who is overly suspicious." How true that is.

So, does the green drop on Fiji water bottles convey to a *reasonable consumer* in the circumstances that the product is endorsed for environmental superiority by a third party organization? No, said the court. The drop itself bears no name or recognized logo of any group, much less a third party organization, no trademark symbol, and no other indication that it is anything but a symbol of Fiji water. The water has just a green drop, the drop being the most logical icon for this particular product—water. And for context, a green drop on the back of every bottle appears right next to the website name, "fijigreen.com," further confirming to a reasonable consumer that the green drop symbol is by Fiji water, not an independent third party organization—and, of course, inviting consumers to visit the website, where Fiji Water's explains its environmental efforts.

Plaintiff asked the court of appeals to reverse the the trial court's denial of leave to amend, claiming that any defects in the complaint could be cured by amendment. But Hill's saying so "does not make it so," and it was her burden to show how she might amend to cure the deficiencies. She did not. Dismissal without leave affirmed.