

Client Alert

A report
for clients
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NAD Addresses Rise in Green Marketing Claims

National Advertising Division attorneys have recently made several public statements about the rise of environmental claims in advertising and issued a compilation of decisions that addressed such claims. Together, these pronouncements outline an approach to environmental marketing that encourages specific, narrow claims. The use of broad claims such as “environmentally friendly” is disfavored unless supported by a life-cycle analysis and a careful examination of product attributes.

At NAD’s annual conference on September 23, Director Andrea Levine highlighted the importance of accuracy in environmental (or “green”) advertising claims, noting that consumers rely heavily on the claims because they have no independent system to verify them. Whereas a consumer buying a toothpaste for its whitening benefits could evaluate whether the toothpaste performs as promised, a consumer buying travel offset credits has no way to verify if the credits are “good for the environment.” As a result, green claims merit careful scrutiny.

Ms. Levine discussed several types of suspect environmental claims used by green marketers: generalized claims, limited life-cycle claims, false denigration claims and overstated claims. These comments echo observations made by NAD Associate Director David Mallen at an FTC Conference on Green Packaging Claims and were drawn from a compilation of NAD environmental cases issued in August 2008. NAD’s review of questionable green claims can be summarized as follows:

(1) Generalized Claims

A company makes a generalized claim if it makes a broad claim (such as “good for the environment”) based on a very specific product feature. A study presented at NAD’s conference called such claims “Hidden Trade-Off” claims because they allowed companies to emphasize product benefits with favorable green characteristics while ignoring the environmental costs associated with the product.¹ In *Panasonic Corporation of North America/Plasma Televisions*, NAD addressed Panasonic’s claim that its plasma televisions were “environmentally friendly” because they contained no lead or mercury. NAD Case Reports, No. 4697 (July 2007). NAD held that while Panasonic’s televisions did not contain mercury or lead, they consume significantly more power than comparably-sized LCD televisions, and therefore could not be called “environmentally friendly.”

(2) Limited Life-Cycle Claims

A company makes a limited life-cycle claim when it makes an environmental claim about its end-product without considering the environmental costs associated with the product’s creation. In *Nuclear Energy Institute/Nuclear Energy*, NAD addressed the nuclear industry’s claim that its power plants were “environmentally clean” because they “didn’t burn anything to produce electricity, so they don’t pollute the air.” NAD Case Reports, No. 3508 (November 1998). NAD held that the claim was inaccurate because nuclear plants used uranium-enriched fuel which was often produced with electricity from coal-fired plants. Since the coal-fired plants emitted significant greenhouse gasses, the Nuclear Energy Institute could not claim its energy was non-polluting.

¹ TerraChoice Environmental Marketing, Inc., *The Six Sins of Greenwashing – A Study of Environmental Claims in North American Consumer Markets* (Nov. 2007), available at http://www.terrachoice.com/files/6_sins.pdf.

However in *Nestle Purina Pet Care/Pet Promise*, NAD addressed another limited lifecycle claim and concluded that it was substantiated. NAD Case Reports, No. 4837 (May 2008). In *Pet Promise*, the advertiser claimed its products were sourced from farms and ranches committed to “eco-friendly practices” and NAD held that the claim was substantiated because suppliers practiced energy conservation and recycling. Commenting publicly on the case, NAD Associate Director David Mallen distinguished it from *Nuclear Energy* because the *Pet Promise* advertiser was “prepared to hold up the supply chain and talk about the choices that it made all along the line from the renewable energy on the farms to the choice of ingredients to the actual packaging of the product itself.”² In general, Mallen noted that broad environmental claims typically required greater “cradle-to-grave” life-cycle substantiation, while limited claims required less support.

(3) False Denigration Claims

Companies who have developed environmentally friendly products occasionally disparage the environmental attributes of competing brands. In *Columbia Forest Products/Hardwood and Related Products*, NAD addressed an implied claim by a producer of formaldehyde-free hardwood that “formaldehyde-bound plywood significantly harms indoor air quality.”³ NAD Case #4528 (July 2006). NAD held that the environmental claims were unsubstantiated and cautioned green advertisers to avoid overstating potential risks associated with chemicals found in traditional products. NAD reached a similar conclusion in *Seventh Generation/ Household Cleaning Products*, holding that a chlorine-free bleach alternative could not claim that chlorine bleach was “toxic,” or “threaten[ed] to overwhelm the environment.” NAD Case #4488 (May 2006).

(4) Overstated Claims

Finally, companies who develop green products should avoid overstating the efficacy or environmental benefits of their products. In one of the earlier cases addressing this issue, *Andex Corporation/Coffee Filters*, a manufacturer claimed that its coffee filter cartons were “made from recycled material” even though the cartons contained only 35 to 57 percent recycled material. NAD Case #2974 (August 1992). NAD held that consumers might interpret the claim to mean that the cartons were made solely from recycled material, and recommended that the claim be modified to include the limited percentage of recycled material used in the cartons.

NAD’s rulings on green claims provide guidance at a time when these claims are becoming increasingly important to consumers. Roughly 86 percent of consumers identify themselves as “environmentally friendly”⁴ and 52 percent rank global warming as extremely important or very important to them (up from 27 percent in 1998).⁵ Last year, brand consultancy Landor Group concluded that “green is no longer an issue marginalized to fanatical environmentalists—nearly all American display green attitudes and behaviors.”⁶ In 2008, consumers expect to double spending on green products and services.⁷

However, advertising green product benefits to these consumers in a legally responsible manner remains a delicate undertaking. To date, there have been no court cases addressing green claims involving carbon offsets, renewable energy certificates (“RECs”) or sustainability issues. While NAD’s comments provide helpful guidance to marketers, the FTC is still the “elephant in the room” since it has indicated its intent to regulate new green claims but has not yet issued any opinions in the area. The FTC has held a series of workshops that have raised a wide variety of concerns related to environmental marketing (such as additionality, double-counting, life-cycle analysis and measurement metrics⁸), but it is not expected to issue new standards on green claims until it releases revisions to its Green Guides in 2009. In the interim, marketers would be well-advised to follow the recommendations of NAD.

² Transcript of First Session, Federal Trade Commission Green Packaging Claims Workshop (April 30, 2008), available at http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/transcripts/043008_sess1.pdf.

³ The express claims included the following statements: “Formaldehyde preserves things. Or, in the case of air quality, causes them to deteriorate” and “True formaldehyde is quite beneficial. Unless you happen to be breathing.” *Columbia Forest*, NAD Case #4528, at *1.

⁴ Raphael Bemporad and Mitch Baranowski, *Conscious Consumers Are Changing the Rules of Marketing. Are You Ready?*, BBMG, Nov. 2007, available at http://www.fmi.org/docs/sustainability/BBMG_Conscious_Consumer_White_Paper.pdf.

⁵ Juliet Eilperin and Jon Cohen, *Growing Number of Americans See Warming as Leading Threat*, WASHINGTON POST, April 20, 2007 at A20.

⁶ Press Release, Landor Associates, New Survey Conducted Indicates Green is No Longer a Marginalized Issue in the United States (May 1, 2007), available at <http://www.landor.com/index.cfm?do=news.releases>.

⁷ Press Release, Landor Associates, New Research on Green Perceptions and Behaviors Among U.S. Consumers, (September 27, 2007), available at <http://www.landor.com/index.cfm?do=news.releases>.

⁸ In a speech on June 18, 2008, FTC Commissioner J. Thomas Rosch also raised several of the concerns addressed by the NAD, calling attention to life-cycle analysis, hidden trade-offs, generalized claims and exaggerated claims. The speech is available at <http://www.ftc.gov/speeches/rosch/080618greenmarketing.pdf>.

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The Trademark and False Advertising Practice Group litigates trademark and false advertising cases and provides expert counseling concerning the establishment and maintenance of trademarks and the propriety of contemplated advertising claims.

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