



Update on Legal Developments Impacting NFRC and its Members

NFRC Fall Membership Meeting
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- In the early 90's NFRC was formed at the instigation of the FTC and Congress because of concerns that window manufacturers were making unsubstantiated claims about the energy performance of their products.
- NFRC ratings provide information about energy performance that influence consumer decisions about fenestration products they buy.
- Code officials, EPA, other regulators also rely on and refer to NFRC ratings in fulfilling their enforcement and regulatory obligations.
- NFRC and its members devote significant time and resources to develop and maintain a rating system that is credible.
- We do that in part by a checks and balances certification program that includes physical testing, simulation and oversight by independent inspection agencies and NFRC staff.

- There has been an increase in complaints (and class actions) about inaccurate, misleading information about consumer products, including windows, building products.
- Stepped up FTC enforcement actions are being seen.
- Social media and the internet allow consumers to share and aggregate complaints about misleading marketing and product information.
- But consumers are not the only potential claimants against companies that misstate the performance of their products.
- The federal Lanham Act allows one competitor to sue another competitor if it alleges unfair competition arising from “false or misleading product descriptions” by the other company.

Product Labeling Draws Continued Scrutiny

- Here is an example of how this works:
- Recently, the U.S. Supreme Court issued an opinion in *POM Wonderful LLC v. The Coca Cola Company*
 - Companies may sue their competitors under the Lanham Act for “false or misleading” commercial statements that cause them commercial harm (e.g. loss of business).
 - POM sued Coca-Cola for unfairly marketing a “POMEGRANATE BLUEBERRY” juice containing just 0.3% pomegranate juice and 0.2% blueberry juice and 99.4% apple and grape juice.
 - Coke’s product competed with POM’s pomegranate juices and POM alleged that it was losing sales to the Coke product.
 - The dispute was not whether 0.3% and 0.2% were inaccurate, instead it was that the names and characterization of those Coke products was deceptive in light of those percentages.

- So vendors of consumer products, including windows, need to both label and advertise accurately in key ways
 - Performance data that can be empirically supported provides protection against deception claims.
 - Don't undermine that protection by then misstating or exaggerating product performance in your marketing materials.

* * * *
- But also, when companies use specific performance numbers for their products, are they stating to consumers that their products perform exactly that way in all circumstances?
- By analogy, let's look at how fuel economy numbers are required by law to be used.

Analogy to FTC Regulation of Gas Mileage Claims

- The FTC issued the “Guide Concerning Fuel Economy Advertising for New Automobiles”
 - It is currently under review to recognize new EPA fuel economy labeling requirements.
- The Guide requires all representations of fuel economy in advertising to specify:
 - That the U.S. Environmental Protection Agency is the source of the “estimated city mpg” and “estimated highway mpg” and that the numbers are estimates; or
 - If the fuel economy estimates are not derived from an EPA test, then the EPA estimates must still be given more prominently and the source of the test along with the factors such as driving conditions and other variables (such as road or dynamometer test, average speed, range of speed, hot or cold start, and temperature) which differ from the EPA test must be disclosed.
- Under EPACK, it is NFRC, not the FTC, that fills this labelling role for windows.

Analogy to FTC Regulation of Gas Mileage Claims (continued)

- The new EPA label:

EPA
DOT

Fuel Economy and Environment

Gasoline Vehicle

Fuel Economy

26

MPG

Small SUVs range from 16 to 32 MPG. The best vehicle rates 99 MPGe.

22

city

32

highway

3.8

gallons per 100 miles

You save

\$1,850

in fuel costs
over 5 years

compared to the
average new vehicle.

Annual fuel cost

\$2,150

Fuel Economy & Greenhouse Gas Rating (tailpipe only)

7

1

10

Best

Smog Rating (tailpipe only)

6

1

10

Best

This vehicle emits 347 grams CO₂ per mile. The best emits 0 grams per mile (tailpipe only). Producing and distributing fuel also creates emissions; learn more at fuel economy.gov.

Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets 22 MPG and costs \$12,600 to fuel over 5 years. Cost estimates are based on 15,000 miles per year at \$3.70 per gallon. MPGe is miles per gasoline gallon equivalent. Vehicle emissions are a significant cause of climate change and smog.

fuel economy.gov

Calculate personalized estimates and compare vehicles

Smartphone
QR Code™

Understanding What NFRC Performance Values Mean

- While NFRC whole product ratings are credible and are the product of a thorough independent certification program, actual performance of windows in the field may be influenced by many factors.
- Are we making that clear to our stakeholders??
- Our NFRC label notes that:
 - Manufacturer stipulates that these ratings conform to applicable NFRC procedures for determining whole product performance. NFRC ratings are determined for a fixed set of environmental condition and a specific product size. NFRC does not recommend any product and does not warrant the suitability of any product for any specific use. Consult manufacturer's literature for other product performance information. www.nfrc.org [emphasis added.]
- That is a fair disclosure.

Understanding What NFRC Performance Values Mean

- But as consumers and competitor lawsuits become more pervasive, we must revisit how we explain clearly to consumers what our ratings really mean (and don't mean), how they are developed and the assumptions that underlie those ratings.

- The good news; the value of NFRC to the public and to our licensees is:
 - Certification is provided by an independent 501(c)(3) not for profit body subject to strict rules of conduct
 - NFRC ratings require compliance with accepted technical procedures, testing and simulation = credibility
 - IA's assist in confirming compliance
 - Membership in NFRC is open to all
 - Our process for promulgating standards and procedures is done in open session; on a consensus basis with input from a wide range of stakeholders

- But we can always do better and must be sensitive to changing landscape of risk and evolving technical knowledge.

HOW LAWYER'S THINK ABOUT PRODUCT DISCLAIMERS



"Here's a dilemma. Should the disclaimer for our client's new sleeping pill read, 'May cause drowsiness' or 'May not cause drowsiness'?"

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The following are actual statements placed on insurance forms where the car's driver attempted to summarize the detail of their accident in the fewest words possible -

- Coming home I drove into the wrong house and collided with a tree I don't have.
- A pedestrian hit me and went under my car.
- I pulled away from the side of the road, glanced at my mother-in-law, and headed over an embankment.
- The pedestrian had no idea which way to run, so I ran over him.

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