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Seals of Approval

“Green” certification marks raise new liability issues

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It seemed like a terrific business opportunity. Consumers and businesses were eager to buy eco-friendly products. So in 1991, Wausau Paper Corp. launched its EcoSoft line of paper towels and tissues, made from 100 percent recycled content.

It wasn't exactly a success story.

The problem: Wausau's green marketing was lost amidst a welter of other companies' eco-friendly claims. The number and variety of claims confused potential customers, who weren't sure which products were truly green. So purchasers often stopped responding to green marketing.

Wausau didn't give up. In late 2003, it got Green Seal to certify its EcoSoft products as environmentally friendly. Green Seal, an independent nonprofit, tests a wide variety of products and services and inspects manufacturing plants to determine whether a product or service meets Green Seal's environmental standards. If it does, the product or service can display the Green Seal certification mark.

Once Wausau put the Green Seal certification mark on its EcoSoft products, sales soared. In 2004, the market for paper towels and tissues grew 2 percent, but EcoSoft sales rose 16 percent. In 2005, sales jumped an additional 25 percent, and in 2006 sales shot up 26 percent.

Thanks to the Green Seal mark, Wausau was able to demonstrate that certain products in its line were truly green, which brought in a lot of new customers. This is part of a rapidly growing trend. More companies around the U.S.—including Westinghouse Electric, Sony, Dell, 3M, GE and Toyota—are using certification marks to prove their green credentials and boost sales. They also are finding the certification process often brings other benefits: It pushes businesses to improve their plants and business processes in ways that significantly reduce their costs.

But businesses need to be cautious when using green certification marks. The number of these marks is growing rapidly, and companies should carefully consider the costs and benefits before seeking a certification. Companies also must use certification marks carefully, or they may face liability for deceptive advertising. And this risk is increasing as the FTC and other government officials take a tougher look at companies' green claims.

“So many [companies] want to put the word ‘green’ on their products, and there’s a host of laws saying when you can and can’t do that,” warns Peter Hsiao, an environmental law attorney in the Los Angeles office of **Morrison & Foerster**. “Right now this is a very vigorous issue because so many ... businesses and products are tapping into consumer demand for eco-friendly products.”

Avoiding “Greenwash”

As Wausau knows, the right green certification mark can provide a company with a powerful

marketing advantage. But not all green certification marks are equal. "There's been a huge surge [in the past two years] of marks certifying that products meet certain environmental standards," says Richard Ruzich, an IP attorney in the Chicago office of Duane Morris.

Major green certification marks include: Energy Star (energy conservation), Green Seal (environmental standards for a variety of products), Fair Trade (economic, social and environmental criteria for agricultural products), FSC (ecologically sound forestry management and products) and LEED (eco-friendly buildings). And there are now a host of minor marks. There's a certification mark for environmentally correct batteries, for instance, as well as a mark for eco-friendly windows and one for Chlorine-free products.

Finally, there are certification marks issued by less-scrupulous groups. These marks have nice green-sounding names, but their standards are so low, they're virtually meaningless. These marks are just "greenwash," Ruzich notes.

A business should thus evaluate which certification standards it meets and consider whether it is worthwhile to get those certifications. A minor certification mark, for instance, may help a B-to-B firm whose customers are familiar with the relevant certification marks. A company that sells primarily to consumers may benefit from only a major, well-known certification mark.

"For a consumer, unless there is a UL or Energy Star mark, it is hard to know what the mark means or who is certifying what," Ruzich says.

Cost Benefit

There are some drawbacks to seeking a green certification mark that has relatively high standards: Getting the right to use such a certification can take a lot of time and money. The applicant must pay the certifying authority to conduct tests and inspections. For large projects, this can cost more than \$100,000 and take months to complete. Moreover, if the certifying authority finds problems, the applicant may have to alter its product, service or manufacturing process, resulting in additional costs and delays.

These short-term costs are often outweighed by the lower operating costs and other financial benefits that can result from meeting high ecological standards. Consider the National Geographic Society. In 2000, it began a \$7 million renovation of its headquarters in Washington, D.C., to achieve a Silver LEED certification. According to the company, the return on this investment was \$24 million, thanks to lower operating costs, higher appraised value, higher tenant rents, increased credit ratings and lower interest rates on debt obligations.

The strict standards of a certification mark also can help companies improve their products and services. Chicago-based PortionPac Chemical Corp., which makes cleaning chemicals, had to change the formulation of many of its products to obtain Green Seal certification. These changes not only made the products greener, but made them better, according to Mark Samios, national education director for PortionPac.

"This is thanks to a rigorous and thorough review by Green Seal," Samios says.

Marketing Matters

Companies have strong incentives to market themselves and their products as environmentally friendly. More than 80 percent of Americans say a company's environmental record should be an important factor in deciding whether to buy its products, according to a March 2007 USA Today/Gallup poll.

However, companies should approach any green marketing with caution because these marketing claims are drawing more scrutiny from a variety of government authorities. California, for instance, has a statute that specifically regulates green marketing claims, and the state's attorney general is increasingly interested in enforcing this statute, according to Hsiao. The FTC also is becoming more active in overseeing green marketing claims.

"This is a big priority for the FTC right now," says Anthony DiResta, an advertising law attorney in Reed Smith's Washington, D.C., office.

The FTC has issued guidelines for environmental marketing indicating which types of claims are acceptable and which types the agency considers deceptive advertising. These guidelines state that

a company's environmental claims must be specific and substantiated. Companies should therefore avoid broad claims that their goods and services are "green" or "ecologically friendly."

"Stating that a product or package is 'environmentally friendly' is so broad and ambiguous that it is not subject to any meaningful substantiation, the FTC has said, so if a company makes this claim it could be subject to agency action," DiResta explains.

Moreover, it is not enough for an environmental claim to be technically correct. If a claim would be misconstrued by a reasonable consumer, it is deceptive, according to Hsiao.

Similarly, if a green certification mark misleads consumers into thinking the business or its products are greener than they actually are, the business could find itself in legal hot water.

"The FTC wants to make sure that every green certification mark will have substantiation and will not be misleading," DiResta says. "If a company's packaging is 5 percent recyclable, but the certification mark says only that the packaging is recyclable, the FTC might not find that acceptable."

Businesses thus need to be careful about which marks they use.

"Do your due diligence, because you are not shifting liability to the certifying organization," Hsiao warns. "You have direct responsibility for your claims under federal, state and international law."

Growing "Green"

The FTC is in the process of issuing new guidelines for environmental marketing claims. "I expect the new guidelines to be tougher," DiResta says.

The new guidelines will specify in greater detail what scientific and technical data is needed to substantiate environmental claims, according to Hsiao. He expects the agency also will address relatively new types of environmental claims, such as assertions that a product or service is carbon-neutral or is manufactured using renewable energy.

"Consumers are paying attention to green certification marks, but they don't know what all these marks mean, they don't trust many of these marks, and green certifications are not available for all products," says Michal Ann Strahilevitz, a professor who teaches marketing at Golden Gate University in San Francisco. "Green certifications need to become clearer and more consistent, and come from somebody that consumers trust.... Consumers, environmentalists, marketers and businesses are all saying we need to make these claims easy to understand."

But the proliferation of green certification marks is not expected to end anytime soon. That's because the attraction of these marks is expected to increase as governments, businesses and consumers become increasingly concerned about the environment.

"I see this [use of certification marks] growing because it is important to consumers and to the country," says J.B. Hoyt, director of government relations at Whirlpool, which puts the Energy Star mark on almost 600 of its products.

"This won't be a fad," Strahilevitz says. "This will be around for at least the next few decades and hopefully the next few centuries."