

Green Is Good...

By Victoria Davis Lockard  
and Joshua L. Becker

**C**ompanies and their counsel should be prepared for the new wave of “greenwashing” claims.

# ...Until “Eco-Friendly” Becomes “Eco-Fraud”

Green is the new black in consumer product marketing. Gone are the days when the local co-op was the only business pushing products labeled as environmentally friendly. Even large, mainstream retailers and manufac-

turers have joined the green revolution and are reaping the benefits of green marketing. Environmentally friendly products are in great demand, and companies are repackaging their products as “clean and green” to stay competitive. Unfortunately, the more aggressive a company is with its environment friendly assertions, the more likely it is to become a target in an “eco-fraud” or “greenwashing” action brought on behalf of consumers, competitors or the government.

## What Is “Greenwashing” or “Eco-Fraud”?

The term “greenwashing,” a derivative of “whitewash,” has recently come into vogue to describe the promotion of environmental benefits through consumer advertising and labeling practices that are perceived to be false, deceptive, misleading or vague. The term “greenwashing” is widely attributed to a 1986 essay penned by suburban

New Jersey environmentalist Jay Westerveld criticizing the hotel industry’s use of placards suggesting guests could help “save the environment” by reusing their towels. Purple Romero, *Beware of Green Marketing, Warns Greenpeace Exec*, <http://www.abs-cbnnews.com/special-report/09/16/08/beware-green-marketing-warns-greenpeace-exec>, Sept. 17, 2008. Westerveld maintained that the hotels were more motivated by profit than by any real environmental agenda.

Legal actions arising from alleged greenwashing are best described as “eco-fraud” litigation. Such claims, which may be brought by a purported class of consumers, competitors, state attorneys general or government agencies, seek recovery and/or injunctive relief based on allegedly deceptive trade practices and fraudulent advertising of environmental benefits. These actions essentially challenge labels, such as “environmentally friendly,” “eco-conscious,” “carbon neutral,” “energy



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efficient,” “sustainable,” “renewable,” “organic,” “nontoxic,” “chemical free,” “all natural,” “recycled,” or “biodegradable.”

Recent interest in eco-fraud litigation has been triggered partly by aggressive publicity and publications by eco-activists and advocacy groups, such as Greenpeace, decrying the environmental practices of corporate America. One oft-cited study re-

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sponsible for focusing public attention and the plaintiffs’ bar on eco-fraud is *The “Six Sins of Greenwashing” — A Study of Environmental Claims in North American Consumer Markets*, which was published by the environmental marketing firm TerraChoice in November 2007. See [www.terrachoice.com/files/6\\_sins.pdf](http://www.terrachoice.com/files/6_sins.pdf). The study, intended to describe and quantify the pervasiveness of greenwashing, surveyed six category-leading big box stores in which more than 1,000 so-called green consumer products were examined. A host of consumer products, such as shampoo, paper towels, televisions, light bulbs, copy paper, laundry detergent and lumber, were tested for compliance with current best practices in environmental marketing as found in sources such as the International Organization for Standardization (ISO), the U.S. Federal Trade Commission (FTC), the U.S. Environmental Protection Agency (EPA), Consumers Union and the Canadian Consumer Affairs Branch. All but one of the products made environmental claims that were judged to be “demonstrably false” or misleading.

The study identified six patterns, or “sins,” of greenwashing: (1) the sin of the hidden trade-off, (2) the sin of no proof, (3) the sin of vagueness, (4) the sin of irrelevance, (5) the sin of the lesser of two evils and (6) the sin of fibbing.

The sin of hidden trade-offs is described as advertising a product as “green” based on one attribute, without considering other

important environmental issues related to the product. This first sin of the hidden trade-off is exemplified, according to the study, by household insulation products that promote indoor air quality without paying attention to other environmental aspects of the insulation, such as manufacturing impact or recycled content.

The sin of no proof arises when a claim cannot be substantiated by easily accessible information. Examples of guilty products include household lamps and lights that promote energy efficiency or facial tissues and paper towels that claim post-consumer recycled content without providing evidence.

The sin of vagueness occurs when a claim is so poorly defined or overly broad that an intended consumer is likely to misunderstand it. Examples of such claims include insecticides promoted as “chemical free,” “natural” hair mousse, and wax paper that claims “recycled” content, but fails to quantify that content.

The sin of irrelevance is committed when an environmental claim is made that may be truthful, but is unimportant or unhelpful to the environmentally conscious consumer. The most common example of this “sin” is the allegedly irrelevant claim that a product is free of chlorofluorocarbons (CFCs), which the study notes have been banned for almost 30 years.

The sin of the lesser of two evils is committed when a claim may be true, but it risks distracting the consumer from the greater adverse environmental impacts of a product’s entire category, with study-cited examples including organic cigarettes and “green” insecticides and herbicides.

The final sin, the sin of fibbing, occurs when a claim is false. The study cites as examples of this sin several shampoos that claimed to be “certified organic,” but for which no claim confirmation could be found.

The conclusions of the TerraChoice study are difficult to verify, because the study does not mention any specific brands, stores or companies by name, and the methodology has been questioned. One detail that is unquestionable, however, is the interest in it by the media: The study has been covered by CNN, MSNBC, *The Today Show*, *The New York Times*, and a host of other national publicity outlets. The study and

similar publications have not only brought greenwashing into the American consciousness, but they have also provided a roadmap to plaintiffs’ attorneys looking for the next big, consumer fraud case.

### **Eco-Fraud: Today’s Flavor of Consumer Class Litigation**

The rise of no-injury consumer product class actions has been chronicled on legal blogs and the seminar circuit for the past several years. The term “consumer product class action” is a catch-all phrase used to describe “no-injury” class actions involving a consumer product claim typically based on a hybrid collection of state and federal consumer protection statutes and traditional theories of recovery. The common paradigm in these cases involves a statewide, or sometimes nationwide, class action targeting a single product, or a discrete class of products, by plaintiffs seeking recovery for an alleged economic injury. A familiar charge is that the product failed to deliver the “benefit of the bargain,” because the product was not delivered as advertised. Thus, the plaintiffs seek a return of the purchase price or the premium paid. The plaintiffs typically allege the defendant either failed to disclose the product’s alleged health risks (e.g., failure to disclose alleged harms from coated cookware) or deceptively advertised the product possessed some unsubstantiated health benefit or premium attribute (e.g., “probiotic” yogurt or tools “made in the USA”). The goal in bringing such claims is clear: attain certification and extract a settlement.

The consumer class action is an alluring avenue for a number of reasons. First, the bar for class certification is far lower in these types of cases than in personal injury or medical monitoring actions, because individualized injuries often defeat the class certification requirements of commonality and typicality. Second, these actions usually dispense with the hurdle of proving scientific or medical causation and the associated expense of hiring a cadre of scientific experts. Third, these actions give rise to large classes with high monetary payoffs, due to the many consumers who purchase the types of everyday products targeted.

Historically, the class model could be avoided in product liability actions alleging

personal injury, because in such cases the differences among individual plaintiffs on issues of liability, comparative fault, causation and the nature and degree of injuries tend to overshadow the commonality of the class. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006). By eliminating the personal injury element in consumer fraud class actions, however, plaintiffs can avoid the biggest hurdle to class certification.

An important and current debate relevant to the defense of consumer class actions concerns the issue of individual reliance, the traditional causal element of a common law misrepresentation claim. It is believed that the courts' relaxation of the reliance requirement—a showing that misrepresentation induced a consumer to purchase the product—is a significant factor in the rise of these consumer product class actions. See Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reigning in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 33 (2006). Many court decisions have illustrated a trend dispensing with the need for plaintiffs to prove reliance under consumer protection claims. See *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 551 (N.M. Ct. App. 2003). Most recently, however, there is a reversal of this trend, and more courts are finding that the “as a result of” language in most consumer protection statutes requires actual causation in the form of reliance. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (“a fraud class action cannot be certified when individual reliance will be an issue.”)

In *McLaughlin*, the “light” cigarette case, the Second Circuit held that “proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof.” *McLaughlin*, 522 F.3d at 223. The court stated that individualized proof of reliance on the misrepresentation is needed to overcome the possibility that a member of the purported class purchased the product for some other reason. *Id.*; see also *Thorogood v. Sears, Roebuck and Co.*, 2008 WL 4709500 (7th Cir. October 28, 2008) (decertifying a class of pur-

chasers of clothes dryers advertised with “stainless steel” drums after finding a presumption of reliance “implausible”).

Eco-fraud is just the latest flavor of consumer product class litigation, as such claims fit squarely within the paradigm and the reliance debate described above. It would be very easy to craft a purported class action based on any of the examples described within the TerraChoice study. For example, products with labels purporting the products are “chemical free” subject themselves to fraud claims on the ground that nothing is truly free of chemicals. Similarly, claims that a product is “nontoxic” may be subject to attack, since most anything, including water, oxygen or salt, is toxic if ingested in excess amounts. Your product may be “all natural,” but so are arsenic, mercury, uranium and formaldehyde.

The same strategies employed for defeating class certification in typical consumer fraud actions apply in eco-fraud cases. Defendants will want to emphasize the dissimilarity of consumer experiences and behavior among putative class members in order to show that the requirements of commonality, typicality, predominance, and superiority cannot be met. See *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076 (N.J. 2007). Members of a purported eco-fraud class likely would not have received the same information, made purchasing decisions in the same way, used the product in a similar way and for the same reasons, or reacted in a uniform manner. A recognizable and reliable market research firm is invaluable in conducting the studies, surveys and other market research needed regarding consumers' consideration and awareness of green claims, motivations, processes and choice behaviors. In most cases, expert testimony on these points is essential to defeat the commonality, typicality, superiority and predominance requirements.

Likewise, reliance will likely present a difficult challenge for plaintiffs in cases of alleged greenwashing. Following the logic of *McLaughlin*, specific proof of reliance on the alleged environmentally friendly marketing should be an element in most of these claims. 522 F.3d 215. Consumers purchase products such as milk, toothpaste,

televisions and lumber for a variety of reasons, and each individual in a class of consumers assumedly did not all purchase the product because of the advertised green benefits. To attack reliance, evidence on the plaintiff's environmental practices and ecological behaviors will be relevant and persuasive. For example, it would be a hard sell to suggest a plaintiff relied on a partic-

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ular green claim in purchasing a household product when it can be shown that the same plaintiff never recycles, drinks his or her coffee from polystyrene cups, and drives a gas-guzzling SUV. In such a case, it is likely the consumer relied on the price, the name brand, or another product attribute rather than the green claim when deciding to purchase a product.

Nonetheless, the climate of concern over consumer class action lawsuits is mounting, and corporate defendants should be particularly wary of potential eco-fraud consumer class actions. Despite the difficulty plaintiffs have proving reliance in these cases, there are several other factors that render these types of cases more troublesome than the average consumer fraud case. First, there is a legitimate public policy argument in favor of protecting the environment and encouraging corporate environmental responsibility, which is absent in the typical consumer product case. Whereas courts may be more willing to take a common sense approach or “buyer beware” stance regarding an exaggerated product label touting trivial claims, such as the “calorie-burning” benefits of a soft-drink or the failure to provide an obvious warning that playing an MP3 player at full volume might damage hearing, they may

be more sympathetic to the environmental cause and environment-related public policies.

Second, plaintiffs have very strong allies when it comes to punishing corporate defendants for perceived greenwashing. In numbers and strength, the environmental watchdog groups are unparalleled. Public interest and advocacy groups, such as

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Greenpeace, are well-funded, active and very willing to fight a corporate defendant over greenwashing. In fact, Greenpeace sponsors a website, [www.stopgreenwash.com](http://www.stopgreenwash.com), featuring its own slick slogan, “Clean up your act, NOT your image.” Similarly Co-op America, whose stated mission is to “harness economic power—the strength of consumers, investors, businesses, and the marketplace—to create a socially just and environmentally sustainable society,” sponsors a website, [www.responsibleshopper.org](http://www.responsibleshopper.org), where consumers can search literally hundreds of company profiles by name or by industry and quickly compare corporate responsibility records. Groups such as The Cornucopia Institute, the Center for Science in the Public Interest, the Organic Consumers Association, and the U.S. Public Interest Research Group, have also shown that they are willing to promote consumer eco-fraud litigation, by providing the needed funding or helping to identify class representatives, to further their missions.

Advocacy groups occasionally have sought to bring such actions solely on their own behalf, although standing is a significant barrier to such direct claims. To establish standing to sue, a group must establish that it suffered an injury in fact, there is a causal nexus between the injury and the defendant's conduct, and the injury is likely redressable through a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Specifically, the organization must demonstrate that it has suffered a “concrete and demonstrable injury”

to its activities, not merely “a setback to the organization's abstract social interests.” *Ctr. for L. & Educ. v. U.S. Dept. of Educ.*, 315 F. Supp. 2d 15, 22 (D.D.C. 2004), *aff'd*, 396 F.3d 1152 (D.C. Cir. 2005) (citing *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)).

Third, the public relations cost to a company targeted in an eco-fraud claim can be huge. A corporate green campaign can quickly backfire, doing more harm than good, if the consuming public believes the public relations assertions are untruthful or misleading. Environmental responsibility is a deep conviction held by many people, from private citizens to professionals, to religious devotees, politicians and individuals holding environmental views considered extreme by the mainstream. Environmental consciousness is a hot topic for the media, and they are quick to disseminate a story involving an alleged “greedy corporation” taking advantage of “innocent” consumers' efforts and desires to “save the earth.” Finally, as opposed to most other areas of consumer fraud, there are published guidelines and standards by which green marketing claims can be objectively measured for deceptiveness, including those provided by the FTC's Green Guides, the U.S. Department of Agriculture's (USDA) organic standards, the ISO's standards, and state environmental marketing statutes. These standards offer benchmarks for measuring the claims and criteria on which consumers can base their complaints. As discussed below, the FTC is expected to issue revised Green Guides in 2009, to include more specific guidance for companies facing dilemmas. While additional guidance is welcome clarification for many, it is also likely to lead to increased litigation when companies' labeling does not comply, even though the Green Guides do not carry the force of law.

### Third-Party Claims: Competitors, Regulators and Public Prosecutors

While the biggest threat to companies accused of greenwashing are eco-fraud consumer class actions, companies should also be concerned about actions brought by competitors, regulatory agencies and public prosecutors, such as state attorneys general. Companies have been known to initiate litigation over a competitor's green

claims to eliminate the competitor's market advantage from a misleading pro-environment assertion. For example, Tyson Foods, Inc., the second largest domestic chicken producer, was reportedly sued for eco-fraud by competitors contending that Tyson's chicken products were fraudulently advertised as “raised without antibiotics.” *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F. Supp. 2d 491 (D. Md. 2008). See also Emily Chasen, *Tyson sues USDA over antibiotic-free labeling*, Reuters, June 14, 2008; Erin Marie Daly, *Tyson Yanks Antibiotic-Free Chicken Claim*, Law360, June 3, 2008. Both Tyson and its competitors added an antibiotic known as ionophores to their chicken feed to help protect consumers from contracting disease. Tyson also injected a vaccine containing antibiotics into the chicken eggs right before the eggs hatched. The “antibiotic free” label was believed to enhance Tyson's profits, because consumers were willing to pay more for an environmentally “green” product.

The Tyson labels at issue initially were approved by the USDA's Food Safety and Inspection Service. However, the USDA later claimed that the approval was a mistake based on misinformation provided by Tyson. Thus, the label was rescinded, to avoid claims that it was false and misleading. The court ordered an injunction barring Tyson from similar advertising, and Tyson subsequently voluntarily withdrew the contested label. Tyson's antibiotic free labels, advertising and corresponding marketing materials have spawned a purported class action on behalf of consumers, as well as a petition to the USDA by Tyson's competitors. See *Sanderson*, 547 F. Supp. 2d 491.

In another competitor suit in 2008, Dr. Bronner's Magic Soaps filed a lawsuit in the California Superior Court against Estee Lauder and numerous other personal care brands to force them to stop making alleged misleading organic labeling claims. *All One God Faith, Inc. d/b/a Dr. Bronner's Magic Soaps v. The Hain Celestial Group, Inc.*, Case No. CGC-08-47401, Superior Court of California, County of San Francisco, Department 305. Dr. Bronner's and the Organic Consumers Association (OCA) had threatened to sue offending brands unless they either dropped their organic claims or

reformulated their products. The suit maintained that organic labeling standards set by the USDA's National Organic Program for food and beverages set the bar for consumer expectations of "organic" cosmetic products, even though the USDA standards do not necessarily apply to cosmetics, body care or personal care products.

Government agencies, such as the USDA, the FTC and state attorneys general, are also willing to challenge perceived greenwashing by corporate defendants, either in connection with consumer class actions or independently. For example, the FTC and various states became involved as watchdogs of environment-related marketing as early as 1988 when they pursued actions against Mobil for its Hefty® brand trash bags, advertised as "biodegradable." See Jerry Taylor, *The Greening of the First Amendment*, REGULATION MAGAZINE, Vol. 14 No. 4 (Fall 1991). To qualify as biodegradable, the bag would have had to be fully metabolizable by microorganisms and assimilated into the natural biological cycle of soil and water. The bags were made from polyethylene and were allegedly not fully biodegradable, because they would break down only slightly if left in the sun rather than fully degrade. The FTC and seven states filed suit against Mobil, and the company eventually entered into a consent agreement with the FTC whereby it agreed to stop making the allegedly unsubstantiated claims. Mobil also settled with the states, paying a total of \$165,000 and agreeing to remove the term "biodegradable" from the Hefty® bags.

The risk of eco-fraud claims extends beyond U.S. borders, as government entities in other countries also have begun bringing eco-fraud enforcement actions. In 2008, for example, eight Japanese paper companies were reportedly sanctioned by Japan's Fair Trade Commission for exaggerating the percentage of recyclable material in their paper products. See Ryan Davis, *Japanese Cos. Sanctioned Over 'Recycled' Paper*, LAW360, Apr. 8, 2008.

As these examples illustrate, companies should be prepared to defend eco-fraud claims on multiple fronts, as competitors, government agencies and individual states may pursue independent actions. Aside from the civil penalties involved, the expense and burden of defending a product

in various arenas can mount quickly, with each arena having its own set of discovery and investigatory obligations.

### The FTC'S Green Guides and Other Sources

Subsequent to the Mobil case, the FTC, with the cooperation of the EPA, released the Green Guides to provide guidance to companies engaged in pro-environment marketing. 16 C.F.R. §260. Originally released in 1992 as "Guides for the Use of Environmental Marketing Claims," and last updated in 1998, these provisions are the primary tool for federal regulation of environmental marketing. The Green Guides are intended to aid companies in their compliance with Section 5 of the FTC Act, which makes unlawful deceptive acts and practices in or affecting commerce.

Given the flurry of green marketing claims and growing concern about alleged greenwashing, the FTC has promised the Green Guides will be revised for 2009 to better address the relevant issues. To that end, the FTC accepted public comments and held a series of workshops in 2008 to discuss the Green Guides and needed areas of revision. The FTC is currently investigating a variety of environmental product claims and is expected to show renewed interest in pursuing claims against corporate defendants once the Green Guides are updated.

The Green Guides apply to environmental assertions included in labeling, advertising, promotional materials and all other forms of marketing, as well as claims about the environment-related attributes or "carbon footprints" of a product, package or service. *Id.* at §260.2. Some states, such as California, also have their own environmental marketing statutes, which are more stringent than the Green Guides' guidelines. See, e.g., California's Environmental Representations Law, CAL. BUS. & PROF. CODE §§17580, 17580.5. Familiarity with these guidelines and state statutes is essential to avoid, and defend against, litigation and enforcement actions.

Because the Green Guides are not legislative rules under Section 18 of the FTC Act, they are unenforceable regulations; they have no force or effect of law. 16 C.F.R. at §260.1. They do, however, provide the basis for voluntary compliance with other

existing laws. The FTC notes that conduct inconsistent with the positions articulated in the Green Guides may result in corrective action by the FTC under Section 5, if the FTC believes that behavior falls within the scope of conduct declared unlawful by the FTC Act. *Id.* at §260.1.

Currently, the Green Guides set forth general four general principles, as follows:

- Any qualifications or disclosures, such as those described in the Green Guides, should be sufficiently clear, prominent and understandable, to prevent deception;
- An environment-friendly marketing assertion should make clear whether the pro-environment attribute or benefit asserted refers to the product, the product's packaging, a service or to a portion or component of the product, package or service;
- A pro-environment marketing assertion should not overstate the attribute or benefit, expressly or by implication; and
- A pro-environment marketing assertion that includes a comparative statement should make the basis for the comparison sufficiently clear to avoid consumer deception.

In addition to these general principles, specific guidance is offered about the use of environment-related marketing involving the following terms: degradable, biodegradable, photodegradable, compostable, recyclable, recycled content, source reduction, refillable, ozone safe, ozone friendly, and "general environmental benefit claims," such as eco-safe or environmentally friendly. *Id.* at §260.7. For example, the Green Guides point out that a product labeled "degradable," "biodegradable" or "photodegradable," "should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, *i.e.*, decompose into elements found in nature within a reasonably short period of time after customary disposal." *Id.*

Specific guidance is also provided for use of the term "recyclable" in marketing. Such language may be used only when a product or package "can be collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling

program.” *Id.* Similarly, the Green Guides advise that a lawn care product advertised as “essentially non-toxic” or “practically non-toxic” may be deceptive if the label applies to health effects but not to the toxic effects on the environment. The Green Guides currently provide around 60 specific examples with further guidance. Additionally, companies should refer to

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the FTC’s publication, “Complying with the Environmental Marketing Guides,” which is available on the FTC’s website.

There are a number of additional sources that outline environment friendly advertising standards and guidance. The International Organization for Standardization (ISO) has published “Global Green Standards,” for environmental labeling. See Int’l Inst. for Sustainable Dev., *Global Green Standards: ISO 1400 and Sustainable Development*, <http://www.iisd.org/pdf/globalgrn.pdf> (specifically ISO 14020:2000, ISO 14021:1999, ISO 14024:1999 and ISO 14025:2006). The Consumers Union, which publishes Consumer Reports, also maintains a website with an extensive, searchable database with report cards for a wide variety of environment friendly labels and logos and the products on which they appear. See Consumer Reports, *Greener Choices*, <http://www.greenerchoices.org/ecotags/ecotags-home.cfm>.

Australia, France, Canada, the United Kingdom and other countries have published their own guidelines, some mandatory and some voluntary, regarding environment friendly marketing of consumer products. Moreover, a number of independent third-party certifiers and eco-labeling organizations, such as Green Seal and members of the Global Ecolabelling Network, are available to evaluate and certify products as environmentally preferable. Thus, there are a number of resources

available to help set standards for acceptable environmental marketing claims, and voluntary adherence to these will help companies avoid litigation and bolster their defense in the event they are targeted.

### “Organic” Labeling and the USDA

The USDA’s regulations include strict requirements for the labeling of organic products, and labeling violations can carry severe penalties. The Organic Foods Production Act (OFPA) authorized the USDA’s National Organic Program (NOP) to develop, implement, and administer the national production, handling, and labeling standards for organic agricultural products. 7 U.S.C.A. §§6501–22. The NOP also accredits the certifying agents, foreign and domestic, who inspect organic production and handling operations to certify that they meet USDA organic standards. 7 C.F.R. §205.

Agricultural commodities or products that meet the NOP standards for certification can be certified under the NOP and, therefore, labeled as “organic,” or “made with organic,” pursuant to the NOP regulations. 7 C.F.R. §205.300 *et seq.* To qualify for such certification, a producer or handler must comply with the applicable NOP regulations as set forth in the C.F.R. The USDA has accredited certifying agents whose job is to certify that handlers and producers representing their products as organic have complied with NOP regulations.


The USDA defines three levels of organic labeling for food and beverages. First, a product can be labeled “100 percent organic” if it is made entirely with 100 percent organically produced ingredients, not counting added water and salt. *Id.* Second, generally, the label “organic” may be used if the product contains at least 95 percent organic ingredients, with no added sulfites. Both of these categories may also display the USDA organic seal. *Id.* Third, products may be labeled “made with organic ingredients” if they contain a minimum of 70 percent organic ingredients and no added sulfites, except that wine may contain sulfur dioxide. *Id.*

Recently, the advocacy group Organic Consumers Association has pushed for tightened restrictions on organic labeling of cosmetics and personal care articles. Currently, cosmetics and personal care products may be certified and labeled

“USDA organic,” if they meet the production, handling, processing, labeling, and certification standards, although compliance for such products is not required. Currently, the USDA has no authority governing the production or labeling of personal care products not made of agricultural ingredients or products that do not make claims to meet USDA organic standards. Generally, cosmetics, body care products and personal care products may be labeled and marketed “natural” or “organic.” or may display other green labels without being subject to the USDA NOP program.

Failure to comply with the USDA labeling requirements can subject companies to hefty fines, as well as civil suits for alleged misrepresentation. In 2007, multiple purported class actions were filed against Aurora Dairy Corp., alleging that it labeled and sold its milk as organic, which yields much higher prices than conventional milk, without following federal standards for organic products. *In re Aurora Dairy Corp. Milk Marketing and Sales Practices Litigation*, MDL-1907, E.D. Mo.; Tresa Baldas, *Battle Over Organic Products Turns Toxic*, NAT’L L.J., June 24, 2008 Following a familiar pattern, an advocacy group first made complaints to the USDA, which subsequently launched an investigation into the company’s practices. Class action lawsuits, at least six in total, were filed on the heels of the USDA investigation, alleging violations of various statutes and common law, including consumer fraud, unjust enrichment, breach of warranty, negligence and false advertising.

### Conclusion

Recent developments suggest companies and their counsel should be prepared for the new wave of eco-fraud litigation. Greenwashing has become a buzzword for consumers, advocacy groups and the media, and this is fertile ground for no-injury consumer class actions and regulatory enforcement actions. Unfortunately, the rules are not always clear, consistent or static when it comes to responsible pro-environment marketing. As companies become more aggressive with “green and clean” campaigns than in the past, they must take care to avoid becoming a target for eco-fraud and greenwashing claims. 

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**Eco-Fraud**, from page 44  
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