

It Isn't Easy Being Green

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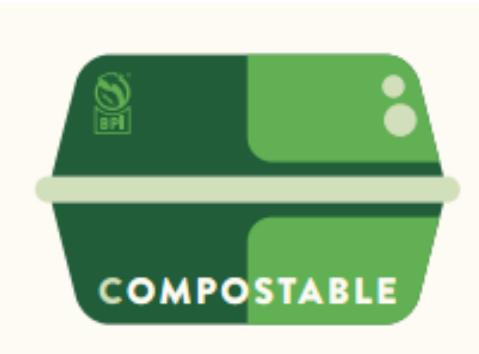
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Introduction

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Regulatory Landscape

- Federal and state general advertising laws
- FTC's "Guides for the Use of Environmental Marketing Claims"
 - Last updated in 2012
 - Green Guides review, launched in 2022, is currently stalled
- State laws implementing the Green Guides or instituting stricter standards
 - California law setting stricter standards for "recyclable" claims
 - Colorado law setting specific substantiation requirements for "compostable" claims



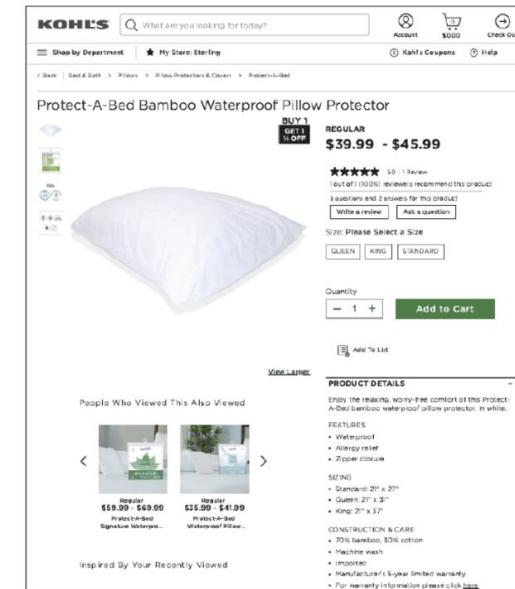
Green Guides

- Structure
 - Basic guidance on making environmental claims
 - Avoid general environmental benefit claims
 - Standards for specific claims (e.g., biodegradable, renewable, etc.)
- Key themes
 - Be specific about the benefit
 - “Made with recycled content” – how much?
 - Explain the benefit, if consumers won’t understand it
 - “Made with 50% renewable material” – how is it renewable?
 - Ensure that consumers will get the benefit
 - “Recyclable” – how is it recyclable?



FTC v. Kohl's

- FTC charged Kohl's with falsely marketing textiles as made from bamboo
 - The products are made from rayon, not actual bamboo fiber woven into fabric
 - Turning bamboo into rayon involves the use of hazardous chemicals
- FTC also alleged that Kohl's "environmentally friendly" and "help the planet" claims were also misleading
 - Although bamboo is a renewable resource, the manufacturing process uses toxic chemicals and causes the emission of hazardous pollutants
- Kohl's settled for \$2,500,000 (4/22)



Promoting Sustainability

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Promoting Sustainability

- “Sustainable” claims are not addressed in the Green Guides
 - One common definition: “the capability to meet the needs of the present generation without compromising the ability of future generations to meet their needs”
- What does “sustainable” really mean?
 - Is it a general environmental benefit claim?
 - Or is it just non-actionable puffery?

Rawson v. Aldi

- Consumers sued ALDI over its “sustainable” Atlantic salmon claim
 - Argued the salmon is not sustainable since ALDI sources its salmon from large industrial fish farms that use environmentally destructive practices
- ALDI moved to dismiss
 - It’s not misleading since it should be read with a “Best Aquaculture Practices” certification
 - It’s non-actionable puffery
- Court allows the case to continue (6/22)
 - Consumers may not understand the certification to modify the claim or how it does
 - It’s not puffery, since it’s communicating some sort of benefit



Lizama v. H&M

- Lawsuit over H&M’s “conscious choice” collection made from better material, such as recycled polyester
 - “More sustainable” shopping
 - “Our most environmentally sustainable products”
- Plaintiff argues that the clothes aren’t more sustainable, since they are made of polyester and will end up in landfills
- Court dismisses the case (5/23)
 - The “more” claim just communicates an improvement



Aspirational Claims

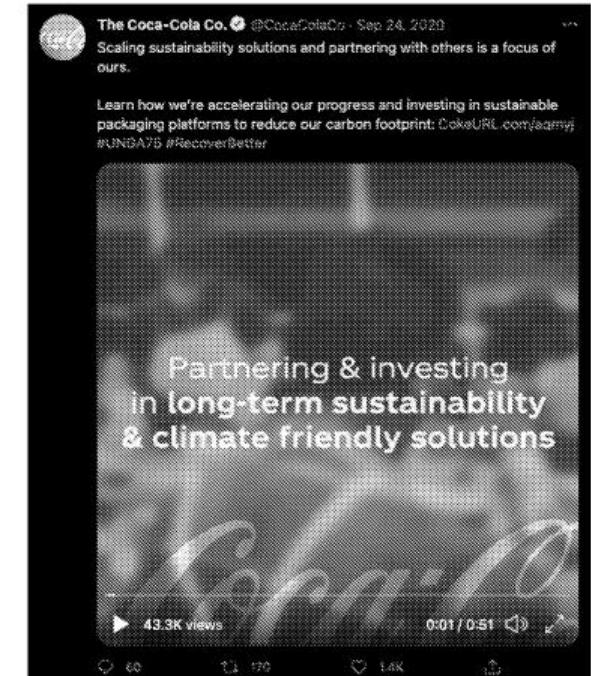
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Substantiating Aspirational Claims

- What proof is required for aspirational claims?
 - Are they objective claims that must be supported by competent and reliable evidence?
 - Or will consumers understand them to be simply a company's goals and hopes for the future?
- NAD has long held that aspirational claims require proof
 - Do you have a reasonable plan in place?
 - Are you taking steps to achieve those goals?

Earth Island v. Coke

- Earth Island sued Coke, alleging that its aspirational claims are misleading
 - “Use at least 50% recycled material in our packaging by 2030”
- D.C. trial court dismissed the case, and the appellate court reversed (8/24)
 - Consumers could be misled if Coke isn’t serious about achieving its goals and if it isn’t making a meaningful difference
 - “It’s akin to cigarette manufacturers marketing light or low tar cigarettes as if they were healthier”



New York v. JBS USA Food

- NYAG sued JBS over its “Net Zero by 2040” claims
 - JBS hadn’t calculated its scope 3 emissions
 - It didn’t have a reasonable plan in place
 - Its goals aren’t feasible
- Court dismisses the case ^(2/25)
 - Didn’t think consumers would take away the message that JBS was committing to achieve this
 - Aspirational claims – without specific promises – aren’t actionable
- JBS settled for \$1,100,000 ^(11/25)
 - Agreed to frame its statements as goals, not commitments

Our Path To Net Zero

Pilgrim's was the first global meat and poultry company to pledge to achieve net-zero greenhouse gas emissions by 2040 throughout our global operations and in partnership with our producers, suppliers and customers.

Emerging Claims

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Using Emerging Claims

- Marketers are using many claims today that aren't defined by the Green Guides or state law
- What substantiation is required for claims about "net zero," "circularity," and "regenerative agriculture," as well as other emerging claims?

Dorris v. Danone Waters of America

- Danone advertises Evian as being “carbon neutral”
- Consumers sued, alleging that consumers will understand this to mean that the product doesn’t leave a carbon footprint
- Court first denies the motion to dismiss, and then on a motion to reconsider, dismisses the case (11/24)
 - Acknowledging the claim is ambiguous, the court says consumers could be confused
 - But, faced with that ambiguity, they could consult the company’s website to learn more



Boyd v. Target

- Target sells some products that are categorized as “Target Clean”
 - “formulated without a group of commonly unwanted chemicals”
- Consumers sued, alleging that “Target Clean” is misleading since the products still contain harmful ingredients
- Court denies Target’s motion to dismiss (10/24)
 - Consumers may take away a variety of claims
 - Consumers aren’t obligated to seek out information about what “Target Clean” means



CLE Code: Sustainable

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Promoting Product Benefits

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Lawsuits Against Fossil Fuel Companies

- Regulators across the country are suing fossil fuel companies
 - Alleging that their sustainability-focused marketing misleads consumers about the actual adverse impact that they are causing
- What's at stake here?
 - Is it misleading for all companies to promote the good that they are doing when their products cause environmental harm?
 - Do companies have an obligation to affirmatively disclose the harm they cause?

Lawsuits Against Exxon Mobil, et al.

- D.C. court denies motion to dismiss
(4/25)
 - Aspirational claims may be actionable
 - Ads didn't just express statements of opinion
 - Ads can still be misleading even when consumers understand that fossil fuels cause climate change
- NY court grants motion to dismiss
(1/25)
 - Aspirational claims are not actionable
 - Some of the company's statements are just puffery
 - Fossil fuel companies shouldn't be liable for failing to disclose information that is publicly known



LA County v. Coca Cola

- LA County sued Coke and others arising out of their marketing of products in single-use plastic containers (10/24)
 - Misleads consumers into believing that purchasing single-use plastics is an environmentally responsible choice
 - Promoting recycling misleads consumers about how much is actually recycled
 - Promoting recycled content misleads consumers about how much of the company's products use recycled content
 - Fails to disclose the harms that plastics cause



New York v. Pepsi

- NYAG brings similar lawsuit against Pepsi
- Court dismisses the case (11/24)
 - The NYAG's claims "strain the bounds of credulity"
 - Pepsi's aspirational claims are not actionable
 - The lawsuit is "simply policy idealism"



Is Boxed Water Better?

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IBWA v. Boxed Water is Better

- The International Boxed Water Association challenged Boxed Water is Better at the NAD, alleging that BWB is misleading consumers about the benefits of its boxed water ^(7/25)
 - “Recyclable”
 - “Renewable”
 - “Better for the planet”
 - “Boxed water is better”
 - And more!



IBWA v. Boxed Water is Better

- BWB advertised that its cartons are “recyclable”
 - Consistent with FTC standards, 62% of communities in the U.S. accept cartons for recycling
- IBWA said the claim was misleading, since even if they accept the cartons for recycling, they may not recycle them – due to the fact that some facilities can’t separate out the layers of the carton
- NAD wasn’t open to rethinking what the claim meant
 - It complies with FTC standards (for now) and the plain meaning of the “recyclable” claim suggests that it is substantiated



IBWA v. Boxed Water is Better

- BWB advertised that its cartons are made of “92% renewable materials”
 - BWB submitted evidence that 96% of the carton is made of plant-based material
- IBWA said the claim was misleading because BWB is substantiating the claim using a mass balance accounting approach
 - Even though the advertiser is using 92% renewable materials, because of mass balancing, any individual carton may not actually contain that much renewable material
- NAD didn’t accept the mass balancing approach, expressing concerns consumers may expect each carton to have that much renewable content
 - Appears to be taking a more restrictive view than the FTC



IBWA v. Boxed Water is Better

- BWB advertised that its water is “better for the planet,” “sustainable,” and “helping the planet heal one carton at a time”
- NAD wasn’t troubled by the “better for the planet” claim on the packaging
 - It was immediately followed by a paragraph explaining the issues with plastic packaging
- NAD also wasn’t troubled by the other claims on BWB’s website
 - Even though they didn’t have text nearby that qualified the claims, there was information elsewhere on the website qualified the claims
 - Is the NAD departing from the FTC’s “clear and conspicuous” standard here and starting to align with many courts’ views that consumers have an obligation to dig deeper?



IBWA v. Boxed Water is Better

- And what about “**Boxed Water is Better**”?
- NAD said that, when used in a specific comparative context, it’s a claim
 - BWB needs to make clear that it’s only comparing itself to premium water bottles (the bottles that use more plastic)
- NAD said that, as a standalone claim, it’s puffery
 - “When used as a brand name on the advertiser’s carton, without reference to any other product or any other specific attribute near the claim,” the claim is puffery
 - Is NAD making a big departure here from FTC’s guidance about general environmental benefit claims?



What's Next?

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Republican AGs v. Tech Companies

- Sixteen Republican AGs wrote to Amazon and other major tech companies challenging their “renewable energy” claims (9/25)
- As permitted by the Green Guides, the companies are advertising that they are powered by renewable energy due to the purchase of renewable energy credits
- AGs say the claims are still misleading
 - “The FTC Green Guides do not permit tech companies to make misleading claims”
 - We’re not bound by the Green Guides



Thank you!

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