Whose Grass Is Greener? Green Marketing: Toward a Uniform Approach for Responsible Environmental Advertising

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NOTES

WHOSE GRASS IS GREENER? GREEN MARKETING:
TOWARD A UNIFORM APPROACH FOR
RESPONSIBLE ENVIRONMENTAL
ADVERTISING

INTRODUCTION

Marcal Paper Towels: Paper from Paper—Not From Trees; Recycled
without Chlorine Bleaching
Trend Detergent: Trend is Packaged in Recyclable Paperboard
Glad Garbage Bags: Safe for the Environment;
Are Degradable in the Sunlight;
Act as a Non-contaminating Inert Material in a
Landfill;
Can be Incinerated Safely, Providing More Fuel
Value than Wood or Coal

These are some of the “environmentally friendly” claims made by
manufacturers to induce consumers to purchase their products. As
American consumers become cognizant of the impact their purchasing
powers have on the environment, and even express a willingness to pay
more for ecologically-sound products,1 there has been a sharp increase in
manufacturers touting their merchandise as contributing to a better envi-
ronment.2 This advertising strategy is known as “green marketing.”

While green marketing is an environmentally valuable method of ad-
vertising, it is becoming increasingly suspect as companies make claims

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1. Dennis Chase, Advertising Age/ Gallup Survey, ADVERTISING AGE, Jan. 29,
1991, at 8.
2. The “number of environmental claims on packages doubled between 1989-90 and
this trend shows no sign of slowing down . . . .” Linda M. Harrington, FTC Urged to
Regulate ‘Green’ Ads, CHI. TRIB., July 18, 1991, at C17. The green marketing phenome-
on has been increasing since 1989, when the attorneys general of several states combined
forces to investigate and improve green marketing practices. The Task Force now con-
sists of Attorneys General from California, Florida, Massachusetts, Minnesota, Missouri,
New York, Tennessee, Texas, Utah, Washington and Wisconsin. The Task Force, in
conjunction with the FTC and the EPA, held a national Public Forum in March 1990,
consisting of leaders of business, government and environmental groups concerned about
the effects of green marketing on consumers. The findings of the Public Forum were
compiled by the Task Force and were set forth in November 1990, in The Green Report:
Findings and Preliminary Recommendations For Responsible Environmental Advertising
(John K. Van de Kemp, California Attorney General, et al. eds. 1990) [hereinafter Green
Report].

Responding to criticisms that some of its recommendations were untenable, unfair or
ill-advised, the Task Force issued Green Report II in May 1991, in which it clarified and
revised some of its original suggestions. The Green Report II: Recommendations for Re-
II]. This Note discusses the Task Force’s recommendations as they stand as of this writ-
ing. The Task Force’s efforts are discussed fully, infra part III.
that are trivial, confusing and misleading. This Note examines the current status of green marketing practices. Part I discusses consumer demand and the green marketing trend. Part II addresses the need for national environmental advertising standards. Part III examines the recommendations that have been made for industry to follow until such standards are established. This Note concludes that national environmental advertising standards are essential to maximize green marketing benefits to the environment.

I. CONSUMER DEMAND AND THE GREEN MARKETING TREND

As the green marketing phenomenon grows, “[c]onsumers across the board are looking for marketers to do more for the environment and say they will change their buying behavior to favor companies that are environmentally sensitive.” Consumers are willing to pay up to five percent more for environmentally sound products, and one company that participated in the national Public Forum on environmental marketing predicted that consumer interest in environmentally sensitive products would increase its sales of such merchandise by over 500% in 1990. Consumers are relying on manufacturers to feed them accurate information, and manufacturers must behave responsibly when labeling products. If manufacturers continue to misrepresent the environmental impact of their products, bombarding consumers with mixed signals, the credibility of environmental advertising and labeling will be seriously un-

3. “A claim that may be literally true may nonetheless be misleading if a consumer might infer additional meanings—for example, with a claim that a product is “recyclable,” a consumer might infer that such recycling is likely to occur.” David J. Freeman, Environmental Product Claims Invite New Scrutiny, Litigation, Nat’l L.J., June 3, 1991, at 18. Some claims are misleading because they are “simply meaningless, such as the bathroom cleaner which ‘contains no nitrates.’ You cannot actually buy a bathroom cleaner which contains nitrates. . . . [Another example is] labeling a plastic bottle as ‘recyclable’, [which,] even if true, is likely to be unhelpful, because so few plastic recycling schemes exist.” Simon Hinde, How to Spend It; Green Con Tricks, Fin. Times, Sept. 15, 1990, at IX. See infra part IV (discussing Recommendation A of Task Force).


5. Felix H. Kent, Green Marketing, N.Y. L.J. Feb. 22, 1991, at 3, 35. The term “environmentally sound,” like “environmentally safe,” “environmentally friendly” and “good for the environment,” is itself enigmatic. These are ambiguous phrases that give no concrete information as to the environmental attribute of the product. Is it recycled? Recyclable? These claims must be accurately and narrowly tailored to the individual product. See also Green Report II, supra note 2, at 5.

6. See e.g., Consumers Go Green, Advertising Age, Sept. 25, 1989, at 3. A J. Walter Thompson survey reported that of the consumers polled: 45% read labels for environmentally harmful products; 34% reduced use of paper towels; 49% bought products made of recycled materials; 54% stopped using aerosol sprays and 31% bought products because they were supposed to be good for the environment. Environmental Action, Advertising Age, Dec. 10, 1990, at 62. Labels, when used properly, serve to guide consumers “through a ‘green’ wilderness where more and more advertising and marketing departments are using elaborate and sometimes false environmental claims as a selling point.” Marlise Simons, A ‘Green Label’ for Europe’s Consumer Goods, N.Y. Times, Dec. 14, 1990, at A6.
dermined. If consumers cannot trust environmental claims, their incentive to purchase so-called environmentally safe products will be lost. Similarly, if companies are not reproved for making trivial or exaggerated environmental claims, some companies that would otherwise make substantial investments in more environmentally sound manufacturing processes and new products will be discouraged from doing so.

An Advertising Age/Gallup Survey revealed that the companies that were most recognized as taking positive action toward bettering the environment were Proctor & Gamble, Wal-Mart, McDonald's, and some cereal companies, while beer and diaper manufacturers generally lagged behind. Proctor & Gamble, although already considered one of the leading companies in green marketing, ran into a green roadblock with its Luvs' and Pampers' disposable diapers advertisements, which deceptively suggested that the diapers were readily degradable. Although the diapers are supposedly 80% compostable, few composting facilities exist. The company settled with the ten states that challenged the claim, agreeing to change the advertising. Proctor & Gamble intro-

7. Terri Shaw, The Selling of 'Green': Labels Use All the Buzz Words, But What Do They Mean?, WASH. POST, Feb. 28, 1991, at T9. See Judann Dagnoli, Whose Job Is It to Define 'Green?', ADVERTISING AGE, Feb. 4, 1991, at 13. An Advertising Age/Gallup survey reported that when consumers were asked to rate their confidence that product advertising provides trustworthy information about a product's impact on the environment, only 8% of the respondents said that they were 'very confident,' while 43% said 'somewhat confident,' and 47% said 'not confident'. Responding to a question about their confidence that product labeling provides accurate information about the environment, 12% said that they were 'very confident,' 51% said 'somewhat confident,' and 35% said 'not confident'. Yet when asked if they were confident in knowing how to choose products that are really environmentally responsible, 75% said they were 'very' or 'somewhat' confident. Dennis Chasd, P&G Gets Top Marks in AA Survey; Exclusive First Look at How Consumers Feel; Wal-Mart, McDonald's, Cereal Companies Stand Out; Beer, Diapers, Labeling, Advertising Have a Long Way to Go, ADVERTISING AGE, Jan. 29, 1991, at 8. While many consumers may be environmentally conscious, it is unlikely that they will independently research the numerous products being offered as "environmentally safe". It is for this reason that green marketing must accurately reflect the product's environmental impact.


9. The makers of Bunnies disposable diapers agreed not to promote their diapers as biodegradable following charges by several states that the claim was deceptive. See infra notes 80-83 and accompanying text.

10. Chase, supra note 7. Kmart department store is trying to improve its environmental image by entering joint marketing programs with manufacturers, promoting products such as Rubbermaid trash cans, made mostly or completely from recycled plastic. Patricia Strnad, Kmart Expands Environmental Plan, Sets Rubbermaid Tie, ADVERTISING AGE, Feb. 18, 1991, at 33.


12. See Winski, supra note 11, at 4.

13. For a discussion of similar state investigations of deceptive environmental advertising claims, see infra notes 72-83 and accompanying text.

14. Ten States, supra note 11.
duced its environmental education promotion in April 1991. The program, entitled “Let’s Not Waste the ‘90s,” which the company supports in conjunction with the organization Keep America Beautiful, was initiated “to generate consumer interest in solid waste disposal issues at the community level.”

In August 1990, McDonald’s formed a task force with the Environmental Defense Fund to reduce the solid waste that its restaurants generate. Much of McDonald’s efforts to be environmentally responsible stems from public pressure rather than conclusive environmental analysis. In fact, although McDonald’s polystyrene plastic packaging was found to be environmentally superior to its paperboard packaging, consumers appeared more opposed to the foam clamshells, so the company switched to plastic-coated paper wrappers. This debate about foam versus paper makes fast-food chains hesitant to boldly advertise their environmental efforts. Yet McDonald’s is still one of the first companies consumers name in terms of being environmentally conscious.

Predictably, the green marketing trend has not limited itself to household items. Even furniture retailers and manufacturers have introduced products ranging from “environmentally correct baby rattles and nontoxic paper clips to unbleached cotton sheets and side tables stained with blueberry juice.” Established merchants offer furniture made from recycled materials and there are now “ecological department stores” that sell only “environmentally safe” products.

18. McDonald’s commissioned the Stanford Research Institute to conduct an environmental impact study in 1976. Scott Hume, McDonald’s Goal is to be a Leader in Environmentally Sensitive Marketing, but when It Moved Faster than Public Perceptions, with and to Do an About-Face on Packaging [sic], ADVERTISING AGE, Jan. 29, 1991, at 32. The Institute found that “[p]aper and paperboard used with food have to be coated, making them ‘mixed materials’ that are nearly unrecyclable. Polystyrene uses less energy than paper in its production, conserves natural resources, represents less weight and volume in landfills, and is recyclable.” Id.
19. Id.
20. Id.; Spurs and Starts, supra note 16.
21. Polystyrene manufacturing releases chlorofluorocarbons into the air, which harms the ozone layer; paper kills trees. Hume, supra note 18, at 32.
23. Hume, supra note 22.
25. Id. The first store in New York is the Terra Verde Trading Company. Id.
As green advertising expands and thrives, there is a nationwide call\(^\text{26}\) for the enactment of uniform standards to properly guide consumers toward well-informed environmental purchasing decisions.\(^\text{27}\) The main focus of all groups addressing the environmental advertising problem is to ensure that such marketing is not deceptive or confusing\(^\text{28}\) to consumers, although there is debate over whether these standards should be promulgated by the federal government, by the states, or by industry itself.

II. THE NEED FOR NATIONAL GREEN MARKETING GUIDELINES

While present federal laws\(^\text{29}\) prohibit deceptive acts and practices in

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26. See infra, part II.
27. If national consensus over the use of [environmental claims] is not reached in the near future, we face the danger of losing a valuable tool for educating the public and influencing the production and use of more environmentally oriented products. Consumers may come to distrust or ignore all environmental claims, and national manufacturers and marketers may become so hamstrung by conflicting State standards that they avoid making these claims completely.


28. Claims are deceptive “if there is a representation, omission, or practice that is likely to mislead in a material way the consumer acting reasonably in the circumstances, to the consumer’s detriment.” Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir.), cert. denied, 479 U.S. 828 (1986). Guidelines ensuring that environmental claims are not deceptive will help eliminate consumer confusion. Buyers will know exactly what they are getting.

Additionally, consumers are often confused about environmental claims because “they are uninformed, not because the claims are delivered deceptively.” FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide, 61 Antitrust & Trade Reg. Rep. (BNA) 117 (July 25, 1991). “The Task Force believes that, if companies conform their advertisements to [the Task Force recommendations], consumer confusion over environmental advertising claims will be substantially reduced.” Green Report II, supra note 2, at viii-ix.


15 U.S.C. § 55(a)(1) provides:

The term “false advertisement” means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account . . . not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. (Emphasis added).

See Freeman, supra note 3.

The FTC and other enforcement agencies have a variety of tools available to remedy deceptive advertising practices. The most benign tools are cease-and-desist orders with “fencing-in” provisions. In such cases, there is no monetary penalty unless the consent decree provisions are violated in the future. In more serious cases, the commission may seek monetary redress for consumers or require corrective advertising sufficient to dispel the misimpression created by the earlier advertisement.

Id.
advertising, they are simply insufficient to address ever-growing green marketing concerns. Since the Federal Trade Commission Act\(^{30}\) specifically excludes product labeling from its definition of false advertisement,\(^{31}\) it does not adequately target environmentally deceitful labeling practices. Green legislation aims directly at the environmental buzzwords on product labels.\(^{32}\) With environmental advertising, not only is there potential harm to the consumer, there is also the possibility of irreparable harm to the environment—harm that can be avoided if claims are made properly from the start.

In February 1991, the Association of National Advertisers (ANA) asked the National Advertising Division of the Better Business Bureau to consider issuing “green guidelines” for self-regulation of marketing claims.\(^{33}\) An ad hoc group of eleven businesses and trade associations led by the National Food Processors Association (NFPA) petitioned the FTC to adopt national “Industry Guides” for environmental labeling and advertising, with the aim of “prevent[ing] companies marketing goods nationally from becoming enmeshed in a web of conflicting state regulations covering the use of environmental claims.”\(^{34}\) National standards are useful because an abundance of advertising occurs on a nationwide scale.\(^{35}\) “[S]tandardization of environmental claims is necessary to provide a level playing field upon which businesses can compete on an equal footing . . . . [S]tandards would reduce for both consumers and business the mounting confusion about the meaning of environmental claims.”\(^{36}\)

The FTC should not rely solely on its present enforcement powers to adjudicate green marketing claims on a case-by-case basis. An early instance of the FTC’s case-by-case adjudication was in *Ex-Cell-O Corp.*,\(^{37}\) where the company represented that its Pure-Pak carton\(^{38}\) was com-

\(\begin{align*}
30. & \quad 15 \text{ U.S.C. } \S 55(a)(1) \ (1988).
31. & \quad \textit{Id.} \textit{See supra} \textit{note} 29 \ (\textit{quoting text at} \ 15 \text{ U.S.C. } \S 55(a)(1)).
32. & \quad \textit{E.g., Indiana's Environmental Marketing Claims Act enumerates these terms: environmental choice; ecologically, earth, or environmentally friendly; ecologically or environmentally sound; ecologically or environmentally safe; environmentally "lite;" green product; any other term or terms similar to the other terms listed in this chapter. IND. CODE ANN. } \S 24-5-17 \ (\textit{Burns} 1991); \ H.R. 1408, 102d Cong., 1st Sess. \ (1991); \ S. 615, 102d Cong., 1st Sess. \ (1991).
35. & \quad \text{Standards with national applicability would alleviate much of the pressure on companies to tailor their claims to individual state requirements, although these federal guidelines, as such, would not prevent states from enacting their own regulations. 56 Fed. Reg. 24,968, 24,971 \ (1991). See infra note 55 and accompanying text.}
36. & \quad \text{Green Report, supra note 2, at 15; 56 Fed. Reg. 49,992-49,993 \ (1991).}
37. & \quad 82 F.T.C. 36 \ (1973).
38. & \quad \text{The carton was mainly used for milk products. \textit{Id.}}
\end{align*}\)
pletely biodegradable and that the carton would essentially turn into soil within a short period of time. Environmental consciousness has obviously heightened in the almost two decades since that action, yet green claims continue to be a problem. Comprehensive guidelines would help reduce the number of green violations in the first instance. If FTC-promulgated guidelines are “clearer or more extensive than [those] derived from cases, and if guidelines can be developed more quickly than illustrative cases are decided, more widespread compliance may result, and fewer enforcement actions may be necessary.”

Such guidelines have the potential disadvantage of being overbroad because while environmental claims should be unique to each product, the guidelines obviously will be generalized. Thus “the use of guides could increase the likelihood that the [FTC] might inadvertently either discourage beneficial claims or encourage deceptive claims. Guides also set a standard that may become obsolete as science, technology, and consumer knowledge of environmental issues evolve.”

These concerns can be assuaged if it is remembered that these guidelines are not binding—they are only advisory in nature, providing a comprehensive map for all green marketers to follow. While the guidelines do not preempt state or local laws, they provide necessary direction for states that have not chosen to enact their own green legislation. The guidelines’ encompassing form can be adapted by manufacturers to fit each product’s needs. If they are too specific they might exclude many claims. Broadness also allows for more leeway as technology improves

39. Id. This misrepresentation was successfully challenged. Ex-Cell-O Corp. agreed to cease and desist from representing that the Pure-Pak carton was biodegradable without stating which part of the carton was not biodegradable and that biodegradation, if it occurs, depends on various environmental and other factors to which the carton is exposed. Id.

40. See infra notes 72-83 and accompanying text.

41. Steven W. Colford, FTC Slatés Green Claims Hearings, ADVERTISING AGE, Mar. 18, 1991, at 12. According to FTC Commissioner Mary L. Azcuenaga, “the FTC’s mission in the environmental advertising and labeling area is to ensure that claims on environmental superiority of a product over those of competitors do not exaggerate advantages or distort consumer purchase decisions.” 60 Antitrust and Trade Reg. Rep. 632 (BNA) (May 1991). “For many companies, . . . the most serious sanction is the adverse publicity that an FTC enforcement action creates. Especially when companies are selling an image of being environmentally conscious, the merest hint of a government enforcement proceeding can turn an ad campaign into a public relations nightmare.” Freeman, supra note 3. The FTC held hearings to address green marketing guidelines on July 17 and 18, 1991. 56 Fed. Reg. 24,968 (1991).


43. Id.

44. Some states require that Commission interpretations be given great weight. 56 Fed. Reg. 24,968, 24,971 (1991). See e.g., ALA. CODE § 8-9-16 (1975 & Supp. 1990); ALASKA STAT. § 45.50.545 (1962 & Supp. 1990); ARIZ. REV. STAT. ANN. § 4-1522(B) (1986 & Supp. 1990). California’s and Indiana’s green marketing laws provide that certain definitions promulgated by the FTC are to be followed. See infra note 61 and accompanying text.
On March 12, 1991, Representative Gerry Sikorski and Senator Frank Lautenberg introduced practically identical bills entitled the "Environmental Marketing Claims Act of 1991" (the "Act"), in the House and Senate, respectively, for the purposes of:

1. preventing the use of fraudulent, deceptive, and misleading environmental marketing claims;
2. empowering consumers with reliable and consistent guidance to facilitate value comparisons with respect to environmental marketing claims;
3. establishing uniform, accurate standards and definitions that reflect the best available manufacturing practices, products, and packaging;
4. encouraging the development of innovative technologies and practices to be adapted by manufacturers in considering the environmental effects when producing products and packages; and
5. encouraging both consumers and industry to adopt habits and practices that favor natural resource conservation and environmental protection.

These bills provide that the Administrator of the Environmental Protection Agency (EPA), not the FTC, "shall establish by regulation an environmental marketing claims regulatory program" to carry out the provisions of the Act within 18 months after its enactment. Passage of the Act would relieve the FTC of the responsibility for promulgating guidelines and would avoid tension between voluntary FTC guidelines and state laws. The Act establishes an Independent Advisory Board to

45. The [FTC] may change the policies reflected in such guides with minimal procedure and notice. In addition, guides may not be relied on as an independent basis for Commission enforcement action. If the use of a particular environmental claim appears to be inconsistent with a guide, any cease and desist order could issue only after a determination that the claim was unlawful under section 5 [of the FTC Act]. [G]uides have no formal, preemptive effect of State or local laws or regulations. 56 Fed. Reg. 24,968, 24,971 (1991). See infra notes 55-56 and accompanying text.

Interpretive guides are also preferable to the promulgation of a trade regulation rule under 15 U.S.C. § 57(a)(1988). See 56 Fed. Reg. 24,970 (1991); supra notes 14-15. Unlike guidelines, "[t]rade regulation rules are binding on the public and the Commission and may be amended only after full rulemaking proceedings," and may preempt state and local laws. 56 Fed. Reg. 24,968, 24,971 (1991); see also supra note 16. This defeats the purpose and goal of cooperation amongst the various proponents of green activism.

47. Id.
49. Colford, supra note 33. Indeed, the Task Force in Green Report II commended this bill for its approach to state and EPA enforcement of the marketing standards that would be developed under the proposed legislation. Green Report II, supra note 2, at 3. Additionally, the Task Force favors dual enforceability, by federal regulators and the states, of any federal programs developed to govern environmental marketing claims. Id., at 2.

Enforcement of consumer protection and false advertising laws is an essential function of the states' general police powers. The federal regulatory scheme
make recommendations concerning the regulation of environmental marketing claims. Participation and cooperation of all the groups affected by the guidelines are required. The status of the Board members and the provision that the Board may hold meetings for public comment and participation demonstrate that the Act seeks to involve all those concerned about this environmental marketing predicament. While the state representatives are ex officio members who cannot vote, they still have input in the process.

The regulatory program adopted by the federal government would not "prohibit a [S]tate from enacting and enforcing a standard or requirement with respect to the use of an environmental marketing claim that is more stringent" than one established under the Act, so some potential for conflict remains. However, this provision is no different than the recognition that states may adopt laws that are more restrictive than federal

therefore should supplement, rather than supplant, existing state law governing false advertising and deceptive practices. The states must continue to share with the federal government the authority and responsibility for taking action against the companies that violate standards developed to govern environmental marketing claims. The states would, accordingly, vigorously oppose any statute or regulation that proposes preemption of states' rights in this area.

*Id.* Companies can make generalized claims that promote their products and are consistent with individual state regulations. For example, the claim, "recyclable where facilities exist," seems to comport with current state laws. See infra notes 58-65 and accompanying text.

50. H.R. 1408, § 5(a); S. 615, § 5(a).
51. H.R. 1408, § 5(b)(1); S. 615, § 5(b)(1):

The Board shall consist of 15 members, including 4 ex officio members, who shall be appointed by the Administrator as follows:

(A) Three members who are recognized as consumer advocates, one of whom is a recognized expert in marketing or consumer perception.

(B) Five members representative of industry and manufacturing, including—

(i) One retailer;
(ii) One manufacturer;
(iii) One recognized waste management expert in the private sector;

and

(iv) One end user of post-consumer materials.

(C) Three members representative of environmental organizations, of which one member is a recognized expert in soil science or environmental toxicology.

(D) Two members who shall serve ex officio who are officers or employees of State government, and of which—

(i) One member is recognized expert in consumer protection; and
(ii) One member who is recognized as a waste management, pollution reduction, or pollution prevention expert.

(E) One member who is an officer or employee of a local government and is engaged in pollution prevention or waste management, a municipal recycling program, or consumer protection who shall serve ex officio.

(F) One member who is an officer or employee of the National Institute of Standards and Technology, who shall serve ex officio.

52. H.R. 1408, § 5 (c)(1); S. 615, § 5(c)(1).
53. H.R. 1408, § 5 (b)(2); S. 615, § 5(b)(2).
54. H.R. 1408, § 13(c); S. 615 § 13(c).
Additionally, companies should have less objection to EPA implementation of regulations than to congressional legislation because the EPA is better equipped than Congress to address environmental issues and thus to effectuate practical, reasonable solutions to the green marketing dilemma. 

Several states have adopted independent legislation aimed at regulating green marketing. These states address the environmental marketing issue from different angles and define many terms differently. New York’s regulation of recycling emblems was specifically enacted to address the use of such emblems in “the promotion or advertisement of a package or product” sold in the State. Rhode Island flatly prohibits the use of the terms “degradable,” “biodegradable,” “photodegradable,” and “environmentally safe” on packages because these terms are misleading. Alternatively, California and Indiana restrict the use of the terms

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55. See Union Elec. Co. v. EPA, 427 U.S. 246 (1976) ("[I]f a state makes the legislative determination that it desires a particular air quality by a certain date and that it is willing to force technology to attain it . . . such a determination is fully consistent with the structure and purpose of the Amendments [to the Clean Air Act]."). But see Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (state statute preempted by comprehensive scheme for environmental protection by federal law where the two laws were aimed at same end).

If a state has taken a lead in establishing recycling facilities, it should be able to require companies to relate recyclability claims to the availability in that state. For example, the settlement agreement between the Task Force and Tetra Pak, Inc., Combibloc, Inc. andLintas, Inc., suggests that the following claim would be appropriate: "For more information about the technical feasibility of recycling juice boxes . . . call 1-800-.” See infra note 83 and accompanying text.

56. Although Congress is more susceptible to lobbying than is the EPA, the widespread interest in green marketing issues demonstrated by industry so far indicates that manufacturers and marketers will want guidance from whichever national institution promulgates the rules.


58. See, e.g., CAL. BUS. & PROF. CODE § 17508.5(d) (Deering 1991) (defines the term "recyclable" to mean “that an article can be conveniently recycled.”). But see, N.Y. COMP. CODES R. & REGS. tit. 6, § 368.2(k) (requiring a recyclable material to meet any one of four requirements relating to access to facilities and rate of recycling within the State). See Miriam L. Siroky & Phillip D. Reed, Using ‘Green’ Claims In Advertising and Packaging, N.Y. L.J., Oct. 21, 1991, at 3.


“ozone friendly,” “biodegradable,” “photodegradable,” “recyclable” or “recycled” unless the consumer product or package meets the states’ definitions or the definitions established by the FTC.61

The biggest push for national regulation of environmental advertising began in November 1989, when the attorneys general of California, Massachusetts, Minnesota, Missouri, New York, Texas, Washington and Wisconsin, later joined by Florida and Utah,62 formed a Task Force to investigate environmental advertising claims and to strive toward implementing standards for such marketing strategies. Minnesota Attorney General Hubert H. Humphrey III, who spearheaded the Task Force, has said that national definitions and standards must be established. “‘Voluntary restraint and individual lawsuits are stopgap solutions. Without federal action, state and local lawmakers will have no choice but to piece together their own solutions, the best they can.’”63

The entire country will gain a better environment from improvements in products and from responsible green marketing practices. As discussed above, even after the EPA administers regulations under the Act, states will be free to enact stricter standards. This provision notwithstanding, states should wait until national laws are in place to ensure that the statutes are in compliance with and do not differ substantially from each other.64

III. RECOMMENDATIONS FOR GREEN MARKETING STANDARDS

Out of this mire of industry, federal, and state solutions to the green marketing problem emerge the preliminary recommendations of the Task Force. These recommendations,65 discussed below, offer the strongest

61. CAL. BUS. & PROF. CODE § 17508.5; IND. CODE ANN. § 24-5-17-2.
62. Tennessee joined the Task Force in 1991, bringing the total number of states involved to eleven. See supra note 2.
64. See 56 Fed. Reg. 49,993.
65. a. Environmental claims should be as specific as possible, not general, vague, incomplete or overly broad.
   b. Environmental claims relating to the disposability or potential for recov-
model for interim guidance until uniform standards are adopted.  

A. Environmental claims should be as specific as possible, not general, vague, incomplete or overly broad

"The worst I've ever seen was a product advertised as being environmentally responsible paper towels," said [Alan] Newman of Seventh Generation [a mail-order operation specializing in "environmentally responsible" products]. "It was virgin bleached paper wrapped individually in plastic. The reason it was 'environmentally responsible' was that the cardboard tube was 50 percent recycled cardboard," which is true of most brands. 

The overriding and unanimous concern of those attending the Task Force's Public Forum related to consumer confusion over the various labels on products. For example, it is often difficult to tell whether a simple "recyclable" sticker on a product refers to its package or to the product itself. Recently, when such a sticker was placed on the plastic wrapper of disposable diapers, a consumer brought the wrappers and a garbage bag full of dirty diapers to a recycling facility. Concrete definitions for terms commonly used in environmental advertising are indisputably necessary in order to avoid this mounting confusion.

If environmental marketing claims are to be specific and readily understandable, each term must mean the same thing on every product making that representation. Standards are needed for applying those definitions, as demonstrated by the concern over the use of the terms "degradable" or "biodegradable." These terms are not interchangeable, although they are often treated as though they are.

Biodegradable means a substance can be decomposed by microorganisms that are usually present in the soil. Degradable simply means a
substance will gradually break down under the right conditions. Since most American trash goes to landfills, where things decompose very slowly or not at all, scientists have raised doubts about the use of these terms to imply that a product will help solve the country’s waste problem.\textsuperscript{71}

Six states brought suits against Mobil Oil Corporation\textsuperscript{72} because it labeled its Hefty brand garbage bags as “degradable.” A degradability claim “is meaningless unless [the] product ends up in a composting system where air, water and microorganisms . . . are present.”\textsuperscript{73} Hefty’s claim was false because the bags are only degradable in sunlight and the bags are generally buried in landfills where virtually nothing breaks down.\textsuperscript{74} Mobil settled with the state of Texas for $15,000 and agreed to discontinue using that term.\textsuperscript{75} The other state suits were settled on June 27, 1991, with Mobil paying a total of $150,000.\textsuperscript{76} Mobil stopped using “degradable” on new labels, but boxes with old labels remained on store shelves for months.\textsuperscript{77}

In a suit against a diaper manufacturer brought by ten states on behalf of consumers, American Enviro Products, Inc. agreed not to represent “Bunnies” diapers as biodegradable\textsuperscript{78} and paid $50,000 in settlement costs, although it admitted no wrongdoing.\textsuperscript{79} The manufacturer said

\textsuperscript{71} Shaw, supra note 7. The general assembly of Rhode Island specifically found that:

the labeling of such packaging as ‘degradable,’ ‘biodegradable,’ ‘photodegradable’ or ‘environmentally safe’ is inaccurate and misleading to consumers, since the residue of the breakdown of such products and packaging is uncertain and since it cannot be demonstrated that the labeled material breaks down any more rapidly in a solid waste disposal facility than similar products or packaging not labeled as degradable. R.I. GEN. LAWS. § 23-18.14 (1990).

\textit{See supra} notes 61-63 and accompanying text.


While these suits are obviously working, it is in the interest of judicial economy to have one set of national standards under which to bring the actions.


\textsuperscript{74} Mobil Oil, No. 90-06906.

\textsuperscript{75} Id.


\textsuperscript{77} Shaw, supra note 7.

\textsuperscript{78} “No citation is available for this unusual consent agreement, which resulted from 10 states having brought their power to bear on a company.” Kent, supra note 5, at 35.

\textsuperscript{79} See Chris Woodyard, \textit{Diaper Maker Changes ‘Green Marketing’ Claims}, L.A. TIMES, Oct. 18, 1990, at D7. “[T]he company made claims that the diapers are made of a ‘revolutionary outer backing’ that biodegrades in 3-5 years, that the diapers ‘can play a vital role in the disposal of plastic waste,’ and that ‘Bunnies and the plastic bag they are
that it would redesign the diapers and their packaging in an effort to lessen the product’s negative impact on the environment80 and, on October 29, 1990, introduced “Bunnies Plus.”81 The labels on these disposable diapers tout the environmental benefits of cornstarch-filled plastic, which requires less oil; cotton, which saves trees; and inks that do not contain cadmium or lead.82

The assault on deceptive green marketing by concerned attorneys general resulted in three more settlements with companies in the summer of 1991.83 More suits are likely to be brought and lost by defendant companies sold in will biodegrade before your child grows up.” Robert Abrams, $50,000 Settlement over Environmental Claims Made By “Bunnies Biodegradable Disposable Diapers,” N.Y. State Attorney General, PRESS RELEASE, Oct. 17, 1990, at 1. As with garbage bags, most diapers are disposed of in landfills, not composts. It is therefore misleading to represent them as biodegradable. Further, diapers, “like any organic waste, will take decades to degrade in our nation’s landfills.” Id.

New York Attorney General Robert Abrams further stated:

This is a significant settlement, because it is the first multi-state agreement in the ‘green-marketing’ area to actually reach a cash settlement and move a company in a positive direction. By encouraging American Enviro Products to look for real ways in which to make its product less harmful to the environment, this agreement shows that government regulation of deceptive environmental ads can result in truthful advertising, and, just as important, in products that are better for the environment.

Id. at 1-2.  
80. Abrams, supra note 79, at 1.  
81. Spurts and Starts, supra note 16.  
83. The states of California, Florida, Massachusetts, Minnesota, New York, Washington and Wisconsin sued Chelsea Industries, Inc., manufacturer of Good Sense and Handi-Bag plastic bags, because degradability claims made on the package misrepresented directly and by implication that the bags would completely degrade in a landfill, that Chelsea plastic bags do not pose the same solid waste problems posed by other plastic bags, and that consumers need not concern themselves about the solid waste problem if they purchase Chelsea bags. In re Chelsea Industries, Inc., Assurance of Discontinuance, June 3, 1991, at 2-3. The company, which did not admit any wrongdoing, agreed to avoid making degradability claims for the plastic bags, unless the term “degradable” is defined by federal laws, trade rules or guidelines. Id. at 3-4. Chelsea is also required to pay each of the seven states $7,500 in costs of the investigation. Abrams, supra note 76.

Similarly, Alberto-Culver Company, manufacturer of Alberto VO5, Command, Consort and other hair spray products, reached a $50,000 settlement with California, Florida, Massachusetts, Minnesota, Missouri, New York, Tennessee, Texas, Washington and Wisconsin. In re Alberto-Culver Company, Agreement of Voluntary Discontinuance, August 5, 1991. The Company agreed not to represent that its products are “ozone friendly,” “environmentally safe,” or that they “will not harm the ozone,” unless at the time of the representation “Alberto possesses and relies upon competent and reliable scientific evidence that substantiates such representation.” Id. at 2, 3; Robert Abrams, 10 States Announce $50,000 Settlement with Aerosol Hair Spray Manufacturer Over “Green-Collar Fraud,” N.Y. State Attorney General, PRESS RELEASE, Aug. 5, 1991, at 1.

The same ten states reached a $75,000 settlement with two manufacturing companies, Tetra Pak, Inc. and Comnbibloc, Inc., and an advertising agency, Lintas, Inc., over claims made by the companies that multi-material juice boxes or “drink boxes” are easily recyclable, without indicating that it is difficult to separate aluminum and plastic from the paper box and that there are a limited number of facilities nationwide that are equipped
nies, unless they heed the Task Force's recommendation that their claims be specific and reliable.

Claims regarding preexisting environmental attributes can be misleading. The Task Force therefore recommends "that promotion of a previously-existing but previously-unadvertised positive environmental attribute of a product should not create, either explicitly or implicitly, the impression that the product has been recently modified or improved." This should discourage companies from promoting previously-unadvertised attributes in an irresponsible or misleading manner.

Suddenly promoting a product that had been packaged in recycled paper for years with a claim such as "Now! Recycled package!" is deceptive because it gives the impression that the product is improved when nothing about its manufacturing process was actually changed. Similarly, the message should not indicate that simply because one harmful ingredient was removed, the product is now completely safe for the environment.

The Task Force also recommends that "[e]nvironmental certifications and seals of approval must be designed and promoted with great care, to avoid misleading the public." If a seal of approval has no system for properly evaluating the environmental soundness of the product, consumers will be deceived by its presence on the package. The criteria used in granting the seal are crucial in determining whether the seal is meaningful, potentially confusing or deceptive.

A manufacturer may use a seal to imply that its products are superior to recycle drink boxes in this manner. Robert Abrams, *10 States Reach Landmark Settlement with Manufacturers of "Juice Boxes,*" N.Y. State Attorney General, PRESS RELEASE, Aug. 28, 1991, at 1. It was agreed that when this type of "aseptic packaging is collected or accepted for recycling in a significant number of localities within the signatory states, Advertisers may represent the packaging is recyclable in some communities, not in others, and provide a 1-800 number for consumers to find out if there is a facility near them." In re Tetra Pak, Inc., Assurance of Discontinuance, August 28, 1991, at 4. Again, the companies admitted no wrongdoing. Id.

For example, the most frequently reported "green" purchases are those of aerosol products advertised as non-damaging to the ozone layer because they do not contain chlorofluorocarbons (CFCs). Shaw, supra note 7. These advertisements are misleading because they do not say that CFCs were banned from almost all products 12 years ago. Id. Furthermore, aerosols, such as aerosol cans of Right Guard and Soft and Dry deodorants, contain butane, propane or other substances which can be harmful to the environment. Jamie Beckett, *Behind the Zeal for Seals: As the Marketing Appeal of Seals of Approval Rises, There is Confusion,* S.F. CHRON., Aug. 6, 1990, at C1.
to others that lack the seal when, in reality, other manufacturers simply may have chosen not to pay for the seal or could not afford it. This relates to another green marketing concern, that comparative claims between products be meaningful. It would be patently unfair for one manufacturer to claim its product was better for the environment than another simply because it had a seal of approval.

Finally, the Task Force states that "[s]ource reduction claims should be specific, and where possible include percentages. Comparisons should be clear and complete." Source reduction includes reducing the size of the product as well as the amount of packaging. This recommendation comports with the other suggestions by the Task Force that environmental claims be backed by reliable evidence to ensure that the claims are not confusing, deceptive or misleading.

B. Environmental claims relating to the disposability or potential for recovery of a particular product (e.g., "compostable" or "recyclable") should be made in a manner that clearly discloses the general availability of the advertised option where the product is sold.

At first glance, this recommendation may seem to place a great burden on manufacturers and distributors, who will have to vary packaging depending on the community. However, the environmental claim does not have to be implanted on a package; a sticker will suffice. The products can be sorted for shipping purposes. Companies may even be able to

91. Id. at 16. "One safeguard for this problem would be disclosure, on products and elsewhere, that fees are paid to use the seal." Id.
92. Id. at 11.
93. Comparative claims, whether between two products or a product and a former version of it, should be supported by stating a full comparison and the basis for that comparison. Id. "Such a comparison might be: 'This product is better than [our former product] [our competitor's product] because ...'" Id. Green Seal, Inc. plans to run an independent environmental labeling program in which a stamp of approval would be affixed to products "passing a series of tests that gauge everything from durability to the environmental reputation of the marketing company." Dagnoli, supra note 7, at 13. The European Community is considering creating a similar "official 'green label' to grade products for their effect on the environment . . . ." Simons, supra note 6, at A6. The label would be awarded to products that are deemed the least detrimental to the environment in areas such as "the amount of energy and pollution involved in the product's manufacture, use and disposal." Id.
94. Green Report II, supra note 2, at 17.
95. Id. Source reduction also includes reusable containers and concentrated refills. See id.
96. See infra part D.
97. New York estimates the cost for purchase and application of stickers to range from "less than one cent to ten cents per sticker. If modification of existing labels is possible, substantial savings can be realized."

"The cost for stamping or printing with modern methods is expected to be a one-time minimal expense ($100.00 to $1,000.00) for photocopying or modification of a multi-color printer." Regulatory Impact Statement, NEW YORK COMP. CODES R. & REGS. tit. 6, § 368 (1991).
skirt this recommendation by using a sticker that says something to the effect of, "recyclable where facilities are available."

Furthermore, truly responsible manufacturers probably would not be bothered by having to tailor their environmental claims to the availability of facilities. In January 1991, Proctor & Gamble cut part of a Sunny Delight juice commercial that showed teenagers putting an empty plastic bottle in a recycling bin because plastic recycling facilities are not widely available.98

The three major points of controversy at the Public Forum centered around degradability claims, recyclability claims and recycled content claims.99 Proponents of degradable plastics maintained that their products degrade in many instances, thereby contributing to protecting the environment.100 Furthermore, although these plastics will not solve the solid waste crisis, they "will become increasingly important if municipalities move away from landfill disposal and incineration to more biologically active solid waste disposal systems such as composting."101 Until this happens, however, and in light of the arguments relating to degradability and recyclability claims,102 manufacturers should probably refrain from using these terms.

C. Environmental claims should be substantive

Claims that are nonsubstantive "create a false impression of a product's overall environmental soundness. They also contribute to consumer confusion... [and] reflect[ ] an irresponsible attitude toward the environment... ."103 While a product may not be harmful to the environment, that does not mean that it will actually improve the environment, which is the implication from terms like "environmentally friendly."104

Many companies at the Public Forum stated that intense competitive pressures to start making environmental claims in response to consumer demands and industry rivalry "[took] precedence over their concerns about whether the information contained in the environmental claim was useful and valuable to the consumer."105 Nevertheless, the requirement that claims be substantive will foster, not stifle, competition among man-

98. Lawrence & Colford, supra note 63.
100. Id. at 16.
101. Id.
102. See supra notes 71-79 and accompanying text.
103. Green Report, supra note 2, at 43. For example, claiming that a polystyrene foam cup "preserves our trees and forest" may be technically accurate; however, it "is simply irrelevant, and perhaps deceptive, to suggest that a product made of petroleum products, a scarce nonrenewable natural resource, provides an environmental benefit because it does not use trees," which would have been used if the cup had been made of paper instead of polystyrene. Green Report II, supra note 2, at 28.
104. See supra note 103.
manufacturers encouraging each one to strive to produce a more environmentally healthy product than their competitors. "Only if new, less environmentally damaging products are available and are discernible from other products can consumers choose products that are less harmful to the environment." A substantive requirement will prevent companies from making hollow claims such as "contains no nitrates."

D. Environmental claims should be supported by competent and reliable scientific evidence

It is an "inherent duty of [corporate] environmental responsibility . . . [for each business] to minimize the adverse environmental impacts of its products," and to do this as truthfully and competently as possible. This last recommendation of the Task Force merely reiterates what "has always been required under state and federal law—that advertising claims must be supported by tests, analysis, research or studies . . . ." For example, the Fair Packaging and Labeling Act has been in effect since 1967. The Environmental Marketing Claims Act of 1991, if passed as submitted, will not render this law obsolete; the Act provides that it will merely be added to the end of the section.

The NFPA's proposed guidelines for environmental claims suggest that the claims be supported by a reasonable basis. This basis would consist, in part, of scientific tests, analyses and research, using procedures accepted to produce accurate and reliable results. Although "the science involved in understanding the environmental issues underlying these [marketing] claims is complicated and the related technologies associated with environmental management are undergoing rapid change," it is still possible to supply consumers with current, accurate information about the environmental possibilities of products. As New York contemplated in enacting its recycling emblems regulation, the cost of changing stickers on packages is minimal. Industry should be amenable to absorbing such minor expenditures, and, since consumers have indicated that they would pay more for environmentally safe merchandise, there is little excuse for responsible companies not to make appropriate changes in their products and packaging.

If manufacturers perform the proper tests on their products and monitor "the environmental effects at each stage of every product's life-
cycle," it will be easier for them to establish the environmental soundness of their products and to pass this information on to consumers more effectively. "Such a review must take into account the natural resources and energy consumed and the waste produced in the manufacture, packaging, distribution, use and disposal of the product." By making environmental concerns the routine rather than the aberration, future production of old and new goods will contribute to a safer environment, and the manufacturing process will not have to be changed as often.

IV. Conclusion

As world awareness of the dangers to our environment increases, green marketing continues to be a powerful contribution to the removal and prevention of many environmental hazards. Consumers are enthusiastic about exercising their purchasing power in favor of environmentally sensitive products. The burden on industry to respond to consumer and environmental demands is not an overwhelming one. As indicated by the Green Report and industry's own pleas to the FTC, companies and advertisers appear ready to work toward the establishment of national standards. The standardization of environmental claims must reflect the combined input of environmental and consumer groups, public officials and business representatives. While small victories may be won if these groups work individually, only their combined strength can ensure that green marketing achieves its most desired end—a safe environment for all.

Joanna L. Watman

118. Id.