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LITIGATION

Sustainability claims warrant extra caution

By Albert M. Cohen

National Public Radio recently ran a series on “sustainable” seafood claims which raised concerns regarding the validity of certain sustainability claims and certifications. The series put into focus the types of concerns that all marketers face when characterizing products as sustainable or environmentally friendly. Assessing issues raised by the series in light of the Federal Trade Commission’s recently promulgated “Green Guides” highlights some of the difficulties marketers face and, at the same time, provides marketers guidance to help insure that sustainability claims are not subject to challenge.

There are several key statutes which bar marketers from making statements that are false or misleading. These include Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, and the Lanham Act, 15 U.S.C. Section 112(a), which prohibit false or misleading advertising, and California Business & Professions Code Section 17500, which bars false advertising claims in California. In essence, these laws prohibit marketing claims unless they are true, not misleading and verifiable. For example, Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices.” Marketers must ensure that “all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.”

In October 2012, the FTC issued its revised Green Guides, which are designed to help marketers ensure that claims they make about environmental attributes of their products are truthful. The guides, which are based on well-established principles, are useful in evaluating claims under all of these statutes. They set forth specific requirements for a variety of environmental claims. Significantly, however, the guides do not specifically address sustainability claims. Nevertheless, the reasons why the FTC did not address sustainability claims, how it did address other issues, and longstanding truths in advertising principles, provide marketers guidance for how to approach sustainability claims. Three aspects of the guides are particularly relevant to sustainability claims.

First, in drafting the guides, the FTC was particularly concerned that environmental claims be supported by scientific evidence. The guides caution that claims must be supported by “competent and reliable scientific evidence” and that such

evidence must “be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that representation is true.” Thus, the FTC takes the position that simply having some evidence to support a claim is not sufficient. Rather, the sufficiency of the evidence must “be considered in light of the entire body of

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Second, the FTC was particularly concerned about general environmental benefit claims such as “green” or “eco-friendly.” The guides caution against making such claims because they are often incapable of being substantiated and likely communicate specific environmental benefits that cannot be supported. Therefore, marketers are cautioned to make sure that their claims can be substantiated and to make clear and prominent disclosures that communicate the specific environmental benefits of the product.

Third, the guides address certifications and seals of approval. They caution that the mere fact that a product has a “third-party certification does not eliminate the marketer’s obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.” Moreover, because certifications may convey a general environmental benefit, where appropriate, the certification should be qualified with clear and prominent qualifying language that clearly conveys that the certification or seal refers only to specific and limited benefits.

The FTC decided not to promulgate specific rules regarding sustainable claims, because at the time it was investigating the matter, its view was that there was no accepted definition of “sustainable.” Nevertheless, the FTC cautioned that “this lack of guidance ... does not mean unscrupulous marketers are free to deceive consumers. Marketers are still responsible for substantiating consumers’ reasonable understanding of these claims.” The FTC noted that this was an

area that it would continue to evaluate and that “marketers who use ‘sustainable’ claims should test those claims in the context of their advertisements to ensure they can substantiate them.” It cautioned that, depending on consumer interpretation, such claims could present substantiation challenges.

In its February 2013 series, NPR raised questions about a body that certifies seafood as sustainable. NPR reported that under the body’s guidelines, a fishery that wants to be certified hires an auditing company to evaluate whether its practices comply with the body’s definition of sustainable. If it passes, it is permitted to use the body’s sustainable seafood label. NPR reported that some environmental groups questioned the use of the term “sustainable,” claiming that some of the target fish are in trouble, the fishing is harming the environment, or there is inadequate evidence to know how the fishery and environment are being impacted. NPR also reported that some environmental groups have suggested that the term “sustainable” implies that the catching can go on into the foreseeable future, but that this is not necessarily the case.

If, as the FTC postulated, there is no commonly understood definition of “sustainable,” it could be difficult to prove that the public was misled by use of the term. However, in recent years the public has become more concerned about sustainability and there is increasing awareness of what people expect a sustainable product to be. Thus, marketers using the term “sustainable” should determine consumers’ reasonable understandings and whether the use of the term is consistent with those understandings. To the extent that consumer understandings develop, marketers have an ongoing obligation to assess how consumers understand the term. The guides suggest that marketers qualify general claims with specific environmental benefits and require that such qualifications be clear, prominent and specific. To the extent that the term “sustainable” is construed as a broad, unqualified, general environmental claim, marketers should consider appropriate qualifications. For example, in the NPR series, some environmental groups suggested that rather than just saying a fishery is sustainable, marketers should consider using such terms as “well managed.”

A marketer must have a reasonable basis for any claim made about a product and be able to substantiate the claim. Where a marketer is not relying on a certi-

fication, but rather is labeling the product on its own, it must be particularly careful to insure that the statement is true, not misleading, and verifiable based on competent and reliable scientific evidence. It is usually sufficient to rely upon independent third-party certifications. However, the guides provide that “third-party certification does not eliminate the marketer’s obligation to ensure that it has substantiation for the claims communicated by the certification.” Thus, marketers using such certifications should consider confirming that the certifying body is independent, has appropriate standards, and is evaluating the products in compliance with those standards. It is not as clear, however, how far a marketer must go to confirm that a certification is reliable and supported by competent and reliable scientific information. Certainly, a marketer cannot willfully disregard or ignore information establishing that the certification is not reliable. On the other hand, are claims by environmental groups regarding the fisheries in question based on relevant and reliable scientific evidence, making it incumbent upon the marketer to re-evaluate is sustainability claims in light of such evidence? Do such claims raise a concern that there may not be enough relevant and reliable scientific evidence to support sustainability claims? These are fact intensive questions. Marketers faced with these types of questions should consider seeking more specific information regarding the certification process, the scientific basis for the certification, the bases for any critiques of the certification, and the determinations made for the particular product to confirm the reliability of the certification.

Consideration of the issues raised by the NPR story, in the context of the FTC’s Green Guides, highlights issues that marketers face when using broad terms like “sustainable,” even when relying upon third-party certifications. The issues are a reminder that whenever making such claims, marketers must take into account all relevant information and circumstances to ensure that its claims are true, convey an accurate message, and are verifiable.

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