



# Environmental Marketing Claims

May 2, 2024

Sheila A. Millar

Partner

Keller and Heckman LLP

Washington, DC Office

202.434.4143

millar@khlaw.com



# Presenter



Sheila A. Millar

Partner

Washington, D.C.

202.434.4143

[Millar@khlaw.com](mailto:Millar@khlaw.com)

# Advertising Basics

- ◆ Claims may be express or implied
  - ◇ Example of express claim: “Production of our product results in net zero emissions”
  - ◇ Example of implied claim: Advertising shows image of flowers and trees coming out of smokestacks
- ◆ Ads must be
  - ◇ Truthful, not misleading + qualified to prevent deception
- ◆ Ads are interpreted from the “reasonable consumer” perspective
  - ◇ Audience sophistication considered (when B2B, consider the reasonable business)
  - ◇ Social norms, legal framework relevant
  - ◇ Evaluate claims in all collaterals



# Green Claims

- ◆ Advertising claims that highlight environmental attributes
  - ◇ Consider net impression of words, images, color
- ◆ Examples:
  - ◇ Specific performance claims: “compostable,” “recyclable,” “recycled content,” “degradable,” “non-toxic,” “free of,” “ocean safe,” “climate positive,” “carbon negative,” “net zero”
  - ◇ General claims: “green,” “earth friendly,” “eco-safe,” “sustainable,” “circular” & more



# What Are the Rules of Substantiation?

- ◆ Must have “reasonable basis” for all “material claims” at the time the claims are made
- ◆ “Competent and reliable scientific evidence” (CRSE)
- ◆ Supplier certifications and assurances may provide support
- ◆ Generalized knowledge typically insufficient
- ◆ Technical feasibility alone may not suffice (e.g., “recyclable” claims)



# Why Do We Care?

- ◆ Risks are increasing
  - ◇ FTC Guides not preemptive
  - ◇ State regulations on the rise
  - ◇ Attorneys General investigations are targeting claims
  - ◇ Private litigation and demands are on the rise
  - ◇ Self-regulatory bodies assessing green claims



# FTC's Green Guides

- ◆ *Guides for the Use of Environmental Marketing Claims* (16 C.F.R. Part 260)
  - ◆ Issued in 1992, revised in 1996, 1998, and 2012
    - Few enforcement actions
    - Currently under review
  - ◆ Not regulations – illustrate how FTC interprets Section 5 of the Federal Trade Commission Act
  - ◆ Do not preempt state law
  - ◆ Provide guidance on specific claims
    - Not all claims addressed
    - Establish “safe harbor” disclosures, but other disclosures may adequately qualify claims



# State Green Claims Laws

- ◆ **Alabama, California, Colorado, Florida, Indiana, Maryland, Michigan, Minnesota, Rhode Island, Washington and Wisconsin**
  - ◆ Have general or specific green claims laws
  - ◆ Some laws restrict labeling of products marketed with claims such as “degradable,” “compostable,” “recyclable,” + mandate specific substantiation, certification in some instances
  - ◆ Some require specific substantiation
  - ◆ Climate reporting laws in CA, voluntary carbon market disclosure







# FTC v. State Laws: Recyclable, Recycled Content, Compostable, Carbon Offsets



# FTC “Recyclable”

- ◆ Per Green Guides, the term “recyclable” should only be used when a product or package can be diverted or otherwise recovered from the waste stream through a recycling process for reuse or use in manufacturing or assembling another item
- ◇ Recyclability claims must be qualified to the extent necessary to avoid deception
  - Qualification is required where recycling facilities are not available to a “reasonable proportion of consumers” (i.e., a substantial majority, which is at least 60%)
- ◇ Inconspicuous use of plastic resin identification code is **not** a recyclable claim



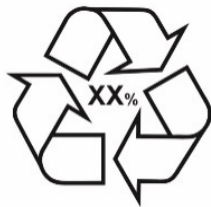
# State “Recyclable”

- ◆ California SB 343: “Recyclable” claims barred if statewide recyclability criteria not met
  - ◇ Will also restrict use of “chasing arrows” to products that meet recyclability criteria and restrict plastic RIC



# FTC “Recycled Content”

- ◆ Per Green Guides, “recycled content” includes materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer)”
- ◆ The use of an accompanying symbol is optional
- ◆ Percentage of recycled content must be disclosed to avoid deception if less than virtually all is recycled content
- ◆ New issue: Role of mass balance in supporting allocated recycled content claims



# State “Recycled Content”

- ◆ Generally follow FTC Guides
- ◆ The use of an accompanying symbol is optional
  - ◆ CA SB 343 will affect this use and restrict RIC triangle of arrows design



# FTC “Compostable”

- ◆ Per Green Guides, compostable claims ***must be substantiated*** with “competent and reliable scientific evidence that all the materials in the item will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner (i.e., in approximately the same time as the materials with which it is composted) in an appropriate composting facility, or in a home compost pile or device”
- ◆ Unqualified compostable claim = “home compostable”
  - Need competent & reliable scientific evidence of home compostability
  - No standard or method specified
- ◆ If a product is compostable only in industrial compost facilities, qualifiers are needed to disclose limited availability
  - Need competent & reliable scientific evidence of industrial compostability
  - No standard or method specified

# State “Compostable”

- ◆ State laws in, e.g., California, Colorado, Maryland, Minnesota, and Washington, add restrictions for compostable claims
  - ◇ CA, MD expressly recognize home compostable, require OK Home Compost
  - ◇ CO, MN, WA – “compostable” = industrially compostable
    - Plastic/plastic-coated products must meet ASTM D6400 or D6868
    - WA amended law also recognizes ASTM D8410, ISO17088 and EN13432
    - “Home compostable only” and similar claims barred in WA absent proof of industrial compostability
  - ◇ Some state laws apply labeling, marking, coloring requirements, certification requirements to bags and/or food service products

# State Legislation – Marking and Labeling

- ◆ CA and MD: Do not impose specific on-product marking requirements but require clear and conspicuous “labeling”
- ◆ CO: Requires product marking + only color green accepted + certification logo must be marked on product together with color/tint/stripe/band
- ◆ MN: Food and beverage products must be “clearly and prominently labeled on the product, or on the product’s smallest unit of sale,” and that such label be in “a legible text size and font”
- ◆ WA: Food service products must be at least partially colored or tinted or have a stripe or a band in green, beige or brown
  - ◆ Certification logo and “compostable” required on pack label (but not on product)



# FTC Carbon Offsets



Employ proper CRSE and accounting methods to quantify claimed emission reductions and prevent double-counting



Don't claim reductions that have already occurred; clearly and prominently disclose if offsets represent reductions that won't occur for 2+ years



Don't claim reductions required by law

# California Climate Reporting

- ◆ SB 253
  - ◇ Applies to companies with total annual revenues above \$1 billion, and that “do business in California”
  - ◇ Requires annual reporting of Scope 1, Scope 2, and Scope 3 greenhouse gas (GHG) emissions
- ◆ SB 261
  - ◇ Applies to companies with total annual revenues above \$500 million, and that “do business in California”
  - ◇ Requires biannual reporting of climate-related financial risks and measures adopted to mitigate and adapt to such risks
- ◆ AB 1305
  - ◇ Does not *per se* require climate reporting, but imposes broad disclosure obligations for companies participating in voluntary carbon offset markets (including purchasers who make climate-related claims)



# Litigation and Enforcement Trends

- ◆ Focus on plastics industry
  - ◇ Plaintiffs' lawsuits
  - ◇ AG investigations and lawsuits
- ◆ Scrutiny of unqualified “sustainable” and green claims
- ◆ Scrutiny of aspirational claims
  - ◇ Particularly those related to GHG emissions and climate change



# Class Action Example: Keurig

- ◆ Consumers brought nationwide class-action suit against Keurig alleging that it mislabeled single-serve plastic coffee pods as “recyclable”
  - ◇ Plaintiffs claim pods are not recyclable at all
- ◆ Keurig filed a motion to dismiss, saying it qualified its claims by adding “check locally” or “not recycled in all communities”
  - ◇ California District Court refused to dismiss
- ◆ Judge stated that “Common sense would not so clearly lead a person to believe that a package labeled as ‘recyclable’ is not recyclable anywhere”
- ◆ Class was certified for settlement purposes: all U.S. consumers who purchased between June 2016 and December 2022 Keurig single-serve coffee pods labeled as recyclable
- ◆ Court approved nationwide class action settlement in March 2023 (injunctive and monetary relief)



# Similar Class Actions on “Recyclable” Claims



- ◆ Courts have largely dismissed, finding that claims convey only that items are capable of being recycled
  - ◆ *Swartz v. Coca-Cola*, No. 21-cv-4643 (N.D. Cal.) (complaints dismissed Nov. 2022 and July 2023; SAC filed Aug. 2023)
  - ◆ *Haggarty v. Bluetriton Brands*, No. 21-cv-13904 (D.N.J.) (dismissed Dec. 2022)
  - ◆ *Curtis v. 7-Eleven, Inc.*, No. 1:21-cv-06079 (N.D. Ill.) (dismissed in relevant part Sept. 2022)
  - ◆ *Duchimaza v. Niagara Bottling*, No. 21-cv-6434 (S.D.N.Y.) (dismissed Aug. 2022)
  - ◆ Compl., *Weingartner v. Colgate-Palmolive*, No. 23-cv-4086 (N.D. Cal.) (Aug. 2023, motion to dismiss denied Feb. 6, 2024)
    - Court rejected defendant’s “intrinsically capable of being recycled” argument

# Class Actions: “Compostable” Claims

- ◆ Round of class actions alleged that “compostable” claims for disposable dishware were deceptive where products contained PFAS, making compost unsafe for use
  - ◆ Compl., *Ambrose v. Kroger Co.*, No. 20-cv-4009 (N.D. Cal. June 16, 2020) (\$200,000 settlement)
  - ◆ Compl., *Nguyen v. Amazon.com, Inc.*, No. 20-cv-4042 (N.D. Cal. June 17, 2020) (confidential settlement)
  - ◆ *Hernandez v. Huhtamaki, Inc.*, No. 3:20-cv-08155 (N.D. Cal. Nov. 19, 2020) (same)
  - ◆ *Little v. NatureStar North America*, No. 22-cv-232 (E.D. Cal. Feb. 24, 2022) (dismissed for lack of subject matter jurisdiction in Nov. 2023; amended complaint filed in Dec. 2023, motion to dismiss pending)



# Class Action: *Hussain v. Burger King Corporation*



- ◆ BK's products were allegedly marketed as "safe" and "sustainable"
- ◆ Plaintiff alleged grease resistant packaging contained PFAS, which are harmful to both the environment and human health –total organic fluorine content for Whopper (249.7 ppm) and Fries (13 ppm)
- ◆ Plaintiff alleged that product packaging and other advertising misled reasonable consumers into believing the products can be safely consumed and are sustainable - but products pose a significant health risk and are not sustainable
- ◆ Burger King filed MTD and to compel arbitration/transfer on 7/25/22, case voluntarily dismissed on 8/22/22

# Enforcement and Litigation Landscape - State Attorneys General

- ◆ NY AG sues beef producer for climate claims
  - ◇ Citing NAD case as basis
  - ◇ Seeks court injunction to stop “net zero” ad campaign
- ◆ NY AG sues snack food manufacturer for plastic pollution
  - ◇ Tort theory of liability
  - ◇ Based on State’s survey of Buffalo River showing 17% identifiable plastic items come from manufacturer
- ◆ CA AG investigating petrochemical companies for climate claims and plastics industry members for recyclable claims
  - ◇ Advocacy challenges





# NGOs: *Earth Island Inst. v. Crystal Geysler Water Co., et al.*



- ◆ Ten defendants are alleged to produce single-use plastic packaging that is harmful to humans, animals, and the environment
- ◆ Causes of action: California's Consumer Legal Remedies Act, public nuisance, breach of express warranty, strict liability failure to warn/design defect, negligence, and negligent failure to warn
- ◆ EII failed to allege that the defendants encouraged or instructed consumers to improperly dispose plastic packaging into the marine environment and that defendants' conduct, as opposed to third parties who improperly disposed of defendant's plastic packaging, did not create the presence of plastic pollution
- ◆ **No obligation to warn EII about the obvious environmental impacts associated with the improper disposal of plastic packaging**

# Managing Risk



Define internal procedures for creating, collecting, maintaining and updating substantiation files

Document methodologies, calculations, assumptions, uncertainties, etc. to guide business stakeholders, define retention periods, & make sure substantiating data is available quickly in case of a challenge



Establish claims review and approval process



Training, education are key to positive collaboration between legal, marketing, R&D, sales, investor relations

# Thank You

**Any questions?**

Sheila A. Millar

Partner  
Keller and Heckman LLP  
Washington, DC Office

202.434.4143

millar@khlaw.com

