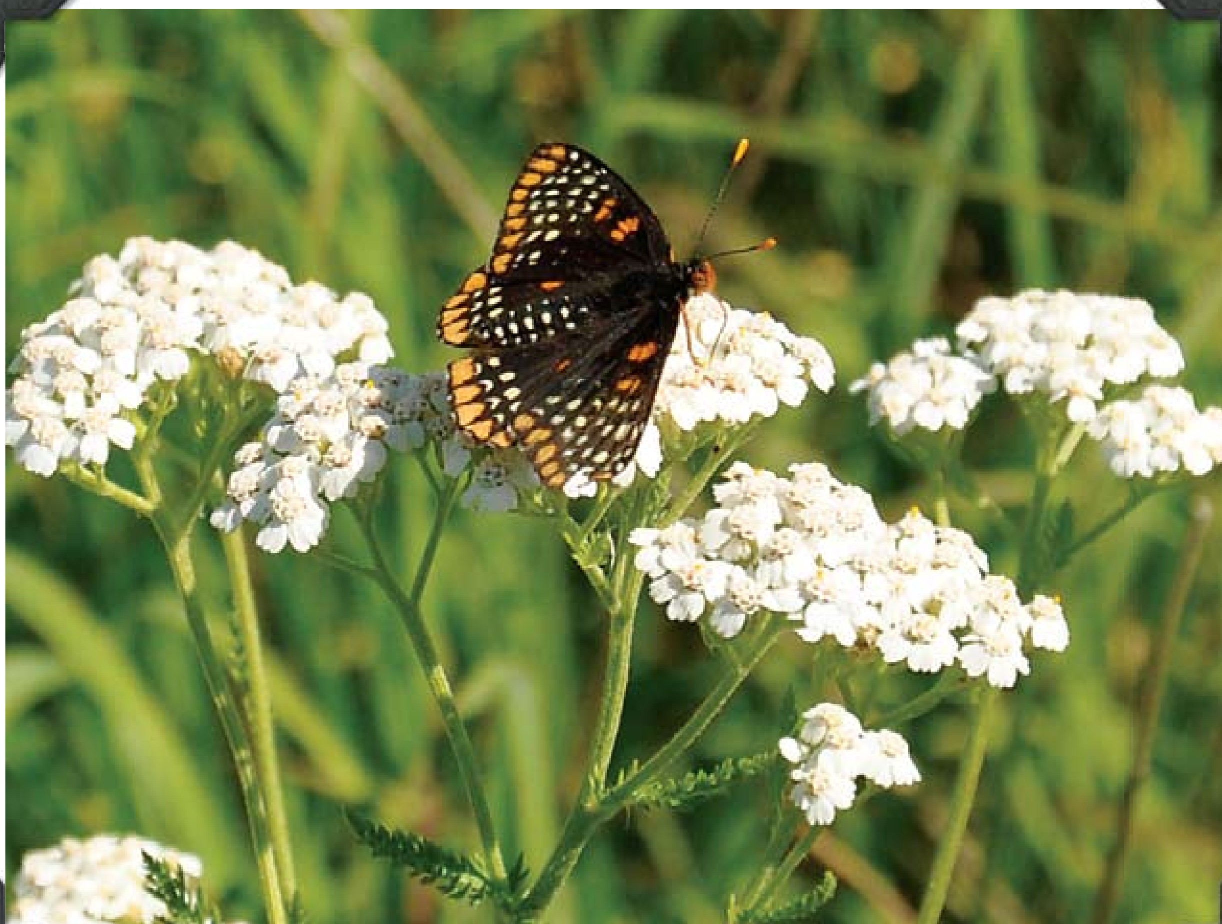
Got Green?

By Susan J. Sadler



Baltimore Checkerspot butterfly, photographed at the Golden Preserve for Biological Diversity during Six Rivers' 2009 Annual Butterfly Count in Springfield Township.
Photo by Heather Huffstutler

The last five years have seen an escalating interest in purchasing green products and sustainable design. This has led to the expanding field of "green contracts." Green contracts present unique drafting problems for lawyers. Parties must anticipate disputes over representations by manufacturers and the scope of performance standards in the contract. Often the representations in green contracts are more about image than describing a product's real environmental benefit. Much of what constitutes green representation is little more than a marketing ploy developed by an advertising agency. These simple marketing ploys are not without risk in the field of green contracts.

Opinions, Puffing, False Representations, and Fraud

Only through a complete understanding of a product's environmental impact over its life cycle can one make the affirmative claim that it is, in fact, a green product. The very loose terminology used to describe environmental attributes sets up sellers and buyers for potential disputes. At the very heart of a contract is risk identification and allocation of the risk between parties. It is easier to assess and allocate risk if a product or a service is measured by generally accepted scientific criteria. Terminology used to promote green design and green products can be full of puff and unsubstantiated claims. Terms used to describe the green attributes of a product are new and have not sustained the rigors of judicial review, making drafting green contracts difficult.

Generally, the mere expression of opinions does not result in actionable fraud. Parties typically have the right to give opinions and to praise the value of their products, even when the opinions constitute "puffing" made to induce the sale of a product. Under Michigan law, an action for fraud must be predicated on more than a mere expression of an opinion or what is referred to as puffing or salesman's talk.[1] Drawing the distinction between an opinion and fraudulent representation is problematic in the field of green contracts.

Marketing and Green Contracts

Producers of green products must consider how environmental watchdog groups might assess their products. The deceptive use of green marketing is sometimes referred to as "greenwash" or "greensheen." Greenwash describes marketing techniques that give the appearance that a product or service is beneficial to the environment although, in reality, it has little value.

In December 2007, the environmental marketing firm TerraChoice released its paper titled "The Six Sins of Greenwashing,"[2] which identified categories of greenwashing often used in marketing products as environmentally beneficial:

(1) **The Sin of Hidden Tradeoff:** Failure to consider the negative environmental impact over the entire life cycle of the product.

(2) **The Sin of No Proof:** Absence of certification that supports the environmental claims.

(3) **The Sin of Vagueness:** Claims that a product is "100 percent natural," but the product contains toxic substances such as arsenic and formaldehyde.

(4) **The Sin of Irrelevance:** Product claims it is CFC free (which is truthful)—but *all* products are CFC free.

(5) **The Sin of Fibbing:** Product falsely claims it is certified by an international environmental standard.

(6) **The Sin of Lesser of Two Evils:** Claim that a product is environmentally friendly to distract from the overall detriment to the environment.[3]

In addition to environmental watchdog groups, there is a growing movement at the federal level to regulate green marketing. The Federal Trade Commission (FTC) oversees the implementation of the Lanham Act and has extended its authority to regulate deceitful practices involving environmental claims. In 1992, the FTC issued "Guides for the Use of Environmental Marketing Claims."[4] The guides set forth what might constitute deceptive environmental marketing. If the FTC believes that a company's behavior is deceptive and unlawful by the statute, it may take corrective action.

The guides recommend that marketers qualify environmental claims and avoid assertions that are broad or vague. Substantiation of an environmental claim should be done by reliable scientific testing or other studies. The data collected must be done in an objective manner by experts in their field to yield accurate and reliable results.

While there are multiple directives given to industry in the guides, there are consistent themes on how to detect deception in environmental marketing. The FTC evaluates an environmental claim from the perspective of how the claim would be construed by a reasonable consumer. The guides are critical of environmental marketing when a company misrepresents the environmental attributes of a product in the following ways:

- **Qualifications and Disclosures:** Disclaimers limiting the environmental claims must be clear and prominent.
- **Distinction Claim:** Environmental claim must identify whether it refers to the product's packaging, its service, or a component of the product.

Fast Facts:

"Green" is subject to many interpretations.

Loose terminology is a setup for contract disputes.

Certifications, standards, and claims of environmental benefits require close scrutiny.

- **Overstatement of Environmental Attributes:** Manufacturers cannot suggest that there is a significant environmental benefit when, in fact, the benefit is negligible.
- **Comparative Claims:** The basis for any product comparison must be sufficiently clear, and the comparison must be substantiated.
- **Broad Environmental Benefit Claims:** It is deceptive to imply that a product or service possesses general environmental benefits because such general assertions can have a range of meaning to the consumer.
- **Degradability:** If the package cannot degrade in the environment upon customary disposal, this claim is deceptive.[5]
- **Compostable:** A product is appropriate for inclusion in compost only if substantiated by reliable data.
- **Recyclable Content:** If a component in a product prevents recyclability, it would be deceptive not to qualify this claim. It is also deceptive if only a few facilities are available to accept the product for recycling.
- **Recycled Content:** This can be asserted only if the material was diverted from a waste stream either during the manufacturing process (pre-consumer) or after consumer use (post-consumer).
- **Source Reduction:** It may be deceptive to suggest that a product's weight has been reduced without showing the actual basis for any comparison.
- **Refillable:** A refillable claim generally should be made only if there is a readily available system to refill the package.
- **Ozone Safe or Ozone Friendly:** Any time a product contains an ozone-depleting substance, it is deceptive to suggest it has no impact on the ozone layer.

The FTC Green Guides went out for comment in 2008; industry workshops were also conducted in 2008. Revisions to the guides are expected within a year, and the FTC has indicated the revisions will be tougher.

Government Green Contract

A key component on federal contracts is an assessment of the bidder's ability to meet "green purchasing objectives." The federal preference for green purchasing was first set forth in the 1998 Executive Order 13101—Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition. From the federal government's perspective, green purchasing refers to a range of products that have attributes such as recycled content, energy, and water efficiency. A product is considered environmentally preferable if it is bio-based, non-ozone depleting, and promotes the use of alternative fuels.

State and local governments have adopted similar green purchasing objectives as part of contract solicitation. Companies deciding to switch gears and provide products and services in the area of fuel conservation, renewable energy, sustainable materials, green building products, and waste management must be prepared to offer their green credentials.

Bidders on government contract work must describe the environmental attributes of the product or services they are offering. Substantiating these assertions is dependent on the detail the manufacturer has in its contract with its suppliers. The bidder must know that the product it is offering is consistent with the government's goals of pollution prevention, health and safety protection, and reduction in environmental impact. Absent a very thorough understanding of the product, its components, and the operations of suppliers, representations regarding environmental attributes in the bid may be inaccurate. It is this level of detail and substantiation of representation that may make the difference in winning the government contract and avoiding a lawsuit.

Adding Clarity to Green Terminology

There are many definitions of green products or green services. To avoid confusion, environmental claims should be measured against established criteria. For example, a contract should set forth the specific level of energy savings the product offers. The use of measurable terms in the contract will diminish the likelihood of unanticipated outcomes.

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Eco-Labels and Certifications

To tout the environmental attributes of a product, companies have rushed to put "eco-friendly" seals of approval on their products. In response to interest in all things green, there has been the proliferation of new green certification groups that are ready to bless products as environmentally friendly. But not all eco-labels or certifications are created equal.

While sourcing of green products and confirming the green status of suppliers is difficult, it is not sufficient to rely on a mark or certification program as proof that a product is sufficiently green to meet a contract term. Even when a contract references a well-respected certification program such as LEED,[6] that certification alone may not meet the intent of the parties. Certification programs can have certain features that may result in participants "gaming" the system. Parties may make decisions to collect points and get good PR for activities that have little positive impact on the environment. If a purchaser is hoping to achieve a specific level of energy efficiency, then the measuring method and level of energy saving should be set forth in the contract in addition to certification requirement.

Many organizations with nice-sounding green names have low thresholds for certification. Certifying groups are competing with each other in an attempt to dominate specific sectors of green industry. Therefore, when referencing green certifications in a contract, parties must take a closer look at the exact nature of the organization and confirm whether the certification has independent third-party verification.

Managing Green Contract Risks

To manage green contract risks, all references to standards, criteria, and product components need to be defined with specificity because differences over the environmental benefits of a product are ripe for subsequent disputes. If appropriate, parties may agree in their purchase agreements to turn over contract disputes to arbitration or mediation before "green panels" with experts in this field.

An obvious problem in the field of LEED certification exists if parties disagree over whether a building ultimately achieved the agreed certification level (whether it is certified silver, gold, or platinum). This question of certification can be more than a status problem. There can be direct and indirect losses from failure to achieve certification, including bonus payments, tax credits, incentive programs, and rejection by tenants specifically seeking sustainable buildings. Therefore, a contract must specifically state whether the certification of a building or product is offered as a warranty or only a goal.

When a product fails to meet an expected green standard and the purchasers are left to assert a claim for damage, calculating that loss may be very difficult. Some green purchases have more of a "feel-good" benefit than a measurable improvement. This type of damage may prove to be too speculative. This risk can be avoided if the contract sets forth a specific valuation method to employ in the event of a breach.

To manage risks associated with green contracts, parties may need unique insurance coverage, but the insurance market is in a state of flux. The insurance industry is reviewing the implications of whether a comprehensive general liability (CGL) policy covers the additional monetary losses that flow from an unanticipated change in a product's green status or a building's green design. Insurance companies have raised the question whether the CGL policy covers the additional cost of replacing a building after a fire with a building that achieves the original LEED certification. Some insurance companies have taken the position that because there is no enforceable standard, they will not offer green environmental policies. The insurance industry anticipates increased investigation of green claims and that new policies or coverage enhancements will be created to address these concerns.

The sale of products and services that tout their green status is ripe for future disputes. What is green is subject to many interpretations. Absent clear language, reliance on data from independent third parties poses a substantial risk for contract disputes and claims of fraudulent advertising or misrepresentations. Green contracts should not be about green hype or feel-good and guilt-free transactions. Attorneys drafting green contracts need to define green terminology with precision and specifically identify generally accepted methods for measuring chemical usage, energy savings, and water usage. Anything less and the contract is not green, and it has not allocated risk in a manner consistent with the parties' interests. ■

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FOOTNOTES

1. See *German Free State of Bavaria v Toyobo Co, Ltd*, 480 F Supp 2d 958 (WD Mich, 2007).
2. TerraChoice, *Greenwashing Report 2007*, available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2007/>. All websites cited in this article were accessed August 8, 2009.
3. Recently, TerraChoice added a seventh sin—worshipping false labels—in reference to false third-party endorsements. See TerraChoice, *Greenwashing Report 2009*, available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2009/>.
4. 16 CFR 260.
5. On June 9, 2009, the FTC filed administrative complaints against Kmart, Tender Corp, and Dyna-E for deceptive advertising of certain products as "biodegradable." The FTC testing showed the products did not decompose in a relatively short time into elements normally found in the earth. Tender and Kmart agreed to stop advertising the products as biodegradable. A settlement is pending with Dyna-E.
6. LEED (Leadership in Energy and Environmental Design) is a voluntary certification program developed by the U.S. Green Building Council to evaluate buildings from a sustainability perspective.