# Legal Pipeline

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# One federal court clarifies claims available regarding ENERGY STAR

While "green" building and LEED certification are hot trends in the world of commercial development and construction, the amount of litigation relating to these trends has been paltry.

Instead of focusing on LEED, this article takes a closer look at the federal program known as ENERGY STAR and consumer-related litigation involving the label.

## The ENERGY STAR program

ENERGY STAR is a U.S. Environmental Protection Agency (EPA) voluntary program that helps businesses and individuals save money and protect our climate through superior energy efficiency. The program was established by the EPA in 1992, pursuant to Section 103(g) of the *Clean Air Act. 42 U.S.C.A. § 7403(g)*. Specifically, this section of the statute directs the Administrator of the EPA to, "conduct a basic engineering research and technology program to develop, evaluate, and demonstrate non–regulatory strategies and technologies for reducing air pollution."

In 2005, Congress enacted the *Energy Policy Act. 42 U.S.C.A. § 13201 et seq*. Section 131 of this act amends Section 324 of the *Energy Policy and Conservation Act, 42 U.S.C.A. § 6294*, and, "established at the Department of Energy [and EPA] a voluntary program to identify and promote energy – efficient products and buildings in order to reduce energy consumption, improve energy security, and reduce pollution through voluntary labeling of or other forms of communication about products and buildings that meet the highest energy efficiency standards."

The EPA touts the program for encouraging American consumers, businesses and organizations to make investments in energy efficiency that transform the market for efficient products and practices, create jobs and stimulate the economy.

## Disclaimer



ENERGY STAR certified buildings, projects and products meet strict energy performance standards set by the EPA. They use less energy, are less expensive to operate and to the extent applicable, cause fewer greenhouse gas emissions and pollutants than non-ENERGY-STAR-certified projects.

## Principles for ENERGY STAR product designation

As it relates to products, the EPA has established certain specifications that must be met in order for a product to earn the ENERGY STAR label. These specifications have been established based on the following set of guiding principles set forth by the EPA: (1) product categories must contribute significant energy savings nationwide; (2) certified products must deliver the features and performance demanded by consumers, in addition to increased efficiency; (3) if the certified product costs more than a conventional, less-efficient counterpart, purchasers will recover their investment in increased energy efficiency through utility bill savings, within a reasonable period of time; (4) energy efficiency can be achieved through broadly available, non-proprietary technologies offered by more than one manufacturer; (5) product energy consumption and performance can be measured and verified with testing; and (6) labeling would effectively differentiate products and be visible for purchasers.

Keeping this framework for ENERGY STAR designated products in mind, what recourse does an end-user or consumer have if he or she buys a product bearing the ENERGY STAR label when that product does not meet the EPA's ENERGY STAR specifications? Does the consumer have recourse under the federal law establishing ENERGY STAR? May the consumer obtain relief under the federal Magnuson-Moss Warranty Act (MMWA), 15 U.S.C.A. § 2301 et seq.? Does the consumer have claims under state law, such as breach of warranty or consumer fraud?

For the answers to these questions, as well as the flip-side inquiry – what exposure do product manufacturers and sellers face in this instance? – we take a look at a recent case decided by a federal court right in my own "backyard" of the District of New Jersey. The case is *Dzielak v. Whirlpool Corporation*, Civ. No. 2:12-0089 (KM)(JBC), 2015 U.S. Dist. LEXIS 100217 (D.N.J. July 31, 2015).

## Case background

In this case, the defendants manufactured and sold washing machines bearing the ENERGY STAR label. After the EPA learned that the washers in question did not qualify for the ENERGY STAR program, the individual purchasers brought suit. The plaintiffs alleged that they

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purchased washing machines that were supposed to be ENERGY STAR compliant, but in fact were not.

Among other things, the plaintiffs sought damages for breach of express warranty and implied warranty of merchantability under New Jersey law, unjust enrichment under state law, and violation of certain state consumer protection statutes, such as the *New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.*, and violation of the federal MMWA, a federal statute regarding warranties in consumer products.

The defendants filed a motion to dismiss the complaint. First, the defendants sought to dismiss the state law claims, arguing that they are preempted by federal law and regulations governing the ENERGY STAR program. The defendants allege that the EPA could have ordered them to compensate the plaintiffs, and since the EPA did not do so, the plaintiffs' state law claims are preempted.

Aside from the obvious lesson here – make sure products are ENERGY STAR compliant if they bear that label and are being promoted as such product manufacturers and sellers should take note of this decision.

As it relates to the MMWA, the defendants argued that this claim must also be dismissed because the MMWA does not apply to warranties governed by other federal laws. Finally, Whirlpool argued that the claim for unjust enrichment must be dismissed.

**Preemption**

After analyzing the arguments in light of plaintiffs' claims, the court held that the state law claims were not preempted by federal law. However, the court gave the defendants a "consolation prize," dismissing the MMWA claim for failure to state a cause of action and dismissing the claim for unjust enrichment against Whirlpool only.

The U.S. Constitution provides that federal law will be supreme over state law (see *U.S. Const., art., VI, cl. 2*). Therefore, where state law interferes with or is contrary to federal law, federal law will preempt state law. Here, Whirlpool argued that the federal EPA's failure to require manufacturers to pay compensation to purchasers of the disqualified washing machines preempts any state law requirement mandating compensation. Whirlpool claimed that once the EPA disqualified the washers, it had the discretion to order the defendants to pay the consumers who overpaid for ENERGY STAR compliant washers, but failed to exercise this discretion.

The court rejected this argument, "In my view, EPA's action (or rather inaction) does not rise to the level of a federal 'law' that can be given preemptive effect. EPA has never issued a formal policy regarding the remedies or punishments a manufacturer will face when its product is found to be non-compliant with ENERGY STAR."

Therefore, according to the court, "EPA's failure to order manufacturers to compensate consumers is not a federal law capable of pre-empting a state law cause of action. For that threshold reason, I would deny preemption."

**Magnuson-Moss Warranty Act**

The court did dismiss the claim under the MMWA, relying on a provision of the statute which provides, "This chapter . . . shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law . . . ."

The court further found that "[n]othing in the MMWA suggests that it is intended to override remedial policy choices in other statutes."

Thus, the court dismissed this claim for relief under the federal warranty statute.

**Unjust enrichment**

It is widely held that in order for a plaintiff to prevail on a claim for "unjust enrichment," the plaintiff must show that it conferred a direct benefit on a defendant.

Here, the plaintiffs could not recover in unjust enrichment against Whirlpool, the manufacturer of the washers, because the plaintiffs did not purchase the washers in question from Whirlpool, they purchased them from the retailer-defendants. It was the retailer-defendants who received the benefit (i.e. payment for the noncompliant washers). Therefore, the court allowed the plaintiffs to maintain the unjust enrichment claim against the retailer-defendants, but dismissed the claim against Whirlpool.

**What does all of this mean?**

Aside from the obvious lesson here – make sure products are ENERGY STAR compliant if they bear that label and are being promoted as such product manufacturers and sellers should take note of this decision. Although it is the decision of one federal court in the country, it offers a critical warning to product manufacturers and sellers: if your products bear the ENERGY STAR label and they have not been qualified as such by the EPA, then not only do you face potential consequences from the EPA, you also face potential lawsuits for money damages from aggrieved consumers (in the class-action context or otherwise).

Consumers have numerous state law claims at their disposal, including violation of consumer protection statutes, which often allow recovery of punitive or treble damages and counsel fees. As this could be a very expensive proposition, product manufacturers and retailers who wrongly promote products as ENERGY STAR compliant when they are not must realize that they face significant monetary exposure, regardless of whether the EPA, as the court said, is "wishy-washy about fishy washers." ■

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