Take a look at the green drop on the bottle of Fiji Water pictured right. (If you are a rational actor, you won't buy the bottle for $7, but that's another story). What do you think it means? What if it was accompanied by the website URL "fijigreen.com"?

Well, if you are the California Court of Appeal, it means essentially nothing. Four days ago, in *Hill v. Roll Int'l Corp.,* the Court of Appeal affirmed a trial court decision holding that as a matter of law, the drop logo and the website did not constitute deceptive "greenwashing." "No *reasonable consumer,"* said the Court, "would be misled to think that the green drop on Fiji water represents a third party organization's endorsement or that Fiji water is environmentally superior to that of the competition." (emphasis in original).

This seems a little strange to me, because as a general matter this sort of judgment would be a quintessential jury question. The Court in this case acknowledged this, noting that generally it *is* a jury question, and citing the other appellate decisions holding as much. But "generally" is not "invariably," it said, and this was one of those cases that didn't fit into the general pattern. Besides, in the Second Appellate Division, it contended, misleading advertising claims are pure questions of law.

This one could probably stand to go higher, and not only because of the split between jurisdictions. Fiji Water has a very controversial record: environmental activists have repeatedly accused it of misleading the public about its record on the environment and social responsibility. But Fiji is not alone, and is part of a bigger trend. Given the growing market for "green" products, the California Supreme Court needs to make it as clear as possible how such cases should proceed — and importantly, how such claims interact with First Amendment protections for commercial speech.

The court here was clearly hostile to the plaintiff, accusing her brief of "hyperbole." (Well I never!). It also believed that the complaint was not well-pled, and there is lots of other evidence about Fiji's strong suggestions that it is an environmentally superior alternative. "Not all waters are created equal," is another slogan. And one of my personal favorites: "It's not from Cleveland." Cleveland officials angrily retorted that *their* water didn't have any arsenic in it, unlike, say Fiji Water's.

The controversy with Cleveland also shows why tougher policing of bottled water claims might be necessary. As Elizabeth Royte has demonstrated in her terrific

book, Bottlemania: How Water Went On Sale and Why We Bought It, bottled water can often have devastating environmental consequences with no added health benefits. Robert Glennon of the University of Arizona Law School has provided important evidence of the tendency of bottled water production to deplete aquifers. But the growing market for bottled water can also mean less political support for municipal water systems, which often do a better job than the private sector, both in terms of health and environmental stewardship. At the very least, if the bottlers are going to undercut public agencies, they might as well have to tell the truth.

UPDATE: Looking over the opinion more closely, it is hardly a model of tight reasoning. A green drop of water is no more than what would be expected for a seller of water, it said. Is normal drinking water usually green? The plaintiff referenced another one of Fiji's slogans: "Every drop is green." Does that make environmental claims? Not at all: this slogan would not alter the overall impression of a reasonable consumer — which of course is a pure matter of law. The California Supreme Court needs to look at this decision carefully.