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### Welcome and Some Housekeeping Items

- Be sure to sign-in for MCLE Credit at the registration desk.
- Ask questions! Our panelists are happy to engage with you.
- If your attendance time meets the rules set by the Illinois MCLE Board, ACC Chicago will send your certificate by email next week.
- Watch for the survey/feedback link sent to your email after the program.

### A reminder about the benefits of ACC membership...

- Free CLE, Roundtables & Professional Development Programs
- Socials, Special Networking Groups, Annual Celebration Event & Summit
- Community Service/Outreach Initiatives & Pro Bono Offerings
- Leadership and Speaking Opportunities
- Access to ACC Global Resources, including:
  - ACC Docket Magazine & Newsstand (searchable legal news feed)
  - ACC Resource Library, Survey, AI & Contracts Portals & Legal Ops Section
  - E-Groups and Committees on Substantive Practice Areas





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United Airlines



### What are "Greenwashing" Claims?

- Claims based on allegedly deceptive marketing and advertising
- Overstating environmental benefits
- Downplaying environmental impacts



### What are "Greenwashing" Claims?

 Most commonly (but not always) consumer class actions

- Most common vehicles for greenwashing claims:
  - Consumer protection statutes
  - False advertising statutes
  - Unfair competition laws
  - Common law fraud/misrepresentation theories



### Surge in Greenwashing Claims

Increase in environmentally conscious consumers

- Companies respond by pursuing and marketing sustainability efforts
- ■FTC "Green Guides"
  - Updated in 2012
  - Requested comments for further revisions in 2022



### Sources of Challenged Statements

- Product labels
- Website statements
- Commercials/advertising
- Social media posts
- Goal statements and corporate pledges



### **Industries Impacted**

- Aviation
- Food and beverage
- Household products
- Retailers
- Clothing and fashion
- Technology
- Auto
- Fossil fuel
- And more...





# Regulatory Framework: The Green Guides



### **The Green Guides**

- Issued by the FTC in 1992.
- Purpose: "To help marketers avoid making environmental claims that are unfair or deceptive."
- Amended in 2012
- Solicited comments on proposed amendments in 2022
- Do not confer a private right of action



### The Green Guides

- No "unqualified" environmental benefit claims
- Qualifying language must be clear and prominent
- Marketers should not imply that any specific benefit it significant if it is, in fact, negligible



### The Green Guides: Examples

"Eco-Friendly"

"Greener than previous packaging"

Picture of printer in a forest: "Buy our printer. Make a change."

"Improved fuel efficiency"



### **The Green Guides**

- Carbon offsets
- Third party certifications and seals of approval
- Other common claims:
  - "Compostable" and "degradable" claims
  - "Free-of" and "non-toxic" claims
  - "Ozone-safe" and "ozone-friendly" claims
  - "Recyclable" and "recycled content" claims
  - "Refillable" claims
  - "Renewable energy" and "renewable materials" claims
  - "Source reduction" claims



### **International Regulations**

- European Union Empowering Consumers Directive
- United Kingdom Advertising Standards Authority Guidance
- Canadian Competition Bureau Guidance
- Australian Competition & Consumer Commission Guidance





### **Illustrative Cases**



# Earth Island Institute v. Coca-Cola Co. (D.C. Super. Ct.)

- Plaintiff alleged:
  - Coca-Cola's statements painted an inaccurate picture of Coca-Cola as a company.
  - Coca-Cola falsely represented itself as sustainable, when it "is the world's leading plastic waste producer."
  - Coca Cola's stated goals were misleading:
    - "Make 100% of our packaging recyclable globally by 2025."
    - "Use at least 50% recycled material in our packaging by 2030."



## Earth Island Institute v. Coca-Cola Co., (D.C. Super. Ct.)

- Trial Court Holding:
  - Statements were aspirational and pertained to future goals and a vague corporate ethos rather than a specific promise.
  - Rejected efforts to combine "statements taken from various documents at different times."
  - Describing the goal statements:
    - "Would Earth Island Institute make the same allegation about a manufacturer who promised aircraft in 1900, a President in 1961 who promised to land a person on the moon and return that person safely to Earth by 1970, or an entrepreneur whose goal in 2000 was to have more than 95% of Americans owning a cellular phone in 2021"?



## Earth Island Institute v. Coca-Cola Co., D.C. Ct. App.)

- Appellate Court Reversal:
  - Coca-Cola represents itself as a company that is focused on a more sustainable environment, but it also is mass producing single-use plastics.
  - Coca-Cola reliance on single-use plastics is so fundamentally unsustainable that it is misleading to tout marginal improvements.
  - Earth Island plausibly alleged that Coca-Cola had not taken any serious steps toward putting those goals within reach.



### Earth Island Ramifications

- Following Earth Island, the District of Columbia state courts have become a hotbed for greenwashing claims
- Environmental Working Group v. Tyson Foods, Inc.
  - Pledge to be "net zero" by 2050
  - Court rejected attempts to distinguish Earth Island
- Plastic Pollution Coal., A Project of Earth Island Inst. v. The Wonderful Co. et al.
  - Court refused to dismiss claims based on of Fiji Water efforts to "transition to 100% recycled plastic" and to "reduc[e] [their] carbon footprint"



## Salguero v. Mondelez International, Inc. (N.D. III.)

 Class action based on snack bars labeled as "climate neutral certified"

### Plaintiff alleged:

- Statement was misleading because the product's manufacturing produces GHG and causes pollution
- Reasonable consumers believe "climate neutral" means no negative effect on climate

### Court dismissed:

- "Climate neutral certified" is not "climate neutral"
- No allegation that Mondelez violated the standards of the certification
- Label did not violate Green Guides



## Moldex-Metric, Inc. v. Protective Indus. Prods., Inc. (C.D. Cal.)

- Defendant is earplug manufacturer
- Allegedly marketed products as eco-friendly, made with 82% bio-based material.
- Plaintiff alleges earplugs are comprised only of 5% to 40% of bio-based material.
- Plaintiff is a competitor, alleging unfair economic advantage



# New York v. JBS USA Food Co. et al., (N.Y. Sup. Ct.)

 New York Attorney General filed greenwashing suit world's largest producer of beef products

### Challenged Statements:

- "Agriculture can be part of the climate solution. Bacon, chicken wings, and steak with net zero emissions. It's possible."
- "We will cut our own emissions by 30% in 2030 and eliminate Amazon deforestation from our supply chain within five years."
- "JBS will achieve net zero greenhouse gas emissions, reducing its direct and indirect emissions and offsetting all residual emissions."

### Settlement:

- \$1.1 million to support climate-smart agriculture programs
- Agreement to reform its environmental marketing





# Mitigating Risks and Defending Claims



- No general environmental benefit claims.
- Substantiate claims with reliable data

- Disclaimers and qualifying statements:
  - Conspicuous
  - Same font size
  - Close proximity to the environmental statement
  - No "back of package" or "fine print"



- Seals, certifications, or awards
  - Make clear they are issued by third parties
  - Include an explanation of the certification, if practicable.
  - Link to the third party's website in close proximity to the seal.
  - Link to company's website may be insufficient



- Goal statements should be forward-looking and aspirational.
- Qualifying language should be conspicuous and in close proximity.
- Concrete, realistic, science-backed plan to achieve the goal.
- Be wary of relying on advances in technology.



- Reliance on carbon offsets provides fertile ground for plaintiffs.
- If used, conduct independent investigation of the efficacy and validity of carbon credit and carbon offset projects.



 Ensure stakeholders are educated and delivering consistent messaging



### **Defenses**

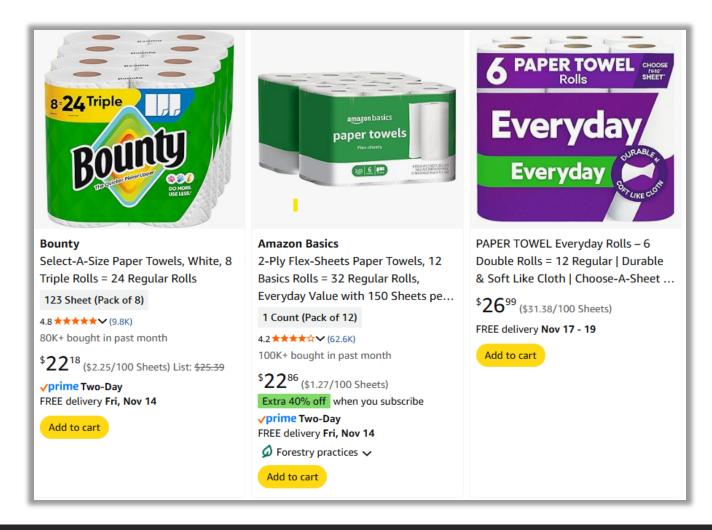
- Analysis of statements in context
- Rule 9(b) particularity
- Standing/injury
- Class Certification Issues
  - Focus on individualized issues that will predominate
    - Materiality
    - Reliance



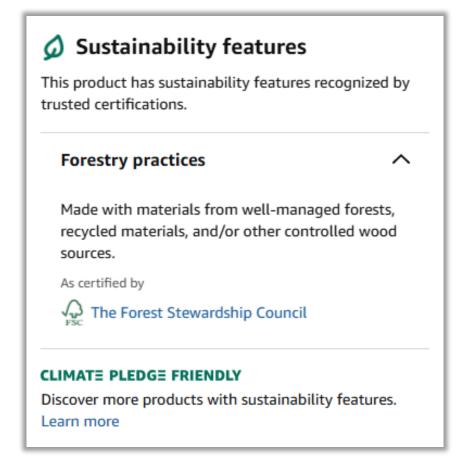


## A Case Study: Shopping on Amazon











## Discover and shop for products with sustainability features

Climate Pledge Friendly collaborates with trusted third-party certifications and we've created our own certifications to highlight products that meet sustainability standards and support our commitment to help create a positive sustainability impact.



### How is Climate Pledge Friendly connected to The Climate Pledge?

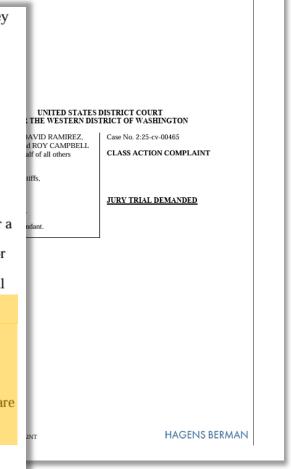
As a co-founder of and signatory to The Climate Pledge, Amazon has committed to be net-zero carbon across our businesses by 2040. Climate Pledge Friendly, inspired by this commitment, highlights products with sustainability certifications that help create a positive sustainability impact.

Learn more about The Climate Pledge >





- 6. More specifically, Amazon uses the Sustainability Leaf and FSC logos to convey that Amazon Basics Paper Products are sourced from FSC-certified forests via suppliers who practice sustainable forestry practices. In turn, because of these responsible forestry practices, Amazon also uses the Climate Pledge Friendly logo to convey that Amazon Basics Paper Products has a lower carbon footprint than other products without this designation.
- 7. Unfortunately, Amazon's environmental claims are simply forms of greenwashing. Greenwashing is the act of misleading consumers about the environmental practices of a company or a product. Greenwashing occurs when a company positions itself (or a specific product) as having a positive influence on environmental issues, when the company (or product) is either exaggerating its influence and/or actively engaging in negative environmental practices that do not align with its previously stated green goals. Here, Amazon misleads consumers because it does not disclose that Amazon Basics Paper Products are sourced from harvests that rely on harmful logging practices such as clearcutting and burning of Canada's boreal forest—an ecological jewel and one of the last primary forests left in the world. Below are some examples of harvests through which Amazon sources its wood pulp for Amazon Basics Paper Products:







## **An In-House Perspective**



### Litigation Risk

Case 8:23-cv-03145-PX Document 1 Filed 11/19/23 Page 1 of 19

### UNITED STATES DISTRICT COURT DISTRICT OF MARYLAND SOUTHERN DIVISION

ALEXANDER ZAJAC, individually Plaintiff's Address and County and on behalf of all others similarly situated.

225 Lastner Ln Greenbelt MD 20770 Prince George's County

Plaintiff.

8:23-cv-03145

against -

Class Action Complaint

UNITED AIRLINES INC.,

Defendant's Address 233 S Wacker Dr Chicago IL 60606

Defendant

Jury Trial Demanded

### I. DANGERS OF CLIMATE CHANGE

World temperature has risen by 1.1 °C since 1850 due to greenhouse gas

("GHG") emissions such as carbon dioxide (CO2) from burning fossil fuels.

42. As a result of the false and misleading representations and omissions about its environmental initiatives, flights on United cost more than on other airlines, higher than similar airline flights, represented in a non-misleading way, and higher than they would be sold for absent the misleading representations and omissions.

### VOLUNTARY ENVIRONEMINIAL INITIATIVES

Despite lofty government goals to address climate change, such attempts have repeatedly failed.





### **Discussion**





### **Questions?**

