

## **Misleading Recycled Content Claims are Criminal**

**By**

**Lynn L. Bergeson<sup>1</sup>**

The Federal Trade Commission (FTC) has stepped-up its enforcement initiatives and recently settled two cases with companies that market plastic lumber and related products. FTC alleged that these companies misled consumers in violation of Section 5 of the Federal Trade Commission Act (FTC Act) in their marketing materials regarding the environmental attributes of their products.

These cases demonstrate FTC's strong interest in ensuring compliance with its *Guides for the Use of Environmental Marketing Claims* (Green Guides). This article summarizes the actions.

### **Background**

FTC released the revised Green Guides on October 1, 2012. FTC intends the Green Guides to help marketers ensure that the claims they make about the environmental attributes of their products are "truthful and non-deceptive." While the Green Guides are administrative interpretations of law, and are not independently enforceable, they describe the types of environmental claims FTC may find deceptive under Section 5 of the FTC Act. Under the FTC Act, marketers that make express or implied claims about their products must have a

reasonable basis for their claims. What constitutes a “reasonable basis” requires competent and reliable scientific evidence.

In its Green Guides related to environmental marketing claims, FTC set forth some general principles with which all environmental marketing claims must comply. These include: substantiation (marketers must substantiate claims under a “reasonable basis” test), qualification and disclosure (marketers must qualify claims where the claimed environmental attribute relates only to a portion of the product (*e.g.*, packaging) if the claim would otherwise expressly or impliedly overstate the attribute or benefit), display of qualifying language (any qualification should be clear to prevent consumer deception; avoidance of overstated claims -- marketers should avoid implications of significant environmental benefits if the benefit is negligible), and comparative statements (where marketing materials make explicit or implicit comparisons between the environmental attributes of different products, the materials should be clear to avoid consumer deception). The Green Guides include guidance on certain environmental claims, including compostable, degradable, ozone, recyclable, and recycled content. For recycled content claims, FTC states that marketers should make recycled content claims only for materials that have been recovered or diverted from the waste stream during the manufacturing process or after consumer use.

### **Enforcement Cases**

American Plastic Lumber, Inc. (APL) distributes plastic lumber products. FTC alleged that APL’s advertisements and marketing materials implied that its products -- and the

recycled plastics they contain -- were made virtually all out of post-consumer recycled content such as milk jugs and detergent bottles. The complaint states that these claims were deceptive and misleading, and that in reality the products contained less than 79 percent post-consumer content, on average. FTC further alleged that about 8 percent of APL's products contained no post-consumer recycled content at all, and nearly 7 percent of the products were made with only 15 percent post-consumer content. N.E.W. Plastics Corp. (N.E.W.) manufactures plastic lumber products, including the Evolve and Trimax brands, which are used to make items such as outdoor decking and furniture. In its complaint, FTC alleged similar violations. The settlement agreements for both companies are similar. Both companies are precluded from making similar claims in the future and no fines were assessed.

### **Discussion**

These cases illustrate FTC's commitment to addressing false and misleading marketing claims and highlight the importance of having a thorough command of the FTC's environmental Green Guides. While no fines were assessed, the companies nonetheless incurred substantial out-of-pocket costs to address these matters with FTC, incurred transactional costs in modifying all marketing materials, and experienced consequential reputational damage occasioned by public relations and consumer confidence issues. Businesses should review and be familiar with FTC's Green Guides so they know what claims they legally can and cannot make.

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<sup>1</sup> Lynn L. Bergeson is Managing Partner of Bergeson & Campbell, P.C. (B&C<sup>®</sup>), a Washington, D.C. law firm focusing on conventional, nanoscale, and biobased industrial, agricultural, and specialty chemical product regulation and approval matters, environmental health and safety law, chemical product litigation, and associated business counseling and litigation issues. She is President of The Acta Group, with offices in Washington, D.C., Manchester, UK, and Beijing, China, and President of B&C Consortia Management, L.L.C. (BCCM) with offices in Washington, D.C.