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Featured Articles

From the Chair

by William Hubbard



This is the first issue of *Building Blocks* edited by our new co-editors Mark Shifton and Jaret Fuente. I would like to personally thank Alan Levy for all of his hard work and dedication in editing our previous newsletters. Alan is our first and, until now, only editor and is responsible for the great content in past issues. I look forward to working with Mark and Jaret.

I think you will find something of interest in each of our three articles. Our first article provides some very practical advice on the Integrated Product Doctrine including a strategic analysis as to how best and when to utilize the doctrine. The next article will be of particular interest to in-house counsel as it relates to the FTC's recent revisions to its Green Guides and offers pointers on how best to avoid claims of greenwashing. The last article is the third in our series on Chinese Drywall litigation. This installment provides a concise overview of the global Chinese Drywall MDL settlement - a herculean feat given that the global settlement is 39 pages long with an additional 41 pages of exhibits.

As you're finalizing your 2013 business development budget, I hope you have included the 2013 Product Liability Conference, which will be held April 3, 4 and 5 in the Washington D.C. area. Please keep an eye out for the conference brochure which is nearly finalized. We hope to see you in April. Until then, if you'd like to get more involved in the Building Products SLG, please do not hesitate to contact myself at bill.hubbard@thompsonhine.com or Alan Levy at alevy@dzclegal.com and if you have an article to submit for our next newsletter, please contact Jaret at jfuentes@carltonfields.com or Mark at mshifton@sgllawgroup.com.

Leadership Notes

Note from the Co-Editors

by Jaret J. Fuente and Mark D. Shifton

The DRI Products Liability Committee Building Products SLG is pleased to publish Volume 3, Issue 2, of its newsletter, *Building Blocks*, and we look forward to publishing future issues. Starting with this issue, *Building Blocks* will be produced by co-editors Jaret J. Fuente and Mark D.



Shifton.

Are you looking for recognition within the DRI community? Have you come across a recent decision or statute that significantly transforms the legal arena of building products law? If so, please submit an article for our next issue!

Topics should be in the realm of either 1) analysis of legal

Seminars



The poster for the Product Liability Conference features the DRI logo at the top left, which includes the text "dri The Voice of the Defense Bar". The main title "CONFERENCE" is prominently displayed. Below it, the topic "Product Liability" is followed by the subtitle "Make Your Products Practice Bloom". The dates "April 3-5, 2013" and the location "Gaylord National Resort National Harbor, Maryland" are listed. A section titled "IN-HOUSE SPEAKERS INCLUDING" lists several names and their affiliations: Steven R. Davis (RMI), Courtney Carter Fletcher (Tosco Wholesale International Inc.), Robert L. Kollar (Kewaunee Motors Corp. USA), Nath Meyer (Pattel Corporation), Carrie E. Watt (Safeway Incorporated), Todd J. Woods (Nidec, North America Inc.), and Rich Young (Schwan Centers). A small tagline at the bottom right reads "DRI delivers resources to build your practice".

[Product Liability](#)

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National Harbor, Maryland

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developments of case law or legislation, 2) practical litigation advice, 3) plaintiffs' strategies or 4) any other information that may be of interest to the Building Products SLG. Suggested manuscript length should range from 1,000-1,500 words or 5 single spaced pages. A short bio or contact information should be included. Articles which are shorter or longer are welcome for consideration. Keep in mind that the majority of our readers are attorneys with a defense-oriented practice, corporate counsel and insurance adjusters. They want your reasoning and your insights. Give it to them! We eagerly look forward to reading your submissions.

If you have any questions, please do not hesitate to contact either Jaret or Mark.

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Featured Articles

In Defense of Component Part Manufacturers: The Essentials of the Integrated Product Doctrine

by Harris Neal Feldman

In product liability cases, many manufacturers and their defense counsel focus on the litigation tools of product inspections and testing and the typical battle of the experts; however, a legal defense born from the economic loss rule – the integrated product doctrine – has developed to protect component part manufacturers when the alleged damages do not involve personal injury or damage to other property. The majority of federal and state courts across the country apply this doctrine to bar plaintiffs from recovering against component part manufacturers in tort, typically limiting a damage recovery (if any) to the terms of an express warranty issued by the manufacturer. To successfully raise the shield of the integrated product doctrine when the facts permit, defense counsel must carefully position their clients and then raise this shield at the right time.

How It Works

The foundation for the doctrine is that damages claims sound in either tort or contract. With tort damages, the potential recovery is only limited by the so-called reasonable jury – leaving defendants and their counsel to make broad, educated guesses as to a potential verdict range. With contract damages, the terms of an agreement between the parties govern (and often limit) the potential exposure. The typical product liability case involves exposure to difficult-to-predict tort damages, but the economic loss rule presents the rare circumstance when contract damages are deemed the appropriate remedy in a product case. When a product causes damage to only itself, "the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The U.S. Supreme Court in *East River*, determined that although the purchaser of a product should be protected by tort law when a product causes personal injury or damages other property, if a product purchased in a commercial transaction injures only itself, then tort claims are not permitted. The majority of courts have applied this rule to consumer transactions. See *Alloway v. General Marine Industries*, 695 A.2d 264 (N.J. 1997) (collecting majority and minority rule cases).

Define the Product

East River set the groundwork for many courts to develop an interesting twist in the case law by defining "the product" – i.e., the case law explains that the product purchased by the

plaintiff is "the product" that should be examined for purposes of determining whether anything beyond the product was actually damaged.

For example, a small control switch in a luxury boat is alleged defective and claimed to be the cause of the entire boat being destroyed by a fire that started with the switch. That switch was an original part of the boat and that boat was purchased new by the plaintiff. The switch cost less than a dollar for ABC Switch Co. to manufacture and a replacement switch would cost under five dollars. The boat, however, was worth half a million dollars. Unlike traditional product liability cases, there was no personal injury. Plaintiff sues the manufacturer of the switch in tort seeking to collect the full replacement value of the boat. First, the court should define the integrated product as the boat because that is what the plaintiff purchased. The switch was simply one of numerous components of the boat. Second, despite the alleged significant damage to property other than the switch, because the product is defined as the boat, there was no alleged damage to any property other than the product. Therefore, absent personal injury or other property damage, the integrated product doctrine bars any tort claim against the switch manufacturer here. See, e.g., *Sea-Land Service, Inc. v. General Electric Co.*, 134 F.3d 149 (3d Cir. 1998).

In short, defining and proving the product purchased by the plaintiff will identify "the product" for purposes of applying the integrated product doctrine defense.

The Litigation Plan

While defining the product is an important preliminary step, once defense counsel for a component part manufacturer learns that no personal injury or other property damage occurred, defense counsel must determine the ideal time to raise the shield defense. The timing issue is best discussed with clients as soon as defense counsel determines that the integrated product doctrine applies. Raising the integrated product doctrine early on may be appealing to a client who is not eager to pay litigation costs for a year or more of fact discovery. Advising a plaintiff of this defense early in a case or even pre-litigation could result in an early and inexpensive victory for a component party manufacturer. However, raising the defense too early in a case gives the plaintiff the opportunity to amend the complaint to allege facts that may defeat the defense entirely or fit into the narrow exceptions recognized in some jurisdictions (see below). Skilled defense counsel may choose to make use of early fact discovery to lock in plaintiff's story, propound interrogatories on damages claimed and document requests for all insurance documents, product manuals, express warranties, etc., issue any document subpoenas to non-parties with information, and then take the deposition of the plaintiff (if needed). Once the plaintiff's story is locked-in – and ideally after the time for the plaintiff to amend the Complaint has long passed – the component part manufacturer may safely move for summary judgment pursuant to the economic loss rule and integrated product doctrine. The downside with this strategy is increased defense costs at least until the filing of the summary judgment motion. A simultaneous motion for a stay is infrequently granted. Many plaintiffs will oppose a stay and many judges may agree with the plaintiff and allow fully discovery to play out – increasing defense costs.

Finally, the last reasonable time to raise this defense is at the close of discovery and no later than the deadline for dispositive motions. While plaintiff cannot object to the timing of a summary judgment motion at this stage, the component part manufacturer has now expended significant funds in defending a case (although notably far less than if the case were to proceed to trial). Of course, if this defense is rejected by the court at summary judgment, then trial is right around the corner and defense counsel better be prepared with additional defenses for trial, or settle.

One thing that cannot be overemphasized: The importance of defense counsel and the client engaging in an early discussion analyzing the integrated product doctrine and the timing of a litigation plan, so as to fully explore the pros and cons of when to move on the defense.

Prepare for Efforts to Pierce the Shield

With more states adopting some version of the economic loss rule and integrated product doctrine and with support from the U.S. Supreme Court and most states, component part manufacturers will be raising this defense more frequently and, in turn, plaintiffs' attorneys will develop additional arguments against its application under particular circumstances. One such misleading argument is that tort law should be applied because the product posed a sudden risk to the plaintiff's health/safety despite not causing any physical injury. See *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981). Not only is this contrary to the very nature of tort law, it is also an attempt to create an exception that swallows the rule because a sharp attorney could argue that any product that allegedly malfunctions could potentially be dangerous to people.

Over the past several years, thousands of Chinese drywall cases were filed in many states and a number of judges have rejected the economic loss rule and integrated product doctrine defenses regarding this type of product. Plaintiffs in these cases typically claim damages related to their family's health and safety due to alleged defects in the specific type of drywall installed in their homes.

Another hot topic in developing integrated product doctrine case law is whether a person's home should be considered a single integrated product for purposes of this defense. See *Dean v. Barrett Homes, Inc.*, 8 A.3d 766 (N.J. 2010) (rejecting the integrated product doctrine defense in finding that the EIFS siding at issue was not integrated into plaintiffs' home). Expect this question to be revisited by several state and federal courts in the coming years. See, e.g., *Adams Extract & Spice, LLC v. Van De Vries Spice Corp.*, Civ. No. 11-720, 2011 U.S. Dist. Lexis 147851 (D.N.J. Dec. 23, 2011) (narrowly interpreting the New Jersey Supreme Court's decision in *Dean* and applying the integrated product doctrine).

Other slippery slope arguments, creative causes of action, and narrow exceptions will continue to be raised by the plaintiffs' bar, and defense counsel would be wise not to give such arguments short shrift. Nonetheless, a skilled defense attorney for a component part manufacturer can make very effective use of the economic loss rule and integrated product doctrine when appropriate and significantly contain defense costs.

An Overview of the *Global* Chinese Drywall MDL Settlement

by Jaret J. Fuente



The Chinese Drywall MDL Court is in the process of considering whether to grant class certification for and final approval of various class settlements. The settlements are funded by different parties, including Knauf, the well-known drywall manufacturer, and various suppliers, builders, installers, and insurers. The Court already preliminarily approved the settlements, and the deadline for class members to opt-out or object has passed. This article provides a general overview of one of those settlements, the "Settlement Agreement in MDL No. 2047 Regarding Claims Involving Builders, Installers, Suppliers, and Participating Insurers," commonly referred to as the "Global Settlement." See *In Re: Chinese-Manufactured Drywall Products Liability Litigation*, No. 2:09-md-02047-EEF-JCW (Dkt. No. 15695-2) (E.D. La. Aug. 13, 2012).

The Global Settlement is like a puzzle, with defined terms used throughout (e.g., Affected Property, CDW-Related Actions, Class Members, Litigation, Participating Defendants (and Insurers), Related Claims, Released Claims, and Reserved Claims). The defined terms have specific meanings as set forth in the agreement. Reference to the actual agreement may be helpful in understanding these terms.

The Global Settlement is intended to resolve all Chinese Drywall claims between Class Members who did not opt-out of, and Participating Defendants (which include installers, builders, and suppliers) and their Participating Insurers who did not withdraw from the settlement. Specifically, except as to any Class Member who opted-out, and except as to any Reserved Claims, it is intended that those parties will settle and resolve all claims asserted by and amongst each other, including the Litigation, the Released Claims, and the Related Claims.

Settlement Class

The Settlement Class consists of all persons or entities with claims, known or unknown, arising from or related to actual Chinese drywall alleged to be within the legal responsibility of a Participating Defendant. Participating Defendants are also Class Members to the extent they have repaired or participated in the settlement of claims in one or more Affected Property or repurchased an Affected Property.

Settlement Fund

Participating Defendants and Participating Insurers will contribute a collective sum of roughly \$82,784,000 to the Global Settlement. Knauf and certain of the major drywall suppliers are not participating in the Global Settlement, but have their own separate proposed class settlements from which additional settlement funds may be available to certain Class Members.

Releases, Indemnity, and Waivers

The Global Settlement defines "Released Claims" very broadly to include any and all claims of any kind and nature of a Class Member, Participating Defendant, Participating Insurer, or Knauf arising out of or related to Chinese Drywall, the Litigation, CDW-Related Actions, or Related Claims for any and all losses, damages and/or injuries arising from or related to the foregoing, and for any insurance coverage claims (including additional insured coverage). Released Claims specifically include, among others, claims for personal injury, bodily injury, medical monitoring, diminution in value, stigma, loss of use and enjoyment, emotional distress, and pain and suffering.

It is intended that Class Members who did not opt-out will release all Released Claims against Participating Defendants and Participating Insurers, and be will be barred from asserting any Released Claims against them. Class Members that receive an allocated settlement payment must defend and indemnify Participating Defendants and Participating Insurers from certain Chinese Drywall-related claims involving that Affected Property and from claims for indemnity, contribution, and subrogation resulting from the Class Member's continued pursuit of Chinese Drywall-related claims involving that Affected Property.

It is intended that Participating Defendants who did not withdraw will release all Released Claims against all Class Members, all Participating Defendants, and all Participating Insurers. Participating Defendants will also release claims against Knauf to recover on claims arising from any Affected Properties. To the extent a Participating Defendant has remediated, settled or repurchased an Affected Property, and has the right to recover from other Participating Defendants for that property, that Participating Defendant may participate in the Global Settlement as a Class Member for that Affected Property, or opt-out those claims. However, if a Participating Defendant opted-out as a Class Member for any Affected Property, that Participating Defendant would be permitted to pursue claims against other Participating Defendants in an attempt to recover the costs associated with the remediation, but would be precluded from pursuing any claims against the Participating Defendants and/or Participating Insurers for defense costs and/or insurance coverage as an additional insured on any other Participating Defendants' insurance policies.

It is intended that Participating Insurers will release all Released Claims against all Class Members, all Participating

Defendants, and all other Participating Insurers. Participating Insurers will also release all claims against Knauf to recover on claims arising from any Affected Properties.

Knauf would execute a release of all claims against all Participating Defendants and all Participating Insurers.

Reserved Claims

Notwithstanding the foregoing broad releases, certain claims and defenses are expressly reserved in the Global Settlement, including the following:

- Claims or defenses that any Class Member, Participating Defendant, or Participating Insurer may have against any Non-Participating Defendant, or with respect to any insurance policy issued to a Non-Participating Defendant, even if issued by a Participating Insurer, arising out of, in any manner related to, or connected in any way with Chinese Drywall;
- Claims or defenses that any Class Member who opted-out may have. In the event a Class Member opted-out, all Parties reserve all claims, defenses and coverage positions against that Class Member, against each other, and against any person or entity alleged to have any liability related to the Chinese Drywall in the Affected Property of that opted-out Class Member (including builders, developers, installers, suppliers, distributors, importers, exporters, manufacturers, Knauf, etc.), and that person's or entity's insurers (including under any policy under which a Participating Defendant claims to be an additional insured), whether or not that person or entity might also be a Participating Defendant or Participating Insurer, but only to the extent the claims arise out of the Affected Property opted-out by that Class Member.

To the extent an opted-out Class Member is also a Participating Defendant for a remediated, settled or repurchased Affected Property, that Participating Defendant would be precluded from pursuing any claims against the other Participating Defendants and/or Participating Insurers for defense costs and/or insurance coverage as an additional insured on any Participating Defendants' insurance policy. Such remediating Participating Defendant, however, would reserve all other claims and defenses, relating to that opted-out Affected Property, from and against any person or entity alleged to have liability related to the Chinese Drywall in that Affected Property (including installers, suppliers, distributors, importers, exporters, manufacturers, and Knauf), along with that person's or entity's insurers, whether or not that person or entity might also be a Participating Defendant or Participating Insurer;

- Claims that any Participating Defendant or Participating Insurer may have against another Participating Defendant or Participating Insurer to the extent that those claims are reserved or assigned;
- Claims or defenses against a Participating Defendant or a Participating Insurer who withdrew from the Global Settlement. And in the event a Participating Defendant or a Participating Insurer withdrew, all other Participating Defendants and Participating Insurers reserve all claims, defenses and coverage positions against that withdrawing Participating Defendant or Participating Insurer, and if a Participating Defendant, that withdrawing Participating Defendant's insurers, whether it is a Participating Insurer or not.
- Except as to Knauf, claims against persons or entities who are manufacturers of Chinese Drywall.

However, there would be no release of (a) any obligations of Knauf under the Knauf Class Settlement or (b) any existing or later executed settlement agreements between Knauf and any Participating Defendant, including any agreements with any Participating Defendant that has remediated or paid to remediate any portion of one or more Affected Properties; (c) any unresolved claims between Knauf and any Participating Defendant that has remediated or paid to remediate one or more Affected Properties, including any claims a Participating

Defendant may have against Knauf by virtue of any settlement with a property owner or any assignment of claims from a property owner related to the remediation of any Affected Property; (d) any responsibility of Knauf to Participating Defendants arising out of or related to claims of persons or entities who do not fall within the definition of a "Class Member" as defined in either the Global settlement of the Knauf Settlement; and (e) claims, defenses and coverage positions of a Participating Defendant arising out of or related to an Affected Property connected in any way with a person or entity who opts out of the settlement.

Moreover, there would be no release of (a) any obligation of any Participating Defendant or Participating Insurer under any existing or later executed settlement agreements between Knauf and any Participating Defendant or Participating Insurer; (b) any unresolved claims between any Participating Defendant or Participating Insurer and Knauf related to Affected Properties as to which Knauf is not receiving a release; (c) any responsibility of any Participating Defendant or Participating Insurer to Knauf arising out of or related to claims of persons or entities who do not also fall within the definition of a "Class Member" as that term is defined in either the Global settlement of the Knauf Settlement; and (d) claims and defenses of Knauf arising out of or related to an Affected Property connected in any way with a person or entity who opts out of the settlement.

Opt-Outs and Withdrawals

Class Members with claims involving more than one Affected Property were permitted to opt-out on a property-by-property basis. A Participating Defendant who opted-out in its capacity as a Class Member on any Affected Property could still participate in its capacity as a Participating Defendant, subject to its right to withdraw from or cancel its obligations. Class Members that did not timely opt-out will be bound by the settlement.

Each Participating Defendant or Participating Insurer is also provided an opportunity to withdraw from the Settlement if an opt-out related to an Affected Property of that Participating Defendant. There is a right to withdraw from the settlement, which must be exercised in writing in accordance with the agreement and the MDL Court's subsequent "Order Regarding Fairness Hearing." See *In Re: Chinese-Manufactured Drywall Products Liability Litigation*, No. 2:09-md-02047-EEF-JCW (Dkt. No. 16310) (E.D. La. Aug. 13, 2012). A Participating Defendant who is a Class Member for a remediated or repurchased Affected Property may continue as a Class Member for those Affected Properties even if it withdrew as a Participating Defendant from the settlement.

Bar Order

If it approves the Global Settlement, the Court may issue a bar order and permanent injunction against any and all pending or future claims or lawsuits, other than Reserved Claims or assigned claims, by any and all Class Members who did not opt-out against the Participating Defendants and Participating Insurers in connection with claims arising out of, or otherwise related to, Chinese Drywall purchased, imported, supplied, distributed, marketed installed, used, sold, and/or delivered, or alleged in any way to be within the responsibility of any Participating Defendant.

Allocation Plan

On August 16, 2012, a Court-appointed allocation committee comprised of members of the various party groups submitted a proposed Settlement Allocation Plan. See *In Re: Chinese-Manufactured Drywall Products Liability Litigation*, No. 2:09-md-02047-EEF-JCW (Dkt. No. 15707-1) (E.D. La. Aug. 13, 2012). Pursuant to that plan, to be eligible for an allocation of settlement funds, a Class Member's Affected Property's builder, installer and/or supplier must have participated in the settlement by contributing funds. In order to recover, Class Members must submit proof satisfactory to a Special Master or Claims Administrator (a) that the Affected Property contained Chinese Drywall, (b) of the square footage under air, and (c) that a participating installer, builder and/or supplier was involved.

The Gross Settlement Amount is roughly \$73,354,000 (\$82,784,000 less credits for other settlements), and it would be allocated to three separate funds as follows:

Participating Builders Fund = Contributions by Participating Builders and their Participating Insurers, which would account for roughly 40% of the Gross Settlement Amount.

Participating Suppliers Fund = Contributions by Participating Suppliers and their Participating Insurers, which would account for roughly 40% of the Gross Settlement Amount.

Participating Installers Fund = Contributions by Participating Installers and their Participating Insurers, which would account for roughly 20% of the Gross Settlement Amount.

32% of the Gross Settlement Amount will *initially* be set aside from each of the funds for an award of attorneys' fees. For all Affected Properties, the maximum allowable fee award will be 32% of the Gross Settlement Amount, with no more than 15% of the Gross Settlement Amount allocated to common benefit fees. An additional \$5,000,000 will be set aside for reimbursement of expenses. These two set-asides are called "Attorneys' Fees Set Aside" and "Cost Set Aside." The remaining funds are the "Funds Available for Distribution."

95% of the Funds Available for Distribution will be set aside to compensate class members for Repair and Relocation Damages ("Repair and Relocation Payments"). Class Members can recover those damages from only those Participating Defendant funds to which their respective builder, installer, or supplier contributed. 5% of the Funds Available for Distribution will be set aside to compensate Class Members for alleged bodily injury and property losses ("Bodily Injury Set Aside" and "Personal Property Set Aside").

For each Participating Defendant fund, a Special Master will:

- a. determine the total number of Affected Properties that are entitled to an allocation and the total combined under air square footage of those Affected Properties, then
- b. divide the total amount of each fund by the total square footage for that fund to determine the amount per square foot to be allocated to each Affected Property ("Square Footage Allocation"), and then
- c. multiply the Square Footage Allocation by the square footage of each qualifying Affected Property to determine the allocation.

Participating Defendant Class Members cannot recover from their respective funds. Any unused funds from the Bodily Injury Set Aside and Property Loss Set Aside would be transferred to each of the Participating Defendant funds based on their percentage allocation.

The Global Settlement is intended to provide finality for those who participate. But it has a lot of moving parts, and in some instances it works in conjunction with other MDL class settlements (not summarized here). The MDL Court commenced a final fairness hearing on November 13, 2012. At that time there were more than 290 opt-outs and 5 objections to the Global Settlement. Since that time, many opt-out Class Members have rescinded their opt-outs, and some of the objections have been resolved or withdrawn. The Court left the record open and will reconvene, and likely conclude, the hearing in mid-December 2012. Stay tuned.

for Product Manufacturers to Avoid Claims of Greenwashing

by Mark D. Shifton

On October 4, 2012, the Federal Trade Commission adopted the revised "Guides for the Use of Environmental Marketing Claims" (commonly known as the "Green Guides"). Recognizing the potential for profit in the rapidly-growing field of environmental sustainability, product manufacturers have begun to emphasize their products' environmental benefits in their



marketing efforts. If not properly communicated to the consumer, however, these marketing efforts may be deemed deceptive. With the Green Guides, the FTC has analyzed and interpreted various common marketing efforts, and has constructed a set of rules for marketers to follow so as to remain in compliance. Product manufacturers (and any other entity within the product distribution chain) would be well-advised to consult the Green Guides to ensure their marketing claims regarding the environmental benefits of their products are not unintentionally deceptive.

The Green Guides, which are codified at 16 CFR Part 260, were originally issued in 1992, and were updated in 1996 and 1998. The recently-revised Green Guides are based upon proposed changes originally published for public comment in October 2010. The Green Guides serve as a roadmap for manufacturers and product marketers with regard to how they market the environmental benefits of their products, and help them avoid making claims that could be considered unfair or deceptive under the FTC Act. (15 U.S.C. § 41 *et seq.*) Section 5 of the FTC Act declares unfair or deceptive acts or practices in or affecting commerce unlawful, and empowers the FTC to prevent marketers from engaging in such alleged practices.

The Green Guides do not preempt any federal, state, or local laws, and compliance with them will not preclude an enforcement action by the FTC. The Green Guides are ultimately the FTC's informal interpretations, and are not independently enforceable. They do, however, constitute an instructive guide to marketers seeking to avoid making unfair or deceptive claims about their products' environmental qualities. The 2012 Green Guides contain sections dealing with fourteen separate types of environmental marketing claims, including: (1) claims that using a product confers a "general" environmental benefit; (2) carbon offsets; (3) product certifications and seals of approval; (4) claims that a product is compostable; (5) claims that a product is degradable; (6) claims that a product is "free-of" a specified substance; (7) claims that a product is non-toxic; (8) claims that a product is ozone-safe/ozone-friendly; (9) claims that a product is recyclable; (10) claims that a product is manufactured from recyclable content; (11) claims that a product is refillable; (12) claims that a product was manufactured through the use of renewable energy; (13) claims that a product was manufactured with renewable materials; and (14) claims that a product contributes to source reduction. Notably, the Green Guides do not touch upon marketing claims that products are organic, sustainable, or natural. Oversight of claims that a product is organic would fall under the United States Department of Agriculture, while the FTC notes that it "lacks sufficient evidence on which to base general guidance" as to marketing claims that a building product is sustainable or natural.

As a threshold matter, the Green Guides urge marketers to ensure that all environmental claims regarding their products are truthful, not misleading, and are supported by a reasonable scientific basis. Generally, all claims of the environmental benefits gained by using a given product – and qualifications of such claims – should be clear, prominent, and understandable by the end user. Furthermore, marketers must be explicit as to whether their claims refer to the product itself, the packaging, or to just a portion of the product or package. The Green Guides caution that marketers should not overstate environmental attributes of a product (i.e. "now includes 50% more recyclable content," when the new product's recycled content has been increased from 2% to 3%) or make comparative claims without sufficient context for the consumer to understand the claim being made (i.e. "our product is environmentally preferable," without any information to substantiate this claim).

Summary of the 2012 Green Guides

Of the fourteen enumerated categories contained in the 2012 Green Guides, six are completely new: Marketing claims of carbon offsets, certifications and seals of approval, "free-of" claims, non-toxic claims, and renewable energy and renewable materials claims are completely new, while the FTC's interpretations of other types of claims have been modified slightly since the 1998 revision. The Green Guides themselves provide a brief explanation of the nature of the environmental claims often made, and discuss (often employing helpful examples) whether such claims should be qualified by the marketer to avoid being deemed deceptive.

Claims that Using a Product Confers a "General" Environmental Benefit

The 2012 Green Guides caution marketers against making unqualified claims that a product provides a "general" environmental benefit (i.e., that use of a particular product will be helpful to the environment as a whole, without discussing specifics). Marketers should avoid such broad, unqualified claims, such as:

- "Eco-friendly"
- "Greener than our previous packaging"
- Artwork that, standing alone, may convey environmental benefits
- Claims that a product's environmental benefits have been significantly improved

An unqualified claim of a general environmental benefit is likely to be confusing to a consumer, may convey the message that the product has as far-reaching environmental benefits, and may lead the consumer to believe that use of the product has no negative environmental impact. To stay within the FTC's guidelines, marketers should qualify their statements as necessary, and limit claims of environmental attributes to specific benefits.

Carbon Offsets

The sale of carbon offsets is a relatively new industry, and carbon offsets are new to the Green Guides. A carbon offset is a reduction in the emissions of carbon dioxide or other greenhouse gases to offset another emission that has already occurred. Carbon offsets often take the form of financial support to projects that reduce the emission of greenhouse gases, such as renewable energy projects. Consumers will often purchase carbon offsets so as to mitigate their own use of resources and products that involve the emission of greenhouse gases.

The 2012 Green Guides caution marketers to ensure they do not sell the same carbon offset more than once, and refrain from misrepresenting that a carbon offset will occur in the immediate future if it will not do so for two years or longer. Furthermore, a marketer may not market a carbon offset if the offset is related to an emission reduction that is required by law.

Use of Certifications and Seals of Approval

Certifications and seals of approval are of particular significance to the FTC, because a certification on a product may carry extra weight with the consumer. The 2012 Green Guides state that if a product is marketed using the name, logo, or seal of approval of a third-party organization, it should be meet the FTC's criteria provided in the FTC's Endorsement Guides, at 16 CFR Part 255. A certification by a third-party does not relieve the marketer from substantiating all claims made by the certification. Because the use of a third-party seal of approval may convey that the product offers a general environmental benefit, marketers should qualify such claims with language that the seal of approval refers only to certain specific benefits.

Claims that a Product Is Compostable

Compostable products are those that will break down into useable compost in a safe and timely manner in either a commercial composting facility or home composting system. Claims that a product is compostable must be supported by competent and reliable scientific evidence. If the product cannot be composted safely and in a timely manner in a home compost pile, the claim must be qualified. If the product is compostable but is often disposed of in a landfill where it will not break down into compost, the claim must also be qualified. Finally, marketers must qualify compostable claims if municipal composting facilities are not available to a substantial majority of consumers where the product is sold.

Claims that a Product Is Degradable

A product is degradable if the product will break down and return to nature within a reasonably short time after it is disposed of in its usual fashion. Unqualified claims that a product is degradable must be supported by competent and reliable scientific evidence. To be marketed as degradable, the product cannot be customarily disposed of in a landfill, incinerator, or recycling facility. Claims that a product is degradable should usually be qualified by providing the consumer information about the product's ability to degrade in the environment where it is generally disposed, and the rate and extent of its degradation once disposed.

Claims that a Product Is "Free-Of" a Specified Substance

Marketers often tout that a given product as being "free-of" a specified substance. While it is clearly deceptive to misrepresent that a product or package does not contain a substance, an otherwise-truthful claim that a product does not contain a substance may be deceptive if the product's packaging contains substances that pose the same risk as the substance the product is marketed as free-of, or if the substance itself has not been associated with that product category. Products that contain trace amounts of substances may still be marketed as being "free-of" those substances if the concentration of the substance is no more than what would be expected as trace amounts, the substance does not cause the type of harm that consumers would typically associate with the substance, and the substance has not been intentionally added to the product.

Claims that a Product Is Non-Toxic

The 2012 Green Guides caution that claims that a product is non-toxic are likely to be understood by consumers that the product is non-toxic both for humans and the overall environment. Claims that a product is non-toxic must be supported by competent and reliable scientific evidence. An unqualified claim that a product is non-toxic, yet is deadly to pets, would likely be considered deceptive.

Claims that a Product Is Ozone-Safe or Ozone-Friendly

Since the mid-1970s the scientific community, as well as the public at large, has been aware of the depletion of the ozone layer by chlorofluorocarbons (CFCs), as well as other compounds commonly used as refrigerants such as hydrochlorofluorocarbons (HCFCs) and halons. CFC and HCFC production in the United States has been banned by the Montreal Protocol, and any product containing an ozone-depleting substance such as CFCs, HCFCs, or halons may not be marketed as being "ozone-safe." Claims that a product is "ozone-safe" may also convey the broad message to consumers that the product is safe for the atmosphere in general. Thus, products containing substances contributing to ground-level ozone formation, such as those containing volatile organic compounds, may not be marketed as being "ozone-safe," notwithstanding that such products may not contribute to ozone depletion.

Claims that a Product Is Recyclable

The 2012 Green Guides caution marketers from advertising a product as recyclable unless the product can be separated from the waste stream for recycling. If the product has any quality which would significantly limit the consumer's ability to

recycle the product, however, it should not be marketed as recyclable. Additionally, marketers must take into account the availability of collection sites; a marketer may make an unqualified claim that a product is recyclable when recycling facilities are available in at least sixty percent of communities where the product is sold. If collection facilities are not so widely available, the marketer must qualify the claim by noting the limited availability of such facilities, or the claim that the product is recyclable may be deemed deceptive.

Claims that a Product Is Manufactured from Recycled Content

Recycled content includes recycled raw material, used, reconditioned, and remanufactured components. Recycled content often includes materials diverted from the waste stream during the manufacturing process (pre-consumer recycled content) or after the product has been used by the consumer (post-consumer recycled content). A marketer may make an unqualified claim only if the entire product is made from recycled material. If the product is only partially made of recycled material, the marketer must qualify the claim, based on the amount or percentage of the product that is made of recycled materials.

The claim that a product is made from recycled content need not distinguish between pre-consumer or post-consumer recycled content, but if such a distinction is made, the marketer must be able to substantiate its claim. If a product is marketed as being made from pre-consumer recycled content, the marketer must be able to substantiate that the pre-consumer content would have otherwise entered the waste stream.

Claims that a Product Is Refillable

A claim that a package is refillable cannot be unqualified unless a means for refilling the package is provided. This can be done by either providing a means for the collection and refill, or selling a product for the end user to purchase separately to refill the original package.

Claims that a Product Was Manufactured with Renewable Energy

It is deceptive to misrepresent that a product is made with renewable energy. To the average consumer, a representation that a product was made with renewable energy will convey the message that the entire process involved in the product's manufacture was driven by renewable energy technologies. If any portion of the manufacturing process used energy derived from fossil fuels, the claim that the product was manufactured using renewable energy must be qualified, unless the marketer has purchased renewable energy certificates (RECs) to match the energy used. Finally, it is deceptive for a marketer to represent that a product was made using renewable energy, but to then sell RECs for the same portion of energy.

Claims that a Product Was Manufactured with Renewable Materials

It is deceptive for a marketer to misrepresent that a product is manufactured with renewable materials. Marketers should qualify all claims, unless a product – excluding incidental components – is made entirely with renewable materials. As with all products, marketers should be able to substantiate all express and reasonably implied claims. Reasonably implied claims may be substantiated by providing information to the end user regarding the exact materials used, and explaining why such materials are renewable.

Claims that a Product Contributes to Source Reduction

It is deceptive to misrepresent that a product contributes to source reduction by being lower in volume, weight, or toxicity than other or previous products. All claims of source reduction should be qualified, generally by providing baselines for the end user to compare source reduction claims.

Avoiding Liability for "Greenwashing"

Given the rapidly-growing interest in environmental sustainability – and the premium prices many consumers are willing to pay for environmentally-friendly products – manufacturers may be tempted to oversell their products' environmental benefits, a process commonly referred to as "greenwashing." While adhering to the 2012 Green Guides will not necessarily insulate a marketer from all claims of greenwashing, the FTC has provided a useful roadmap for manufacturers seeking to engage in honest, good-faith efforts to market the important environmental benefits of their products while minimizing their risks.

Ultimately, avoiding claims of "greenwashing" rests on many of the time-honored principles of truth-in-advertising; manufacturers must be cognizant of the express and reasonably implied claims made by their marketing communications. Marketers must be able to substantiate, using scientific data, the claims related to their products' environmental benefits. Marketers should avoid making broad, generalized claims, and consider environmental marketing efforts as an opportunity to truly educate the consumer about the important environmental benefits of their products.

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