

The Perils of Going Green

By Beth Dorris, Danielle Sakai & Kira Johnson

The marketplace is experiencing an increasing demand for “green” products. Eco-friendly products have become a \$200 billion market.¹ Going green is no longer a moral principle but a business plan. This is particularly true today, as vast amounts of stimulus dollars are being made available for environmental programs.²

As “GO GREEN” has moved from protestor slogan to boardroom charts, we lawyers are faced with classic marketing claim dilemmas:

- What does it mean to be “green”?
- How can you prove it?
- And what happens if you don’t?

I. WHAT DOES IT MEAN TO BE “GREEN”?

“Green” is becoming the new “blue ribbon” standard. But just how to earn the ribbon is a complex process. Companies are learning to pay attention not just to the final product, but to the entire supply, production and distribution chain behind that final product.

A. Raw Materials: How Does Your Garden Grow?

In the not too distant past, a product could go “green” just by shifting to greater use of “natural” ingredients. Today, interest in using “natural,” or “grown,” materials remains high, especially in response to the Obama administration’s drive to increase use of “renewable” resources.³

Nonetheless, even “natural” materials can cause environmental harm, depending on how they are grown. For example, Unilever proudly touted its use of only certifiably “natural” ingredients, including palm oil, in Dove soap. But, as the New York Times reported in 2007, expanding palm plantations were clearing huge tracts of Southeastern Asian rainforest, overusing chemical fertilizer, and sending huge amounts of carbon into the atmosphere by draining and burning peat

¹ According to the Natural Marketing Institute, as of 2005, the United States market for purchasing goods based upon environmental and social impacts exceeded \$209 billion. Mara, Janis I., *Consumer Urged to Scrutinize “Eco-Friendly Claims,”* Inside Bay Area, Mar. 9, 2008.

² The stimulus bill includes more than \$80 billion in spending and tax cuts aimed at green technologies. Schoof, Renee, *Focus on Energy May Create Jobs,* The Miami Herald, Feb. 17, 2009.

³ See The White House, Agenda, Energy, and Environment, http://www.whitehouse.gov/agenda/energy_and_environment/.

⁵ Rosenthal, Elisabeth, *Once a Dream Fuel, Palm Oil May Be an Eco-Nightmare,* The New York Times, January 31, 2007.

land to clear additional space.⁵ Greenpeace decided to hold Unilever, the world's largest buyer of palm oil, socially responsible for the environmental damage. In May of 2008, Greenpeace organized an aggressive public campaign against Unilever.⁶ Two weeks into the campaign, Unilever had received tens of thousands of protest emails; suffered through news media events highlighting Greenpeace activists, dressed as orangutans, visiting Unilever's facilities; and endured a growing boycott as Greenpeace's protest video, "Dove Onslaught," gained exposure around the world. Unilever agreed to publicly endorse an immediate moratorium on palm-related deforestation. Unilever also agreed to exert their influence on other companies in the industry, their palm oil suppliers in Indonesia, and the Indonesian government to make the moratorium a reality.⁷

Accordingly, today companies seeking to call themselves "green" look not only at whether the product ingredients are "natural" but at *how* they are grown and extracted.⁸ They may examine whether old growth or carbon-reducing growth (such as rain forest at or near the equator) was displaced in the growing process, whether pesticides and/or chemical fertilizers and fumigants are used, whether slash and burn techniques were employed, whether excessive water is used, and even whether the farming entity muscled out small family farms. If refining or other processing is involved to extract the material, they also are looking at whether the processing method also creates significant pollution and/or waste.

B. Supply and Distribution (Are We There Yet?)

Transport requires fuel. The longer the distance, the heavier the weight, the greater the fuel consumption. Now, with the increasing emphasis on climate change considerations, fuel consumption – and so distance and bulk – count more than ever before.

One way to address this concern is to buy locally, where feasible. Companies buying locally may not only be helping the surrounding community economically, but also arguably are producing a "greener" product in the process. Where buying locally is not a realistic option, a company can still "go green" by revamping its transportation approach. Companies seeking "green" accolades may convert their fleets to hybrids, natural gas burning vehicles, or other vehicles that require less fossil fuel and produce less greenhouse gases.

By definition, fuel efficient fleets use less fuel. So while fleet conversion requires an initial investment, this investment, over time, may pay for itself. These days, of course, finding the credit or funding for any kind of an investment is not easy. Nonetheless, some state and federal funding may be available. For example, California has a long standing incentive program to help fund removal of old gas guzzlers or smog belchers from the road.⁹ Federal stimulus funding also

⁶ See Rastogi, Nina Shen, *Green Lipstick? Making Sense of Natural Bath-and-Beauty products*, Feb. 24, 2009, <http://www.slate.com/id/2211934/pagenum/2>.

⁷ See Greenpeace International, *Public pressure for Indonesia's forests works, Ask Unilever*, May 2008, <http://www.greenpeace.org/international/campaigns/forests/asia-pacific/dove-palmoil-action>; Marx, Eric, *Unilever Blocking Deforestation for Palm Oil*, San Francisco Chronicle, Feb. 1, 2009.

⁸ See Starbucks Shared Planet, Ethical Sourcing, <http://www.starbucks.com/sharedplanet/ethicalSourcing.aspx>.

⁹ The California Air Resource Board (ARB) offers rebates of up to \$5,000 to consumers who purchase or lease new eligible alternative fuel vehicles between May 24, 2007 and March 31, 2009 or until funding runs out. ARB, Incentives For Cleaner Vehicles, April 3, 2008, <http://www.arb.ca.gov/msprog/zevprog/zip/incentiv.htm>.

has now become available to help upgrade fleets to more fuel efficient and less polluting vehicles. Some of this funding may be funneled directly to private fleets¹⁰; other fleet grants are available through partnering with public agencies.¹¹

C. Packaging (What the Emperor Isn't Wearing)

Transportation not only requires fuel, it requires packaging. Marketing also may, absent environmental concerns, result in substantial packaging. The more packaging, the less “green” the materials and final product is likely to be viewed.

Just how the packaging is done can help. And in this case, “more green” can also mean “more green cash.” Pepsi-Cola reports conserving 196 million pounds of corrugated material by switching from corrugated to reusable plastic shipping containers for one liter and 20 ounce bottles - and saved \$44 million in the process.¹² And Nestle reportedly achieved \$603 million in packaging material savings worldwide between 1991 and 2008.¹³ Wal-Mart also has been working the packaging angle. It instituted a program to cut packaging by 5% by 2013 in hopes of saving 667,000 metric tons of carbon dioxide in addition to saving \$3.4 billion in direct costs and \$11 billion across the supply chain.¹⁴

D. Processing (Coloring Smokestacks Green)

Processing practices can pose environmental issues to what otherwise might be an exemplary product. For example, nothing smells better than baking bread. Yet organic bread bakers need to consider air quality issues from their emissions.¹⁵

¹⁰ The Federal Highway Administration’s Congestion Mitigation and Air Quality (CMAQ) Improvement Program provides a flexible funding source for state and local governments to fund transportation projects that help achieve the goals of the Clean Air Act. The CMAQ Improvement Program contemplates funding for private fleet conversions to alternate fuel vehicles. See U.S. Department of Transportation, Federal Highway Administration, Environment, CMAQ and Public-Private Partnerships, 2005, <http://www.fhwa.dot.gov/environment/cmaqpgs/pppartner/index.htm>. See also New York State Energy Research & Development Agency, New York City Private Fleet Program, 2009, <http://www.nyserda.org/Programs/transportation/AFV/NYCPrivateFleet.asp> (awarding CMAQ funds on a competitive basis to private-sector companies and non-profit entities that acquire new vehicles powered by electricity or compressed natural gas, or convert old vehicles to electric, hybrid, natural gas or dual fuel technology). Some CMAQ programs have been allocated federal stimulus funding. See, e.g., Northeast Ohio Areawide Coordinating Agency, New Releases, *NOACA Subcommittee Selects Projects for Federal Economic Stimulus Funding*, March 11, 2009, <http://www.noaca.org/rtis31109.html>.

¹¹ The federal stimulus package includes \$300 million in funding to the Diesel Emission Reduction Act (DERA) for retrofits in 2009. Private fleets are eligible for DERA grants if they have partnered with a public entity (e.g., a school and a private bus contractor). See BASF, *Top Ten Tips to Apply for DERA Funding*, Mar. 2009, <http://www.catalysts.basf.com/Main/download.axd/0419835b49b2425699b8465e113eddb10.pdf?d=BF-8997-040109>.

¹² U.S. Environmental Protection Agency, Wastes, Partnerships, WasteWise Program, Waste Reduction Resources, *Where Are the Biggest Cost Savings?*, 2008, <http://www.epa.gov/epawaste/partnerships/wastewise/wrr/cost.htm>.

¹³ Nestle, Creating Shared Value, Environmental Sustainability, Packaging, <http://www.nestle.com/CSV/EnvironmentalSustainability/Packaging/Packaging.htm>.

¹⁴ Wal-Mart, Facts & News, *Wal-Mart Launched 5-Year Plan to Reduce Packaging*, Sept. 22, 2006, <http://walmartstores.com/FactsNews/NewsRoom/5951.aspx>.

¹⁵ See Bay Area Air Quality Management District Regulation 8, Rule 42, <http://www.baaqmd.gov/dst/regulations/rg0842.pdf>.

Most environmental impacts from manufacturing are already pretty heavily regulated. But now there is a new interest in potential climate change impacts. Just how much energy is consumed, how much CO₂ and methane escapes through the stacks or other operations, and even how much water is needed all are being evaluated now. For example, the State of California has adopted legislation requiring emissions to be brought to 1990 levels by the year 2020 (subject to certain business as usual adjustments). To achieve this result, a host of new regulations and reporting requirements are in the works. Some companies are already reporting their greenhouse gas (GHG) emissions under the largely voluntary “California Climate Action Registry” (CCAR),¹⁶ and the Obama administration has expressed interest in taking over the CCAR at the federal level.¹⁷ The CCAR is publicly available to citizen groups, plaintiff’s attorneys, and others. Accordingly, if a company reports particularly high levels of GHG emissions in the CCAR, this may become fodder for a challenge of its “green” product claims.

Another component of evaluating environmental impacts from the manufacturing process is waste. Waste minimization and recycling have long been associated with “going green.” For example, in the early 1990s, Xerox launched a new initiative to take back used copiers and use their parts as a source of material for new machines. Xerox estimates that the program saved 390,000 megawatt hours of energy in 2003 alone. In addition, customers were happy not to worry about disposing of the machines and Xerox benefited from “several hundred million” dollars in savings each year.¹⁸

E. Building Facilities (Where Walls Walk the Walk)

As Starbucks and other companies have demonstrated, how green the facilities are that produce and sell the product can be a primary component to “going green.”¹⁹ The materials used for storefronts, warehouses and plants can make a big difference to the environment. In California, new “green building” codes are cropping up everywhere.²⁰ And federal stimulus dollars and tax credits are being directed towards the promotion of energy conservation, waste reduction, renewable energy sources, and “sustainable” building materials.

Buildings have a profound impact on our environment and, therefore, present a unique opportunity to improve our environmental footprint. In the United States, buildings consume more than 30% of our total energy and 60% of our electricity.²¹ In addition, buildings consume five billion gallons of potable water per day just to flush toilets.²²

Facility construction and design is one of the few elements of “going green” that has a relatively clear set of standards. There are a number of “green build” draft codes and certification

¹⁶ California Climate Action Registry, <http://www.climateregistry.org>.

¹⁷ See Eilperin, Juliet, *EPA Plans U.S. Registry of Greenhouse Gas Emissions*, The Washington Post, Mar. 11, 2009.

¹⁸ Xerox Corporation, Environment, Health, and Safety Progress Report, 2004.

¹⁹ See Starbucks Shared Planet, News, *Starbucks Opens LEED Certified Coffee Roasting Plant*, Feb. 19, 2009, <http://www.starbucks.com/sharedplanet/news.aspx>; see also Fresh and Easy Neighborhood Markets, A Good Neighbor, Green Building Initiatives, 2009, <http://www.freshandeasy.com/greenBuilding.aspx>.

²⁰ See, e.g., 2008 California Green Building Standards Code, CCR, Title 24, Part 11.

²¹ U.S. Green Building Council, LEED Existing Buildings v2 Reference Guide, 2006.

²² *Id.*

programs. The most prominent is the U.S. Green Building Council's third-party certification program, Leadership in Energy and Environmental Design (LEED). LEED was developed to encourage and accelerate sustainable practices in the design, construction and operation of buildings. LEED has rating systems for various types of projects, including new commercial construction and major renovations, existing building maintenance and operations, commercial interiors, and retail. The LEED system awards points for achieving thresholds in sustainable site development, water savings, energy efficiency, materials selection, indoor environmental quality, and innovation in operation and design.²³ A project must tally a certain number of points to receive LEED certification.²⁴

Again, green building can help a company's financial bottom line. According to Turner Construction's Green Market Barometer, 84% of commercial real estate executives reported lower energy costs in green buildings, and 68% reported lower overall operating costs.²⁵

F. "Brown Thumb" Products

Some products are particularly hard to present as "green." Chemical fertilizers, coal, petroleum products, and pesticides come immediately to mind. Yet, even these "brown thumb" products can perhaps be given a green tint. Chevron's "Do People Care? People Do" campaign exemplifies this effort. Adopting "green" transportation, packaging and processing protocols, together with well-advertised conservation project funding, may go a long way to improving an individual company's environmental image.

II. HOW DOES A COMPANY PROVE IT IS "GREEN"?

A. One Person's "Green" is Another's "Puce"

Going "green" has become a minefield for the unwary. One common problem has been that even when environmental groups or regulators endorse a product as environmentally superior, that doesn't mean it is, or that it is immune from litigation. Below are a few illustrations.

- **MtBE.** MtBE was an additive to gasoline encouraged by EPA as a way of improving air quality.²⁶ The problem is that MtBE, along with the rest of the gasoline product, leaked from underground tanks and pipes into groundwater and from there to drinking water. Plaintiff's lawyers argued that MtBE tastes bad and smells bad, and so shouldn't be in drinking water at all.²⁷ Some argued that it may even cause cancer.²⁸ Regardless of the merits of these claims, oil companies ended up spending what has cumulatively come to billions of dollars in defense costs, settlement payments and

²³ See, e.g., U.S. Green Building Council, LEED Commercial Interiors v2 Reference Guide, 2006.

²⁴ *Id.*

²⁵ Turner Construction, News, Press Releases 2008, Nov. 11, 2008, <http://www.turnerconstruction.com/corporate/content.asp?d=6504>.

²⁶ In re: *MtBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 599-600 (S.D.N.Y. 2001).

²⁷ *Id.* at 599.

²⁸ *Id.*

cleanup costs. Even now, several years after oil companies abandoned use of MtBE, the litigation and cleanup issues have remained.²⁹

- **Refrigerants.** Almost everyone uses refrigerators or cooling systems. Yet every several years the regulators make everyone switch out their cooling systems. At first, the call was to remove ozone-depleting refrigerants (CFCs).³⁰ Many did so early on with HCFCs, but although HCFCs are *less* ozone-depleting, they still have some ozone-depleting capacity.³¹ So, on EPA's urging, companies switched to HFCs. But now some HFCs are classified as High Global Warming Potential (GWP) Gases by EPA³² and as GHGs in California.³³ As a result, non-ozone depleting refrigerants touted just a few years ago as the new "green" solution are on California's target list, as standing in the way of the state's newly legislated goal of peeling back GHG emissions in California to 1990 levels by the year 2020.³⁴
- **Cork flooring.** Cork flooring may be the epitome of a sustainable or "renewable" building material. Yet it is often alleged to be associated with mold.³⁵
- **Paper or plastic?** This is, perhaps, the example most discussed at the office cooler. Plastic doesn't degrade well in the ocean and blows high into trees, where it remains as a constant visible reminder of modern excess. In response, a number of cities near the ocean in California have passed ordinances banning plastic bag use at grocery stores. Most of these ordinances have been challenged, and some have already been invalidated, on the basis that the cities failed to adequately consider the environmental impacts.³⁶ Petitioners challenging these ordinances claim that paper weighs far more than plastic and so requires far more carbon-burning fuel to transport and process, more space and building materials to store, and more landfill space on disposal. Paper also requires large amounts of water to make – a serious consideration in California. At least one large grocery store chain shares some of petitioners' concerns. Fresh and Easy Markets has decided, as part of its "green" program, to give shoppers the option of using heavy reusable plastic bags or canvas bags, but not

²⁹ For example, earlier this year, 150 families and businesses in Harford County, Maryland filed a class action lawsuit against Exxon Mobil Corp. stemming from an MtBE leak that occurred sometime before 2004. Pitts, Jonathon, *Class Action Sought in Hartford Pollution Case*, The Baltimore Sun, Mar. 31, 2009,

³⁰ 40 CFR 82 Appendix A to Subpart A, 82.4 [listing CFCs as class I ozone depleting substances and instituted an accelerated, complete phase out of CFCs by 1996].

³¹ 40 CFR 82 Appendix B to Subpart A [listing HCFCs as class II ozone depleting substances]; 40 CFR 82.16 [phasing out the production and use of some HCFCs by 2003 and all HCFCs by 2030].

³² U.S. EPA, High Global Warming Potential (GWP) Gases, Oct. 19, 2006, <http://www.epa.gov/highgwp/scientific.html>.

³³ California Air Resource Board, Climate Change Proposed Scoping Plan, Oct. 2008, p. 11 (approved Dec. 2008).

³⁴ *Id.*

³⁵ See Marsh, News: Press Releases, *Insurers Cautious in Underwriting Green Building Exposures*, July 29, 2008, <http://global.marsh.com/news/press/pr20080729.php>.

³⁶ Oakland and Manhattan Beach both passed plastic bag bans in 2007 and 2008, respectively. Both ordinances were invalidated for failing to comply with the California Environmental Quality Act. See Californians Against Waste, Plastic Litter and Waste Reduction Campaign, Plastic Bags: Local Ordinances, http://www.cawrecycles.org/issues/plastic_campaign/plastic_bags/local; but see also Save the Plastic Bag, Litigation, Mar. 16, 2009, <http://savetheplasticbag.com/ReadContent541.aspx>.

paper bags.³⁷

B. “Green” Standards

“Greenwashing” is defined by the Concise Oxford English Dictionary, 10th Edition, to be “disinformation disseminated by an organization so as to present an environmentally responsible public image.”

As the market for environmentally friendly goods increases and consumers continue to focus on the environmental impacts of their purchases, manufacturers seeking to tap into this \$200 billion market³⁸ are facing a skeptical consumer base and growing concerns about regulatory compliance and litigation. Those manufacturers seeking to enter the world of environmental sustainability must move forward with eyes wide open or risk the backlash of being labeled as a greenwasher, or worse, being sued by a consumer group or competitor for unfair business practices.

1. LEED Certification Program for Buildings

As discussed above, with respect to a company’s buildings, a company can actually obtain certification that it meets “green” building standards under LEED. One can even achieve different levels of certification – silver, gold and platinum.³⁹ At least one state provides tax incentives for LEED certification.⁴⁰ Certain federal stimulus funding also may be tied to meeting LEED building standards.⁴¹

2. The Federal Trade Commission (FTC) “Green Guide”

Unlike a company’s buildings, its products do not yet have a well-established “green” certification program. The FTC has attempted to fill part of this gap with its “Green Guide,” first issued in 1992 and last updated in 1998.⁴² The FTC’s guidelines were intended to ensure that “environmental claims are not deceptive and are adequately supported, but they are not law.”⁴³

The FTC’s Green Guide states the following general principles related to environmental marketing:

³⁷ See Fresh and Easy Markets’ sustainability plan, described at <http://www.freshandeasy.com/greenBuilding.aspx>.

³⁸ According to the Natural Marketing Institute, as of 2005, the United States market for purchasing goods based upon environmental and social impacts exceeded \$209 billion. Mara, Janis I., *Consumer Urged to Scrutinize “Eco-Friendly Claims”*, Inside Bay Area, Mar. 9. 2008.

³⁹ See, e.g., U.S. Green Building Council, LEED Existing Buildings v2 Reference Guide, p. 14.

⁴⁰ Nevada offers the partial abatement of property taxes for property that has a building or structure that meets or exceeds the LEED Silver rating system. For a Silver rating, the abatement is equal to 25%, for Gold, 30%, and for Platinum, 35%. See NRS 701A.100, 110.

⁴¹ See Green-Building.com, *Obama’s Green Building Stimulus: Synonymous With LEED*, <http://www.green-buildings.com/content/78424-obamas-green-building-stimulus>; see also Bartholomy, Panama, *The Stimulus Package: Impacts on Green Building and California*, U.S. Green Building Council, Northern California, http://www.usgbc-ncc.org/index.php?option=com_content&task=view&id=160&Itemid=157.

⁴² 16 CFR Part 260.

⁴³ See Abram, Susan, *Angelenos, Find Gray Areas in Claims About What’s Green*, The Daily News of Los Angeles, Mar. 14, 2008, p. A1.

- An environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product's packaging, a service, or to a portion or component of the product, package or service.⁴⁴
- An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.⁴⁵
- Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison.⁴⁶
- It is deceptive to misrepresent, either directly or indirectly, that a product, package or service has general environmental benefits or is degradable or biodegradable, compostable, recycleable, refillable, contains recycled content, results in a source reduction, or is ozone friendly unless those statements are true.⁴⁷

Although the Green Guide provides numerous examples of nebulous deceptive practices, the Guide does not provide any clear cut regulations about what is an appropriate claim and what is simply greenwashing.

There has been an increase in the number of claims related to environmental marketing and advertising. This has prompted the FTC to begin the process of reviewing the Green Guide a year earlier than expected. Similarly, there has been a dramatic increase in complaints regarding environmental advertising in England and the European Union prompting politician and industry figures to meet in an attempt to set firm rules related to environmental claims and advertising.⁴⁸

3. Six Sins of Greenwashing

In November 2007, the environmental marketing firm TerraChoice Environmental Marketing, Inc. released a study called "The Six Sins of Greenwashing."⁴⁹

As part of its research, TerraChoice found that all but one of the more than one thousand common consumer products that were marketing itself as environmentally friendly, and were part of the random survey for the study, were guilty of greenwashing.⁵⁰ According to

⁴⁴ 16 CFR Part 260, § 260.6(b).

⁴⁵ 16 CFR Part 260, § 260.6(c).

⁴⁶ 16 CFR Part 260, § 260.6(d).

⁴⁷ 16 CFR Part 260, §260.7.

⁴⁸ Pfanner, Eric, Business of Green, *Green' marketing loses buzz and credibility*, Int. Her. Trib., Jul. 6, 2008.

⁴⁹ TerraChoice Environmental Marketing Inc., *The "Six Sins of Greenwashing™" A Study of Environmental Claims in North American Consumer Markets*, Nov. 2007, http://www.terrachoice.com/files/6_sins.pdf.

⁵⁰ *Id.* at p. 1.

TerraChoice, the six sins of greenwashing are:⁵¹

1. Sin of the Hidden Trade-Off
2. Sin of No Proof
3. Sin of Vagueness
4. Sin of Irrelevance
5. Sin of Lesser of Two Evils
6. Sin of Fibbing

Some of these “Sins” are fairly straight forward. If you claim to be “natural,” “organic” or “environmentally friendly,” your claim must be clear, honest and most importantly verifiable. However, the other three “Sins” require a bit more explanation.

The “Sin of the Hidden Trade-off” is committed by suggesting a product is ‘green’ based on a single environmental attribute ... without attention to other important, or perhaps more important, environmental issues⁵²

“The Sin of Irrelevance is committed by making an environmental claim that may be truthful but is unimportant and unhelpful for consumers seeking environmentally preferable products.”⁵³ TerraChoice found that some products committed this sin by claiming to be “CFC-Free” when all CFC products have been banned for nearly two decades.

Finally, the Sin of the Lesser of Two Evils are “‘green’ claims that may be true within the product category, but that risk distracting the consumer from the greater environmental impacts of the category as a whole.”⁵⁴

Not only are the “Six Sins of Greenwashing” a tool for the consumer wary of “green” claims, but they are also a guide of what not to do for manufacturers and marketers.

III. WHY IS PROOF SO IMPORTANT? - THE PERILS OF GREENWASHING

Unfortunately, neither the “Green Guide” nor avoiding the “Six Sins of Greenwashing” can keep manufacturers and marketers out of hot water when products not traditionally thought of as “green” are advertised as such.

In *Holk v. Snapple Beverage Company*, the Snapple Beverage company found itself being sued for alleged violations of New Jersey’s Consumer Fraud Act because it had labeled its product as “All Natural” despite the inclusion of high fructose corn syrup in its product. Although Snapple was able to get the case dismissed based upon a claim that the Federal Food, Drug and Cosmetics Act, 21 U.S.C.S. 301 preempted the State of New Jersey consumer protection laws, Snapple incurred significant costs in legal fees and publicity related to this lawsuit.⁵⁵

⁵¹ *Id.* at pp. 2-4.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Holk v. Snapple Beverage Company*, 574 F. Supp. 2d 447 (D. NJ June 13, 2008).

A similar lawsuit was filed against the Gerber Products Company, however, Gerber did not have as favorable a result. In *Williams v. Gerber Products Company*, consumers brought a class action suit claiming that Gerber's fruit juice snack violated California's Unfair Competition Law, California Business and Professions Code section 17200, because it allegedly contained confusing imagery of fruits that were not contained in the product, that the only fruit juice in the product was white grape juice from concentrate, and it claimed to be made from "natural ingredients" despite the fact that the most prominent ingredients were corn syrup and sugar.⁵⁶ Unlike *Snapple*, the Ninth Circuit found that the plaintiffs' claim was not subject to dismissal and went so far as to find that Gerber's packaging "could likely deceive a reasonable consumer."⁵⁷ It is important to note that Gerber did not raise the preemption issue before the trial court and so that was not a part of the Ninth's Circuit discussion.

Other companies, like Cadbury Schweppes Americas Beverages and Kraft Foods, have faced claims of greenwashing. However, rather than engage in costly litigation, each company decided to introduce new labeling for their products, 7UP and Capri Sun, respectively, in order to avoid threatened lawsuits by the Center for Science in the Public Interest over use of the term "All Natural" to describe their products which contain high fructose corn syrup.⁵⁸

Interestingly, subsequent to those actions, the Food and Drug Administration issued a letter declaring that if processed a certain way, high fructose corn syrup could be labeled as "natural."⁵⁹ It is unclear if this will stop consumers and consumer advocates from challenging other products as being "All Natural."

One of the most interesting cases related to greenwashing was not brought by consumers, but was brought by a cosmetics manufacturer against its competitors. In *All One God Faith Inc., doing business as Dr. Bonner's Magic Soaps v. The Hain Celestial Group, Inc.*, Dr. Bonner's is claiming that its competitors have labeled and advertised their products as being "organic" or "made with organic ingredients" when in fact, Dr. Bonner's alleges, those products are not organic or made with organic ingredients.⁶⁰ Dr. Bonner's is also challenging the voluntary standard and certification offered by Organic and Sustainable Industry Standards, Inc. also known as OASIS. OASIS provides voluntary organic production standards related to health and beauty products. Dr. Bonner's claims that unless OASIS is enjoined from certifying its competitors' products as "organic" or containing "organic ingredients" while they allegedly do not meet the standards that the United States Department of Agriculture set under the National Organic Program, it and the consumers will be damaged. This hotly contested case will have far reaching consequences related to the regulation of environmental marketing claims and those voluntary entities that certify products as being "environmentally friendly."

Until the *Dr. Bonner's* case is decided, or the FTC issues clear rules, not just guidelines, related to green marketing, a good rule of thumb is to make sure that your marketing claims are clear, completely honest about the product as a whole, and verifiable.

⁵⁶ *Williams v. Gerber Products Company*, 523 F.3d 934 (9th Cir. Apr. 21, 2008).

⁵⁷ *Id.* at 939.

⁵⁸ See Cadbury Schweppes Americas Beverages' January 12, 2007 press release.

⁵⁹ See Department of Health and Human Services June 3, 2008 letter.

⁶⁰ *Dr. Bonner's Magic Soaps v. The Hain Celestial Group, Inc.*, San Francisco Superior Court Case No. CGC-08-474701.

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Ms. Dorris represents potentially responsible parties at major Superfund sites, such as Operating Industries, Denova, and Cameron Yakima. She also provides counsel on compliance with federal and state hazardous waste laws at RCRA-permitted facilities, landfills, and other waste reclamation and treatment facilities, and on hazardous materials handling practices for major public and private projects. In addition, Ms. Dorris provides representation during administrative proceedings and civil litigation related to contamination from underground and aboveground storage tanks, former oil field facilities, large industrial properties, dry cleaning operations, and defense manufacturing facilities. She has particular expertise in issues related to drinking water contamination in aquifers in California, such as the City of Santa Monica's Charnock wellfield and the Concerto wellfield in Orange County.

Ms. Dorris has broad experience in acquisition, disposition, leasing, and financing of facilities with potentially large environmental liabilities, such as energy facilities, chemical manufacturing plants, former oil fields, and Brownfields. She oversees environmental due diligence review, negotiates, and documents the environmental provisions of major transactions involving contaminated facilities. She also routinely provides Proposition 65 compliance advice and represents companies sued under that statute and related claims.

In addition, Ms. Dorris has extensive CEQA counseling and litigation experience, most recently in connection with the defense of the long-range master plan for the Los Angeles International Airport, the I-710 Major Corridor, and a successful challenge to a proposed sphere of influence amendment in the unincorporated area of Los Angeles County. She also provides counsel to both public agencies and private owners on entitlement issues associated with proposed development projects in California.

Ms. Dorris is an Adjunct Professor of Environmental and Land Use Law at Western State University College of Law. She also frequently speaks at seminars for practicing attorneys on topical issues related to CEQA, groundwater contamination, environmental disclosure requirements, and Proposition 65. Ms. Dorris is on the executive committee of the environmental section of the Los Angeles County Bar Association. She also is a standing member of the Los Angeles Regional Water Quality Control Board's Underground Storage Tank Task Force. She has served on the American Petroleum Institute's RCRA/CERCLA Steering Committee and the Western States Petroleum Association's Legal Committee.

Prior to joining Best Best & Krieger LLP, Ms. Dorris was environmental in-house counsel for ARCO. She also practiced environmental law as a partner at other major Los Angeles firms.

Ms. Dorris graduated from the University of Chicago in 1980 with *high honors*, *Phi Beta Kappa*, with both a bachelor's degree and a master's degree in public policy. She received her Juris Doctorate from Stanford Law School in 1984, where she was an editor of the *Stanford Law Review*.

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Danielle Sakai is a Partner in the Environmental and Natural Resources and Litigation Practice Groups of Best Best & Krieger LLP. Ms. Sakai's practice focuses on environmental contamination, land use and real property disputes. She has significant litigation experience and is actively involved in one of the State's most contentious potential superfund sites involving the Rialto/Colton Groundwater Basin. Ms. Sakai routinely represents both public and private entities, before State and Federal Courts, as well as Administrative Agencies.

Ms. Sakai has authored two featured articles for the California Land Use Law & Policy Reporter and is a member of the Editorial Board of the Environmental Liability, Enforcement & Penalties Reporter.

Ms. Sakai earned a Bachelor of Art degree in History and Law & Society from the University of California at Riverside in 1997. She received her Juris Doctorate from Loyola Law School in 2000. While at Loyola, Ms. Sakai received the Bancroft-Whitney Award for Academic Achievement and was a member of the Scott Moot Court Honor Society, where she participated in the finals of the Jessup International Law Competition and was awarded for both written and oral advocacy.

Ms. Sakai is a member of the State Bar of California and is admitted to practice before the United States District Court for the Central and Northern Districts of California and the Ninth Circuit Court of Appeals.

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Kira Johnson is an Associate in the Los Angeles office of Best Best & Krieger LLP and a member of the Environmental Law and Natural Resources Practice Group. Ms. Johnson works with public and private clients in matters involving environmental, water and land use law.

Ms. Johnson received her Juris Doctorate from Loyola Law School in 2008. While in law school, she was a member of the Scoot Moot Court Honors Board, was named Best Oralist in the Scott Moot Court Competition, and competed in the New York City Bar Association's National Moot Court Competition and ABA's National Appellate Advocacy Competition. In addition, Ms. Johnson was a Dean's Scholar and received American Jurisprudence awards for outstanding achievement in Trial Advocacy and other coursework. Ms. Johnson also served as President of the Loyola Environmental Law Society and as a board member of Loyola's Public Interest Law Foundation.

During law school, Ms. Johnson externed with the California Attorney General in the Natural Resources Law Section as part of the Public Rights Summer Honors Program, and with the California Board of Equalization in the Tax Appeals Assistance Program.

Ms. Johnson earned her Bachelor of Arts from Swarthmore College in Pennsylvania with a major in Religion and a concentration in Environmental Studies. After graduating, Ms. Johnson spent three years as an Assistant Coach for the Swarthmore College Women's Basketball Team, making a trip to the second round of the NCAA tournament in 2001. Ms. Johnson also interned at the Metropolitan Water District where she reviewed and commented on California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA) documents. Ms. Johnson was born and raised in Altadena, California.