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Insights: Alerts

"Sustainability" Marketing Claims: Consumers Will Infer What You Do Not Intend To Imply

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A federal court recently held that a customer could sue ALDI, a national food retailer, for false advertising based on an on-pack claim for a salmon product that read: “Simple. Sustainable. Seafood.” The use of “Sustainable” to promote the sale of its food product is exactly the kind of overly generalized eco-friendly claim that the Federal Trade Commission's “Green Guides” warns against, the court held. The court also held that the third-party certification logo included on-pack failed to substantiate the “sustainable” claim.

In the case, the plaintiff customer alleged that stating on-pack that the product was “sustainable” was false, primarily because ALDI sourced its salmon from large industrial fish farms that use unsustainable practices.

ALDI argued a few things to defend the case. First, the “sustainable” claim was limited in scope, and should not be interpreted as a generalized sustainability claim. The court rejected this argument, pointing to the Green Guides, which state that claiming general environmental benefits likely conveys to consumers that the product has “specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact.” Accordingly, ALDI could not avoid the lawsuit because a reasonable consumer would infer that due to the use of “sustainable” on the package, that the product's manufacturing process would have no negative environmental impact. That was clearly not the case.

ALDI also argued that the “sustainable” claim was substantiated by the third party certification logo that also appeared on the package. The packaging did set forth a certification logo from a non-profit association (BAP) which determined that the product was sourced using the best aquaculture practices. The court rejected this argument, however, holding that a reasonable customer would not know what the “BAP” label meant and would not connect it to the word “sustainable.” The reason? Well, the “BAP” label and the “sustainable” label were different colors and were separated by an unrelated white graphic, and the “BAP” label, which was not well-known to consumers, said nothing about sustainability.

ALDI also argued that the word “sustainable” in context on the packaging was mere puffery. The court rejected this defense as well. Non-actionable puffery is an exaggeration expressed in broad, vague, and commendatory language. As the court explained, a label or advertisement will only count as puffery if a reasonable consumer would not interpret it as a factual claim to rely upon when purchasing the product. The court rejected ALDI's claim that its “sustainable” label was puffery because it was reasonable to assume that a product that claims to be sustainable was made in a way that helps the environment.

Quick Takeaways. Based on this court's analysis, advertisers considering “sustainability” claims would do well to remember the following in order to mitigate potential risks:

1) Follow the guidance set forth in the FTC's Green Guides, because courts will reference or rely on the Guides when considering green claims.
2) Do not make unqualified, broad eco-friendly claims – reasonable consumers will (according to the FTC and the courts) infer a strong, broad, generalized environmental benefit claim that is not intended to be implied, and which is not substantiated.
3) An unqualified “sustainable” claim is not puffery.
4) When using third-party certifications to substantiate claims, make sure those certifications are clearly connected to the claim, with no extra content separating them.
5) Lesser or unknown third-party certifications may require additional explanation to support sustainability claims.

If you have any questions or concerns about making environmental benefit claims, or any advertising claims, please feel free to contact us. Kilpatrick Townsend Advertising and Marketing team

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