

Legislative And Litigation Trends In Environmental Advertising

By **Raqiyyah Pippins and Kelsie Sicinski** (February 20, 2024)

It is no secret that consumers have become increasingly interested in the environmental claims made about consumer products. The plaintiffs bar has as well. The past few years have reflected an influx of filed class actions that allege greenwashing.

Litigation tends to make the most headlines. For example, as discussed in more detail below, in January 2024, Starbucks Corporation made headlines when the National Consumers League filed suit, alleging it made false and misleading claims about ethically sourcing its coffee and tea.[1]

However, litigation is far from the sole source of risk to companies promoting products with environmental benefit claims. In addition to the Federal Trade Commission, which enforces — and is updating — its Green Guides, the National Advertising Division, or NAD, of BBB National Programs Inc. issues decisions annually, involving allegations of false and misleading environmental benefit claims.

States are increasingly active in regulating green claims as well. In addition to incorporating the Green Guides as law, many states have begun to pass legislation with impacts on the types of representations that can be made about the recyclability, compostability and biodegradability of products.

It can be difficult to keep abreast of all the developments affecting the risk profile for environmental marketing strategies.

This article highlights recent key litigation and regulatory trends, and provides actionable strategies that can be used to help mitigate the risk associated with green marketing strategies for 2024 and beyond.

Key Trends in Challenges to Green Claims

While all environmental marketing claims can carry risk, certain claims attracted more attention than others, including (1) claims about recyclable packaging, (2) aspirational claims, (3) third-party certifications and (4) general environmental benefit claims. We discuss each of these trends below.

Recyclable Packaging

An emerging trend in 2023 involved plaintiffs alleging that "recyclable claims" implied that products bearing the claim were actually being recycled.

At least one court in the U.S. District Court for the Northern District of California rejected this argument in *Swartz v. Coca-Cola Co.*, finding that "recyclable" "is an adjective that means capable of being recycled" and is not "a promise that an object will actually be recycled." [2]



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In its November 2022 dismissal, the court found that this argument was inconsistent with the FTC's Green Guides, which currently advise that "recyclable" claims are appropriate if the material at issue "can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item" and recycling facilities are available to at least 60% (a "substantial majority") of "consumers or communities where the item is sold." [3]

Plaintiffs, however, have adapted to this ruling, filing more detailed complaints with recycling statistics and quotes from those in the recycling industry. These complaints allege that appropriate recycling facilities are not available for a substantial majority of communities or consumers to recycle items; for example:

- Caps and labels on single-use plastic water bottles in the Muto v. Coca-Cola Co. case in the U.S. District Court for the Northern District of California last year; [4]
- High-density polyethylene toothpaste tubes in the Weingartner v. Colgate-Palmolive Co. case in the Northern District of California last year; [5] and
- Low-density polyethylene "recycling" bags in two cases last year: Keirsted v. Glad Products Co. in the U.S. District Court for the Middle District of Florida, and Peterson v. Glad Products Co. in the Northern District of California. [6]

These lawsuits have paid off for some litigants: A consumer products company agreed to pay \$3 million in November 2023 to settle a false advertising lawsuit in the Illinois Circuit Court case, Gudge v. Reynolds Consumer Products, which alleged that their LDPE recycling trash bags were not actually recyclable. [7]

State enforcement efforts are likely to drive further litigation activity in 2024. Specifically, in December 2023, California's Department of Resources Recycling and Recovery, or CalRecycle, published long-awaited materials related to newly implemented legislation directed at recycling and recyclable claims.

CalRecycle released its draft regulatory text, [8] covered material categories list, [9] and report to the Legislature [10] to address its responsibilities under the Plastic Pollution Prevention and Packaging Producer Responsibility Act — S.B. 54 — and its preliminary findings report under S.B. 343, [11] which regulates the use of the chasing arrows symbol and other indicators of recyclability.

For material to be considered recyclable, both laws require CalRecycle to examine (1) whether certain material is accepted by recycling programs servicing at least 60% of California's population, and (2) whether the material is recovered and sorted into defined streams by recycling processors serving at least 60% of statewide recycling programs.

We can expect that plaintiffs will begin using these resources to allege that material that is not considered recyclable under either S.B. 54 or S.B. 343 is not, in fact, recyclable, and any claim to the contrary is deceptive.

Aspirational Claims

In addition to the current environmental benefits of their products, companies often want to tout the goals they are working toward achieving in the future. These claims can quickly get a company into trouble, however, if they are too lofty and cannot be substantiated or if the company is not actively working to achieve the advertised goals.

For example, in a case heard in front of the NAD, the Institute for Agriculture and Trade Policy, a nonprofit research and advocacy organization, challenged certain aspirational claims made by food company and animal protein producer JBS USA Holdings Inc.[12]

Specifically, the challenger alleged that JBS' claims that it was "committing to be net-zero by 2040" were misleading because they conveyed a message that JBS had "an operational plan in place to achieve its net-zero goals and is implementing such a plan." [13]

JBS argued that these claims were merely aspirational and not intended to convey a message that aspirational future benefits were currently available to consumers.[14] However, the NAD has found that if an aspirational claim is tied to a measurable outcome, advertisers must be able to demonstrate that the goal is not merely illusory and "provide evidence of the steps it is taking to reach its stated goal." [15]

In a February 2023 decision, the NAD found that while JBS had started to take steps that could help it achieve net-zero by 2040, it did not provide evidence to support the claim that it was currently implementing a plan that would help it achieve net-zero by 2040. This could have been achieved by submitting "a plan with specific objectives and measurable outcomes likely to be achieved." [16]

The NAD ultimately recommended that JBS discontinue its "net-zero by 2040" claims.[17] JBS appealed the NAD's decision to the National Advertising Review Board, which agreed with the NAD's analysis in May 2023.[18]

State governments are paying attention to aspirational claims, too. For example, New York recently filed a complaint in the Supreme Court of New York, Erie County, against Pepsico Inc., Frito-Lay Inc. and Frito-Lay North America Inc., related to their use of single-use packaging.[19]

The complaint in part focused on statements the company had made about reducing its use of virgin plastic in the future. The complaint alleged these claims were misleading because the company purportedly shifted its target for virgin-plastic reduction when it realized it would not meet its original goal, without fundamentally changing any of its practices.

These allegations echo the NAD's view that a company must show what steps it is taking to reach a stated environmental goal.

Third-Party Certifications

Third-party certifications can be a useful tool in substantiating environmental marketing claims. However, marketers must take care to ensure that the use of third-party certifications or seals is compliant with the FTC's Green Guides. The FTC has advised that such use "likely conveys that the product offers a general environmental benefit ... if the certification or seal does not convey the basis for the certification or seal." [20]

In 2023, the NAD heard two similar cases against third-party certification bodies.

In the first, two advocacy organizations, the American Society for the Prevention of Cruelty to Animals and the Antibiotic Resistance Action Center, challenged claims that One Health Certification Foundation made about its certification of poultry products, including claims that certification "supports environmental stewardship classes in order to minimize the impact of animal production on the environment." [21]

The NAD found in a February 2023 case report that reasonable consumers are "likely to expect a certification that includes 'environmental stewardship' to represent an improvement over competing uncertified products," and since the certifying body merely collected environmental impact data and did not hold its members to environmental standards, the claim could not be supported. [22] The National Advertising Review Board upheld the decision in May 2023. [23]

In the second, the Animal Welfare Institute, an animal advocacy organization, challenged Where Food Comes From Inc.'s claims related to its "CARE Certified" encircled heart seal on beef and pork labels. [24] Though focused on animal welfare claims, which can be similar to environmental benefit claims, the challenge is illustrative guidance for the general use of third-party certification seals.

Importantly, the advertiser did not use any claims to accompany the seal that could suggest the benefit reflected by the certification was broader than it was, unlike the One Health case discussed above. [25] In July 2023, the NAD found that while the certification may not have matched the "highest animal welfare standards," the CARE Certified standards did "exceed conventional industry standards," and thus the certification was not misleading to consumers. [26]

Plaintiffs also frequently target the use of these third-party certification seals to support their allegations that certain green marketing claims are false or misleading. Three recent examples that have arisen since January 2023 follow.

- In *Bohen v. Conagra Brands Inc.*, in the U.S. District Court for the Northern District of Illinois, the plaintiffs allege that certification by the Marine Stewardship Council cannot support a "sustainable seafood" claim because the certifier allowed harmful fishing practices. [27]
- In *Pina v. Avocado Mattress LLC*, in the Northern District of California, the plaintiffs argued that the defendant's "MADE SAFE" certification did not support the claim that its products were made with 100% healthy ingredients because the certification process "merely involves cross-referencing a product's ingredients against a database of known and suspected toxins." [28]
- In *National Consumers League v. Starbucks Corp.*, discussed above, the plaintiffs claimed that the Rainforest Alliance cannot support statements that Starbucks ethically sources its tea products because labor abuses have purportedly been identified at Rainforest Alliance-certified tea farms. [29]

Though none of the above cases have resulted in an order showing how a court views these claims — a motion to dismiss is pending in Bohen, the plaintiffs in Pina voluntarily dismissed the claims and the National Consumers League was just filed in January 2024 — they serve as exemplars for how plaintiffs will target environmental certifications when alleging false advertising.

General Environmental Benefit Claims and the Supply Chain

The FTC discourages making unqualified general environmental benefit claims because, under Title 16 of the Code of Federal Regulations, Section 260.4(b), such claims "are difficult to interpret and likely convey a wide range of meanings" that a marketer presumably cannot substantiate.[30]

Plaintiffs frequently target claims that a product is sustainable or eco-friendly by alleging that there are aspects of the product's supply chain that make such statements misleading. These are essentially the exact allegations that the National Consumers League makes against Starbucks in its January 2024 complaint, filed in the Superior Court of the District of Columbia.

According to the plaintiff, claims that Starbucks' coffee and tea are ethically sourced cannot be true because of alleged "severe human rights and labor abuses" at the cooperatives and farms in the supply chain.[31]

Key Lessons for Making Green Claims in 2024

Despite the increasing risk of consumer or competitor challenges to certain advertising claims, companies need not be discouraged from truthfully touting the environmental benefits of their products. When evaluating these advertising claims, here are a few ideas to keep in mind, based on recent trends.

A product is the sum of its parts, and green claims should be tailored appropriately.

As reflected in the Starbucks case, companies must take care to consider a product's entire supply chain when crafting disclosures for green advertising claims. As an example, if a company is touting the use of a renewable resource in its product, but the material undergoes extensive chemical processing during production, it is important to consider whether an environmental benefit claim should be made about the product, and how to properly limit the claim to lower risk to the business.

State laws may impose stricter standards than the FTC guidance.

As seen with the California legislation discussed above, the Green Guides are not the end-all, be-all of the standards that companies should consider when drafting green marketing claims.

Many states have laws regarding certain claims that can or cannot be made about products, such as "recyclable" claims in California,[32] or "biodegradable" or "compostable" claims in Alabama, Colorado, Maryland and Washington,[33] to name a few.

It is imperative that companies touting the environmental benefits of their products understand how state and local laws may affect their advertising and labeling, and comply

accordingly.

Aspirational claims must be substantiated, too.

While 2050 may feel far away, a claim that a company is going to achieve an environmental goal in the future has implications for the present. As reflected in the JBS case above, a company must demonstrate that it is taking concrete actions toward achieving a measurable touted environmental goal.

Any aspirational claim should therefore refer to a reasonably achievable benefit, based on a company's current or soon-to-be-implemented practices.

Third-party certifications may be used as substantiation, but take care to ensure claims are narrowly tailored.

Many companies use third-party certification to substantiate their environmental marketing claims. These certifications are a great resource for your toolbox when used appropriately. When not deployed carefully, however, a logo or seal could actually convey a broader environmental benefit than intended.

Any claims made about a product's environmental certification should be limited to information that can be supported by the certification. Otherwise, a company may open itself up to litigation or NAD challenges.

Conclusion

Green marketing claims inherently carry risk, but navigating that risk does not need to be difficult. By staying up-to-date on the FTC's guidance, individual state requirements, and litigation and NAD trends, a company can significantly lower its risk while still touting the environmental benefits of its products.

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[1] Complaint, Nat'l Consumers League v. Starbucks Corp., No. Unavailable, (D.C. Sup. Ct. Jan. 10, 2024).

[2] Swartz v. Coca-Cola Co., No. 21-cv-04643-JD, 2022 WL 17881771 (N.D. Cal. Nov. 18, 2022).

[3] Id. at *2; see also 16 C.F.R. § 260.12(a), (b)(1). It is important to note that in its request for comments for updates to the Green Guides, the FTC asked whether the updated Guides should include guidance for "items collected by recycling programs for a substantial majority of consumers or communities but not ultimately recycled." Guides for the Use of

Environmental Marketing Claims, 87, Fed. Reg. 77766, 77769 (Dec. 20, 2022). At the time of publication, it remains to be seen whether the FTC will go this direction with its future guidance.

[4] See, e.g., *Muto v. Coca-Cola Co.*, No. 3:21-cv-04643-JD (N.D. Cal. Aug. 17, 2023).

[5] Complaint, *Weingartner v. Colgate-Palmolive Co.*, No. 3:23-cv-04086-JCS (N.D. Cal. Aug. 11, 2023).

[6] See, e.g., Complaint, *Keirsted v. Glad Prods. Co.*, No. 6:23-cv-02472 (M.D. Fla. Dec. 26, 2023); Complaint, *Peterson v. Glad Prods. Co.*, No. 3:23-cv-00491 (N.D. Cal. Feb. 2, 2023).

[7] Settlement Approval, *Gudgel v. Reynolds Consumer Prods. Inc.*, No. 23LA00000486 (Ill. Cir. Ct. Nov. 15, 2023). Other "recyclable" false advertising lawsuits have settled privately. See, e.g., Joint Stipulation, *Peterson v. Glad Prods. Co.*, No. 3:23-cv-00491-TSH (N.D. Cal. Nov. 6, 2023).

[8] CalRecycle, Plastic Pollution Prevention and Packaging Responsibility Act Regulations: Proposed Draft Regulatory Text (Dec. 28, 2023), <https://www2.calrecycle.ca.gov/Docs/Web/126588>.

[9] CalRecycle, SB 54 Plastic Pollution Prevention and Packaging Producer Responsibility Act: Covered Material Category (CMC) List (Dec. 28, 2023), <https://www2.calrecycle.ca.gov/Docs/Web/126582>.

[10] CalRecycle, Recyclability Status of Covered Material Categories - SB 54 Report to the Legislature (Dec. 28, 2023), <https://www2.calrecycle.ca.gov/Publications/Details/1730>.

[11] CalRecycle, SB 343 Material Characterization Study Preliminary Findings (Dec. 28, 2023), <https://www2.calrecycle.ca.gov/Publications/Details/1729>.

[12] *JBS USA Holdings Inc. (Net Zero 2040)*, NAD Case No. 7135 (Feb. 1, 2023).

[13] *Id.* at 7.

[14] *Id.* at 7-8.

[15] *Id.* at 8.

[16] *Id.*

[17] *Id.* at 13-14.

[18] Appeal of NAD's Final Decision #7135 Regarding Claims for JBS USA Holdings Inc., Net Zero 2040, NARB Panel #313 (May 26, 2023), at 7-9.

[19] *New York v. Pepsico Inc.*, No. 814682/2023 (N.Y. Sup. Ct. Nov. 15, 2023).

[20] 16 C.F.R. § 260.6(d).

[21] One Health Certification Foundation (Certification of Poultry Prods.), NAD Case No. 7129 (Feb. 1, 2023), at 3.

[22] Id. at 15.

[23] Appeal of NAD's Final Decision #7129 Regarding Claims for One Health Certification Foundation, Certification of Poultry Products, NARB Panel #312 (May 18, 2023), at 4-5.

[24] Where Food Comes From Inc. ("CARE Certified" Encircled Heart Seal on Beef and Pork Labels and Certification), NAD Case No. 7149 (July 5, 2023), at 1.

[25] Id. at 11-12.

[26] Id. at 12.

[27] Complaint, Bohem v. Conagra Brands Inc., No. 1:23-cv-01298 (N.D. Ill. Mar. 2, 2023).

[28] Complaint, Pina v. Avocado Mattress LLC, No. 3:23-cv-02072-AGT (Apr. 28, 2023), at 3-4.

[29] Complaint, Nat'l Consumers League v. Starbucks Corp., No. Unavailable, (D.C. Sup. Ct. Jan. 10, 2024), at 22-23.

[30] 16 C.F.R. § 260.4(b).

[31] Complaint, Nat'l Consumers League v. Starbucks Corp., No. Unavailable, (D.C. Sup. Ct. Jan. 10, 2024).

[32] Cal. Pub. Res. Code § 42355.51.

[33] Ala. Code § 22-27A-1; Colo. Rev. Stat. §§ 25-17-803 – 25-17-805; Md. Code, Envir. § 9-2102; Wash. Rev. Code § 70A.455.040.