



ANSI Legal Issues Forum 2009

**STANDARDS FOR SAFETY
AND SUSTAINABILITY**

Examining the Consumer
Product Safety Improvement
Act and Eco-labeling Issues



KING & SPALDING

Eco-labeling: Helping to Shape
the Sustainable Marketplace

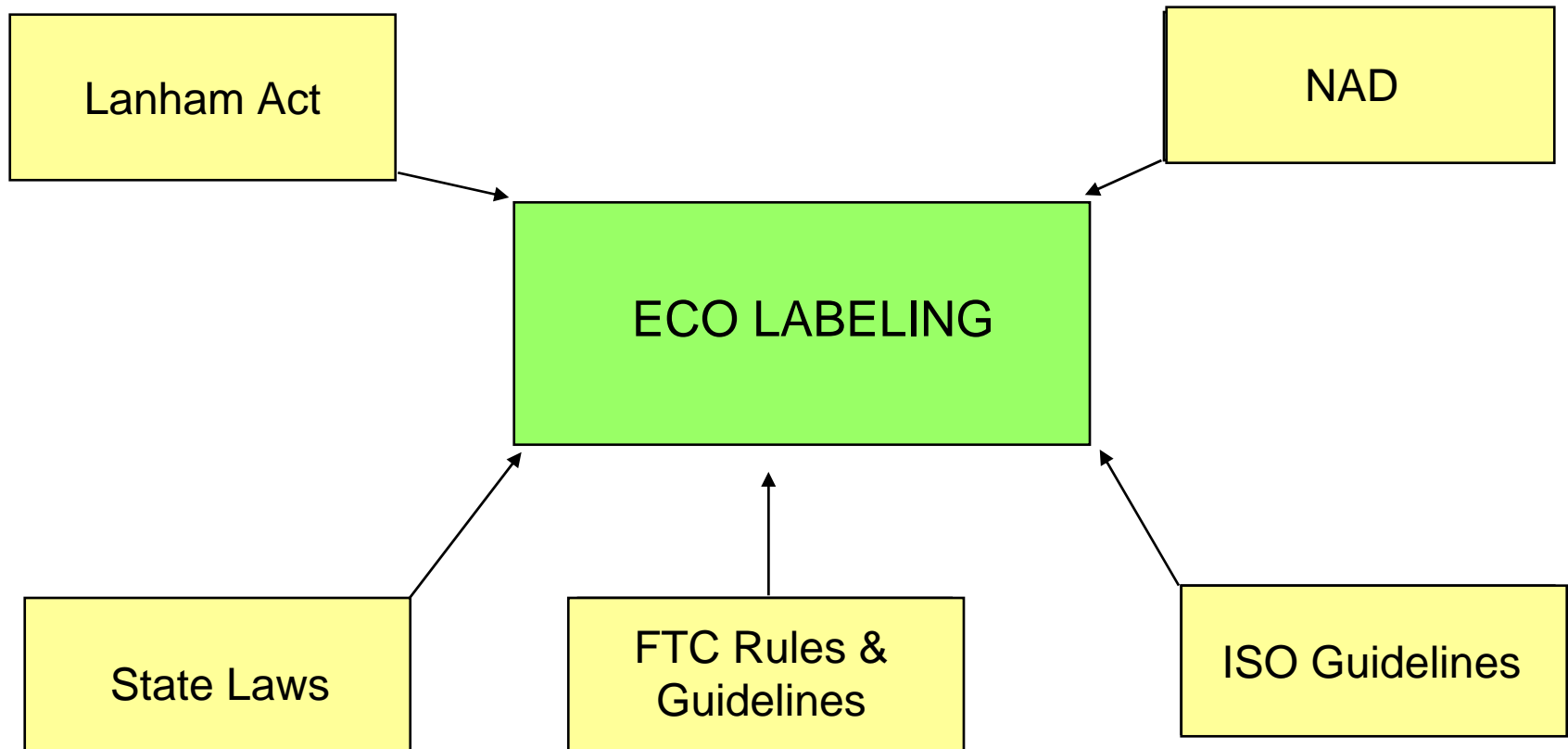
The Legal Landscape

Presented by
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Environmental Advertising Claims



Legal Principles



ISSUES RAISED BY “GREEN” ADVERTISING

- Consumer Confusion and Cynicism
- Actual Environmental Effects
- Harm to Marketplace/Competition (the race to the bottom)
- Legal Considerations
 - How to communicate legitimate environmental claims?
 - Compliance with standards, laws
 - Litigation as a consequence

The Lanham Act

Elements of Lanham Act False Advertising Claim:

- (1) Ads were false or misleading;
- (2) Ads deceived, or had the capacity to deceive, consumers;
- (3) Deception had material effect on purchasing decisions
- (4) Interstate commerce
- (5) Claimant was injured, or likely to be injured

State Law

- The following states have some form of law prohibiting false, deceptive, or misleading environmental advertising, with many incorporating the Green Guides by reference.

California

Maine

Minnesota

Pennsylvania

Florida

Massachusetts

New Mexico

Rhode Island

Indiana

Michigan

New York

Wisconsin

(Potentially) Privately Actionable Green Claims

- Outright falsehoods
 - includes falsely including a third-party seal of approval
- Hidden trade offs
- Green attribute distracts from poor overall environmental impact product

(Potentially) Privately Actionable Green Claims

- Lack of substantiation at time -- or impossible to substantiate
- Vague and overly generalized claims
- Truthful but irrelevant claims
- Peppercorn of substantiation/exaggerated

Where's The **Action**?

- Few federal cases (pre-opinion resolution)
- State consumer protection/deceptive advertising cases

PUBLIC/VOLUNTARY ENFORCEMENT

Although not binding, these may be persuasive sources of guidance to courts in litigation and to business trying to communicate meaningful information about environmental attributes about their own or others' products

FTC Act § 5

- “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”
- Enforcement by the FTC.
- No private right of action.

FTC Actions

- Green Guides as potential source of guidance
- FTC cases have involved the following types of claims:
 - General claims such as “environmentally friendly” and “environmentally safe” (most frequent)
 - “Recyclable” claims
 - “Biodegradable” claims
 - “Ozone,” “ozone friendly,” “no CFC” claims
 - “Non-toxic” or “chemical free” claims
 - “Compostable” claims
 - “Emissions reductions” claims

ISO Standards

- ISO (International Organization for Standardization) is the world's largest developer and publisher of International Standards.
- ISO 14020 Standards
 - Provide guidance on the terminology, symbols, testing and verification methodologies that an organization should use for self-declaration of the environmental aspects of its products and services.
- Voluntary: does not have the force and effect of law.

TRULY PRIVATE ENFORCEMENT: Alternative Dispute Resolution

- National Advertising Division of the Better Business Bureau
- Other arbitration/mediation forums

National Advertising Division

National Advertising Division

- Low-cost alternative to litigation
 - Filing Fee:
 - \$2,500 (CBBB Members)
 - \$6,000 (non-members)
 - No discovery
 - Two letter briefs per side

National Advertising Division

- Low-cost alternative to litigation
- Quick
 - Timeline
 - Advertiser has 15 days to respond to complaint
 - Challenger has 10 days to reply
 - Advertiser has 10 days to send a final response
 - NAD meeting with parties within 15 days of final response (discretionary)
 - NAD decision within 15 days of last document
 - Expedited procedure available: challenger waives reply

National Advertising Division

- Low-cost alternative to litigation
- Quick
- Private
 - Confidentiality throughout the review -- including the existence of the review
 - Cannot subpoena documents from NAD for future proceedings
 - Final case decision is made public by NAD, but cannot be used for advertising or promotional purposes

National Advertising Division

- Low-cost alternative to litigation
- Quick
- Private
- Voluntary

WHAT IS A BUSINESS TO DO?

Compliance Guidelines

- What *express* and *implied* claims does the ad convey to reasonable consumers?
- Is there competent and reliable evidence to support the claims?
- Documentation and validation of substantiation?

Compliance Guidelines

- Green Guides and ISO as Industry Standards
- Other sources in your industry or market?
- Generally:
 - Claims should not overstate product attributes
 - Claims should be specific as to whether they apply to the product, package, or a component of either
 - Qualifications should be clear and prominent
 - Claims should be substantiated



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