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FROM GREENWASH TO GREENMAIL: POLICING THE GREEN COMMERCE MOVEMENT

Charles L. Franklin

Business is booming in the sustainable commerce space. Even as the country struggles to fuel a recovery from the unprecedented recessionary economic conditions of 2008–2009, the overall demand for "green," more "sustainable" products and services has not only held, it has grown.

In September 2011, the market research firm Packaged Facts reported that retail sales of green cleaning products had more than doubled over four years, from $303 million in 2007 to $640 million in 2011. A 2011 report by Pike Research projected that the international "green chemistry" market would grow from $2.8 billion in 2011 to close to $100 billion by 2020. These numbers are still just a fraction of the larger chemicals and products markets, but they are getting the attention of businesses, governments, and nongovernmental organizations (NGO) alike.

But to what end? Green commerce means different things to different stakeholders. Progressive manufacturers and retailers see green chemistry and commerce as ways to generate corporate goodwill, provide greater value to customers, and distinguish their products and services from competitors. Government regulators see green chemistry as a more politically palatable, market-based way to encourage innovation and transition toward "safer," more sustainable business practices. NGOs see the growing green chemistry and green commerce market as evidence that technology forcing—using regulatory, market, and social pressure—works. To some degree, all of these characterizations—or results—of the green chemistry and green commerce trend are true.

But the growing demand for greener products and services—and the enthusiastic embrace of the trend by stakeholders across the political spectrum, also has a dark side. More than ever, consumers, companies, governments, and watchdogs need to distinguish between the health and environmental *claims* associated with specific substances, products, and services, and their objective health and environmental *attributes*. Without greater scrutiny of both positive and negative health and environmental claims, the green commerce movement threatens to become little more than a rhetorical device used to advance the business and political interests of specific factions, to the detriment of consumers, businesses, and communities alike. Here are two ways that false and misleading claims are undermining the legitimacy of the green commerce movement.

Greenwashing: The first use of the term "greenwashing" is typically attributed to a 1986 essay by Jay Westervelt, a field biologist and activist, criticizing efforts by hotels to justify reduced towel service based on environmental grounds. Defined by the Oxford American Dictionary as "disinformation disseminated by an organization so as to present an environmentally responsible public image," the term entered into common parlance during the late 1990s and 2000s as consumer interest in green commerce reached a tipping point, resulting in an explosion of environmental marketing in mainstream markets along with a variety of questionable claims and practices. TerraChoice Environmental Marketing Inc., now a subsidiary of UL Industries, provided a particularly popular distillation of common greenwash tactics in its 2007 report, "The Six Sins of Greenwashing," which, as later amended to add a "sin," referenced:

1. **The Hidden Trade-off** (i.e., highlighting one positive attribute while ignoring a glaring negative);

2. **No Proof** (i.e., making claims without adequate substantiation);
3. **Vagueness** (i.e., making overly broad or unqualified claims lacking necessary context);
4. **Worshiping False Labels** (i.e., use of meaningless labels, logos, and endorsements to exaggerate or conjure green attributes);
5. **Irrelevance** (i.e., claiming attributes that, even if true, lack relevance or importance in the context of the product or industry);
6. **The Lesser of Two Evils** (i.e., citing marginal improvements in a health or environmental attribute to redeem a fundamentally irredeemable product or service), and;
7. **Fibbing** (i.e., outright lying). *See* http://sinsofgreenwashing.org/.

Today, numerous academic, governmental, and NGOs have adopted, defined, and applied the term "greenwash" to reflect a wide variety of environmental marketing practices that use express or implied claims to exaggerate, misstate, or even invent health and environmental benefits of a product or service. Government regulators like the Federal Trade Commission (FTC), state attorneys general, and state and local regulatory agencies actively monitor business communications and take enforcement action against false and misleading claims, supplementing the aggressive oversight efforts by industry watchdog groups like the Better Business Bureau's National Advertising Division and NGOs like Greenpeace and Sourcewatch.

Greenmailing: Surprisingly, for all of the attention given to false, exaggerated, and misleading environmental claims by commercial businesses, few regulators or consumer watchdogs appear to apply similar standards of accuracy, clarity, and fairness to claims asserting negative health or environmental attributes to substances, products, or services. Contrary to its dictionary definition as a corporate takeover tactic, here I am using the term "greenmail" to describe the threat or use of exaggerated, misstated, vague, or factually unsupported allegations of health or environmental risk to discredit substances, products, services, and companies, and to force changes in corporate operations or product content —essentially the converse of greenwashing. Playing on the term "blackmail," the term can be polarizing, having been used by the World Resources Institute (WRI) to describe NGO campaigns to discourage the purchase of paper products and palm oil from Indonesian and Chinese producers, by California politicians and developers to describe threats of litigation under the California Environmental Quality Act as a method for extracting money and concessions from developers; by Australian politicians to describe the use of NGO-derived certification standards to direct Australian government land management efforts, and even by critics of the U.S. Environmental Protection Agency's so-called sue-and-settle program.

But readers need not accede to these characterizations to understand or apply the term as used in this article. Instead, consider the FTC's own environmental marketing guidance.

A *Green Guide*s Primer on Deceptive Environmental Claims

If reasonable people can disagree on what constitutes a false and misleading environmental claim, the FTC has done its best to reduce the uncertainty. In 1999, FTC published its first *Guidelines for Environmental Marketing* (*Green Guides*), providing non-binding guidance on the commission's interpretation of false, deceptive, and misleading environmental marketing conduct under its statutory authority governing unfair competition. 15 U.S.C. § 45(a); 16 C.F.R. § 260. FTC has amended its *Green Guides* several times, most recently in October 2012, to address new marketing terms-of-art and new issues of concern. Though lacking the force of law, *Green Guides* offer an important guidepost to the commission, the regulated community, and the broader public by identifying presumptive prohibitions and safe harbors with respect to marketing practices. For example, the *Green Guides* establish general principles applicable to all environmental marketing:

- **Express and Implied Claims:** Marketers are accountable for all claims reasonably conveyed by a marketing statement or advertisement, whether express or implied, and whether intended or not. 16 C.F.R. § 260.2.
- **Substantiation:** Marketers must be able to substantiate claims, both express and implied, under a "reasonable basis" test. *Id.*
- **Qualification:** Marketers must qualify and limit claims where the purported claim would otherwise expressly or impliedly overstate the attribute or benefit. *Id.* § 260.3.
- **Product vs. Package vs. Service:** Marketers must limit claims to the relevant portion(s) of the product, package, or service. *Id.*
- **Negligible vs. Significant Benefits:** Marketers should not make express or implied claims for environmental attributes with a negligible net benefit. *Id.*
- **Special Care with Comparative Statements:** Where marketing materials make explicit or implicit comparisons between the environmental attributes of one product or process and another, the materials should make the basis for the comparison sufficiently clear to avoid consumer deception. *Id.*

The *Green Guides* also provide more tailored guidance and limits for a long list of commonly used environmental claims and terms-of-art, discussing potential sources of consumer confusion and offering examples of compliant and noncompliant claims. For example, companies will often make "free-of" claims that imply a health or environmental benefit from the absence of a specific substance in a product or service. Under FTC's analysis, even a verifiable claim may still be deceptive "if the product, package, or service contains or uses substances that pose the same or similar environmental risks as the substance that is not present," or "if the substance's presence does not cause material harm that consumers typically associate with that substance." *Id.* § 260.9.

The *Green Guides* Policy in Practice

A review of FTC's enforcement page or even simple Google TM search will provide numerous examples of how FTC has applied its *Green Guides* principles to police corporate environmental claims deemed greenwash. A more interesting exercise might involve applying the same principles to potential cases of greenmail. Take the ubiquitous hazard-based labeling requirement established under California's Safe Drinking Water and Toxic Enforcement Act of 1986, also known as "Prop 65." Under Prop 65, California has published a list of roughly 900 chemicals, including alcohol and wood dust, "known" to cause cancer or birth defects or other reproductive harm under certain laboratory or exposure conditions. Businesses that use a listed substance in the California workplace or marketplaces, or that distribute products containing the listed chemical above a *de minimis* threshold within California, must provide state-mandated warning language on the product labeling or at the point of sale/commerce, along the following (paraphrased) lines:

WARNING: This [product/area][contains/uses] a chemical known to the State of California to cause cancer, birth defects, or other reproductive harm.

Failure to include the required language in the appropriate form or location can expose the business to enforcement and third-party civil suit liability. Proposition 65 supporters argue that the law is a critical tool in fulfilling the consumer's and worker's "right to know" about hazards in their environment, thus giving them the information necessary to take appropriate risk management precautions.

Under the basic standards established under the FTC *Green Guides*, however, the mandated warning language appears to violate many of the basic tenets of fair labeling. Like so many of the environmental marketing claims deemed misleading by NGOs and regulators, the express claim in the Prop 65 warning—that the product or establishment contains a specific substance—may be factually correct. But it is the warning's implied claim—that use of the product or presence in the establishment exposes the individual to a material risk of harm—that is

questionable, if not deceptive. By design, the standards used to trigger a Proposition 65 warning are set well below the exposure levels deemed to cause environmental or health risks based on science or objective regulatory standards. The unqualified nature of the mandatory claim, and the required "warning" language accompanying it, implies an imminent, or at least material risk to the user. Just as with so many of the environmental claims vilified as self-serving and misleading, consumers have no way to gauge whether avoiding the labeled product or establishment in favor of another will offer any health or environmental benefit at all.

Of course, FTC lacks the statutory authority to review a state-mandated disclosure requirement like Proposition 65, and, if the recent furor over the preemption provisions in the bipartisan Consumer Safety Improvement Act (S. 1009) bill to amend the Toxic Substances Control Act (TSCA) is any guide, the administration would be hard-pressed to challenge the California congressional delegation over the state's right to mandate a state-based hazard disclosure law. Still, for practitioners advising clients on the legal and policy foundation for FTC's environmental marketing policy, it is difficult to rationalize holding corporate environmental claims to reasonable standards of substantiation, qualification, and materiality, while upholding laws requiring the same companies to label their products with warnings that have not received the same level of scrutiny.

In any event, for companies and counselors looking to ride the wave of green commerce, perhaps the fundamental lesson is that claims matter, and that green claims are receiving greater scrutiny than ever before—from customers, competitors, regulators, and third-party litigants. From a defensive perspective, however, even companies remaining agnostic on the green marketplace need to be aware that government and third-party efforts to promote greener products and services are increasingly putting conventional products and services under negative scrutiny as well. Even the most ardent greenwashing opponents seem happy to let greenmailing claims fall where they may.

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