



# Current Legal Issues for Certification Programs

NFRC Annual Meeting  
November 16 - 19, 2009

Presented by  
Scott Meza, Esq.  
Greenberg Traurig, LLC

## Organizations Like NFRC Can Be Vulnerable to Anti-Trust Challenges

Because:

1. Our Membership is made up of competitors;  
e.g. window manufacturers, labs, attachment manufacturers
2. NFRC's rating system and certification program effect competition; e.g. consumers and others use NFRC ratings to make their purchasing decisions.
3. If NFRC's certification program is used to intentionally restrain competition, that can be an anti-trust violation.

## An Example of An Anti-Trust Challenge to Certification Programs

### Facts:

- Underwriters Laboratory (“UL”), GE and others were sued in federal court. Part of the suit alleges that UL illegally refused to create a safety certification program for rebuilt circuit breakers.
- UL did form a committee to evaluate a possible certification program for rebuilt breakers but concluded it would not certify those products.
- Plaintiffs alleged UL, GE and other circuit breaker manufacturers conspired to block this new certification program because the rebuilt breakers compete with their new products.
- Plaintiffs alleged that Defendants did so for discriminatory, anti-competitive reasons.

- Court found in favor of UL because:
  - UL had solid technical reasons for not developing a certification program for reconditioned circuit breakers (e.g. inability to trace component parts, breakers not uniformly reconstructed so sample testing is ineffective).
  - Plaintiffs could not show how UL could reasonably rate and certify their products under UL's current certification procedures.
  - While manufacturers of competing products had input on whether UL should create this new certification program, UL based its decision on information from many sources, including technical input from engineers.
  - There was no proof that manufacturers met, communicated or acted "in concert" to block the certification program for these rebuilt products.

- Use objective, technical expertise to support decision making.
- Include a diverse community of interests in decision making process [note NFRC's balanced board].
- Follow NFRC's due processes carefully; open debate; all voices heard; appeal mechanism.
- Do not act out of competitive considerations.
- Act prudently, watch what you say, and write; including emails.

# Consumer Claims Relating to Energy Star Representations

- With the ever increasing emphasis on the energy performance of products, an Energy Star designation is more important than ever.
- When a company promotes its products with the Energy Star designation, consumers believe the product is “energy efficient” .
- If these products do not, for any reason, operate in an energy efficient manner, we may see consumers claiming the Energy Star representations were deceptive and misleading, especially where the products’ performance is “self-certified” by the manufacturer.

- For example, in a current class action suit in Ohio, consumers sued Whirlpool claiming fraud based on Whirlpool selling its washing machines as “High Efficiency” and “Energy Star” compliant.
- The Plaintiffs maintained that because of defects, the machines did not work efficiently requiring re-washing (and therefore more energy use).
- Therefore, using the “Energy Star” label was alleged to be deceptive and misleading to consumers.
- The outcome of this suit is not yet known. It does illustrate some useful considerations, including
  - When a manufacturer claims a product to be Energy Star compliant, it is susceptible to claims by consumers if the product is in fact not “energy efficient” (a subjective standard?).

- This makes independent third party certification all the more important because claims of fraud are harder to support if the product's performance is rated and certified by an independent third party.
- NFRC plays a crucial role as an independent certification body.



**In the future, please say “I object” rather than  
“that’s total bullshit.”**



*"My client is an enigma...an innocent man,  
who, according to the facts of the case,  
appears to be absolutely guilty."*



**It's not my job!!**