



Spotlight On: Consumer Financial Services

It's Not Easy Being "Green"; FTC Targets Marketers of Environmental Friendliness

*Written by:
Ronald W. Zdrojeski and Jennifer R. Rossi**

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In response to growing consumer concern about the environment, many businesses have modified their business practices and upgraded their manufacturing processes so that they can market products and services as "green," "carbon-neutral," "sustainable," "refillable," "recyclable," "degradable" or otherwise "environmentally friendly". Whether these moves will achieve their desired results remains to be seen. If a business markets its services and products in such a manner, the Federal Trade Commission (FTC) cautions that the business should mean what it says.

Indeed, on February 2, 2009, the FTC issued a press release stating that it sued promoters of an allegedly bogus fuel efficiency device in federal court for alleged deceptive advertising. The promoters allegedly marketed the device as, among other things, using "longstanding, proven technologies" to drastically improve fuel efficiency. It is further alleged that the two businesses promoting the product used magazine and internet advertisements to mislead potential consumers into buying the device based on a "false claim that it would increase auto fuel efficiency by 50 percent or more, and has been scientifically proven to do so." An expert hired by the FTC opines, among other things, that the "processes touted by the [businesses] either are impossible or would lead to a net loss of energy." Not only were two businesses named in this enforcement action, but the chief operating officer of one business and the president of the other were individually named.

The FTC pursued these businesses and their key executives for false or deceptive advertising claims under Section 5 of the FTC Act, arguing that their actions constitute "greenwashing". Greenwashing occurs when a business advertises its services or its products or itself as more environmentally friendly than is true. The fundamental interest the FTC protects in pursuing greenwashing claims is false consumer perception. Thus, the FTC will view any greenwashing claim from a consumer's perspective. These claims are likely to become more common now as environmental concerns continue to grow, and as consumers more closely scrutinize their purchasing choices. And, public statements by the FTC over the course of the past several months appear to emphasize a renewed interest in this area.

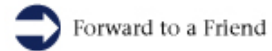
Thus, while the above example may seem rather extreme, businesses should be aware that this is only the most recent of many FTC challenges to marketers of environmentally friendly products. Historically, the FTC has challenged the environmental marketing of everything from "pesticide free" produce and "biodegradable" trash bags to "ozone friendly" aerosol cleaning products and "recyclable" fast food paper packaging. A business facing an environmental marketing claim by the FTC in federal court may also find itself defending consumer claims in litigation alleging the same unfair or deceptive acts or practices under state law.

Businesses are not, however, without guidance. "Green Guides" were issued by the FTC to assist businesses in avoiding an unfair or deceptive marketing claim as well as the courtroom. The Green Guides can be found at www.ftc.gov/bcp/grnrule/guides980427.htm. The Guides are not the law; rather, they are administrative interpretations of the law. They also do not establish standards for environmental performance, nor do they prescribe testing protocols. Nonetheless, they are an essential tool to assist businesses in conducting their affairs and their marketing in a manner that does not violate the law.

When evaluating "green" marketing plans, businesses should proceed thoughtfully and ensure that advertising comports with scientific or other credible evidence.

The information in this spotlight should not be considered legal advice. Consult your attorney before acting on anything contained herein.

*Ronald W. Zdrojeski is a partner in the Business Litigation Practice Group at regional law firm, Robinson & Cole LLP. Jennifer R. Rossi leads the Consumer Financial Services Team at Robinson & Cole LLP, a subgroup of the firm's Business Litigation Practice Group. Mr. Zdrojeski can be reached at rzdrojeski@rc.com. Ms. Rossi can be reached at jrossi@rc.com. For more information about the firm or these attorneys, please visit www.rc.com.



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