



CLASS ACTIONS AIMED AT “RECYCLABLE” CLAIMS: SO FAR, COURTS RESIST DEMANDS TO REINTERPRET EXISTING LAW

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Beginning in 2020, environmental groups like Greenpeace and Earth Island Institute began filing class actions over “recyclable” claims for bottled water and other products sold in plastic containers. The allegations moved beyond current federal and state standards, arguing that “recyclable” claims are deceptive where various plastics are unlikely to actually be recycled. The following year, plaintiff’s firms began filing consumer class actions based on the same types of allegations.

The first section of this article provides an overview of the origins of the plaintiffs’ allegations. The second section summarizes where the cases stand and what defenses have worked so far.

What Do the Cases Allege?

To understand the plaintiff allegations, it is helpful to examine, first, the current law governing “recyclable” claims, then the current marketplace for “recyclable” plastics.

“Recyclable” Items Must Be Capable of Being Recycled. The Federal Trade Commission’s (“FTC”) Green Guides provide guidelines for companies making environmental benefit claims, including “recyclable” claims.¹ Although the Green Guides are not binding law, they represent the FTC’s current thinking on what constitutes deceptive “green” marketing in violation of the Federal Trade Commission Act (“FTCA”).²

According to the Green Guides, marketing a product or packaging “as recyclable” is deceptive “unless [the item] can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.”³ The Green Guides further provide that an unqualified “recyclable” claim may be made only if:

- recycling facilities are available to about 60 percent or more of consumers or communities where the item is sold,
- the entire item is recyclable, excluding minor incidental components, and
- no attributes such as size or shape limit recyclability.⁴

If facilities are available to fewer than 60 percent of consumers or communities, or only some components of an item are recyclable, marketers may still make “recyclable” claims with qualifications to convey such limitations.⁵ Currently, various state laws incorporate the federal Green Guides standards or simply require

¹ See 16 C.F.R. § 260 (2012).

² Section 5(a) of the FTCA broadly prohibits “unfair or deceptive acts or practices” in interstate commerce. See 15 U.S.C. § 45(a). With regard to certain products, including food, drugs, and medical devices, Section 12 of the FTCA prohibits “any false advertisement” that is “misleading in a material respect.” See 15 U.S.C. § 52.

³ 16 C.F.R. § 260.12(a).

⁴ 16 C.F.R. § 260.12(b)-(d).

⁵ 16 C.F.R. § 260.12(b)(2).

substantiation for “recyclable” claims.⁶

Far Fewer End Markets for Recyclable Plastics Exist. In recent years, the global markets for plastic waste have changed dramatically. For years, China imported vast quantities of plastics that were difficult to sort, insufficiently cleaned, or not actually recyclable. As an example of the scale, the United States exported nearly 700,000 tons of such plastic waste to China in 2016 alone.⁷ Historically, China had more efficient systems for handling such waste and lower costs. However, China’s facilities eventually became overwhelmed as well, causing more plastics to end up in landfills and the environment. In 2018, China enacted its “National Sword Policy” first limiting and later banning import of post-consumer plastics and other “solid waste.”⁸ In reaction, U.S. recycling facilities in urban areas have tended to expand and improve operations, and find new export countries.⁹ In more rural areas, smaller facilities have limited or ended programs for various plastics.¹⁰

Plaintiffs Seek to Expand Existing Law. Against this background, plaintiffs, in short, have sought to reinterpret the existing law applicable to “recyclable” claims to hold companies accountable for the changed marketplace. The recent cases allege that “recyclable” claims for plastics are inherently deceptive given the shifts in global markets that have led to decreases in recycling of post-consumer plastics. For example, in one case, the Earth Island Institute alleges that “recyclable” claims for plastic soda and water bottles are misleading where recycling facilities are sending plastics, in general, although not necessarily the defendants’ products, to landfills due to lack of an end market.¹¹ In making its case, the Earth Island Institute relies heavily on a report created by Greenpeace, Inc. stating as follows:

U.S. recycling facilities can process no more than 23% of PET#1 plastic produced each year and no more than 13% of HDPE#2. More alarmingly, plastics #3-7, which are widely considered to be low-value plastics, are rarely, if ever recycled. . . MRFs [material recovery facilities] can process only a negligible percentage of plastics #3-7.¹²

Despite such plaintiff allegations, the existing law has never required companies to consider whether an item capable of being recycled will actually be recycled. In 2012, when the FTC last updated its Green Guides, the question of whether certain materials may actually be recycled or not arose only briefly, without any final determination. The FTC’s “Statement of Basis and Purpose,” issued alongside the updated Green Guides, included a short section entitled “Packages Collected for Public Policy Reasons but Not Recycled.”¹³ In this section, the FTC responded to several public comments by noting that the agency “agrees that unqualified recyclable claims for categories of products that municipal recycling programs collect, but do not actually recycle, *may be deceptive*” and that “a marketer should not assume that consumers or communities have access to a particular recycling program merely because the program will accept a product.”¹⁴ Neither the Green Guides nor any related guidance documents mention anything more about “recyclable” items that may not be recycled, and the FTC has never brought a single action seeking to impose requirements around actual recycling.

⁶ See, e.g., Fla. Stat. Ann. § 403.7193; Minn. Stat. Ann. § 325E.41; 6 R.I. Gen. Laws § 6-13.3-1. In coming years, a new law in California, S.B. 343, will effectively prohibit many “recyclable” claims unless CalRecycle determines that specific materials are actually being recycled in a majority of California communities. That law exceeds the scope of this article, which focuses solely on current standards for “recyclable” and lawsuits purporting to be based on the current standards.

⁷ See Hannah Ritchie & Max Roser, *Plastic Pollution, Our World in Data* (Sept. 2018), <https://ourworldindata.org/plastic-pollution#plastic-waste-per-person>.

⁸ See *China Affirms Ban on Several Scrap Commodities in 2021*, Recycling Today (July 7, 2020), <https://www.recyclingtoday.com/article/china-affirms-ban-solid-waste-2021-announces-scrap-import-quotas/>.

⁹ See Cheryl Katz, *Piling Up: How China’s Ban on Importing Waste Has Stalled Global Recycling*, Yale Environment 360 (Mar. 7, 2019), <https://e360.yale.edu/features/piling-up-how-chinas-ban-on-importing-waste-has-stalled-global-recycling>.

¹⁰ See *id.*

¹¹ See Compl., *Earth Island Inst. v. Crystal Geyser Water Co.*, No. 20civ01213, at ¶¶ 101-102, 144-152 (Sup. Ct. Cal., San Mateo Feb. 26, 2020).

¹² *Id.* at ¶¶ 101-102 (internal citation omitted).

¹³ The Green Guides: Statement of Basis and Purpose, at 174 (2012).

¹⁴ *Id.* at 174-175 (emphasis added).

Such virtual silence appears warranted where a requirement to assess whether an item is actually recycled raises serious policy and practical questions. For instance, where U.S. recycling programs are run largely by local municipalities and, as such, are vastly decentralized, how are companies to know whether any given facility billing itself as a recycling facility is not actually recycling certain items at any given point? Likewise, if the law truly requires companies to confirm actual recycling by recycling facilities, must companies by logical extension also confirm whether consumers actually choose to recycle the company's packaging or products? The recent plaintiff litigation effectively ignores those thorny matters, instead seeking to impose impossible standards that move beyond existing law.

Where Do The Cases Stand?

One Organization Has Faced Difficulty, Repeatedly, in Showing Standing. Organizations like Greenpeace and Earth Island Institute have filed at least three lawsuits over "recyclable" claims for plastics, all in California courts.¹⁵ While defendants in each case have filed motions to dismiss, only a single court has opined on such a motion.

In that case, Greenpeace is challenging "recyclable" claims by Walmart for various store-brand products and packaging made of plastics #3-7. The group alleges that the claims violate California's law prohibiting "unlawful, unfair, or fraudulent" business practices where consumers "do not have access to programs that accept the [items]," "the [items] cannot be separated or recovered from the general waste stream," and/or there are "no end markets to reuse the [items] or to convert the [items] into a material that can be reused or used in manufacturing or assembly of another item."¹⁶

The court has now twice granted dismissal. In its first decision, the court held that Greenpeace lacked standing to pursue the litigation where it failed to show reliance on the alleged misrepresentations.¹⁷ In order to show standing under the relevant California law, a plaintiff must have "lost money or property as a result of the unfair competition."¹⁸ Where "the challenged conduct consists of alleged misrepresentations to consumers," courts interpret the "as a result of" language as requiring the plaintiff to show "actual reliance on the allegedly deceptive or misleading statements."¹⁹ According to Greenpeace, the alleged deceptive advertising diverted the group's resources by "frustrat[ing] [its] mission to protect the natural environment" and "caused [it] to spend money, staff time, and other organizational resources in California in response to that frustration of purpose."²⁰ The court, however, found that such diversion of resources simply "is not based on a misrepresentation to a consumer."²¹ The court reasoned as follows:

[N]othing in the FAC [First Amended Complaint] suggests Greenpeace engaged in its investigation in reliance on a belief that the statements on which it bases its [allegations] were true; rather, the FAC alleges the action was taken by Greenpeace in response to its belief that the challenged statements were false; in other words, Greenpeace was never misled.²²

In a Second Amended Complaint, Greenpeace pivoted to seek an injunction prohibiting Walmart from violating a specific provision of the California business practices law. That provision requires companies making environmental benefit claims to "maintain records . . . supporting the validity or the representation" and to

¹⁵ A fourth case, now settled, alleged deceptive advertising related to a specific, private recycling company that seeks to partner with manufacturers to recycle materials that are difficult for municipal facilities to handle. See *Compl., Last Beach Cleanup v. Terracycle, Inc.*, No. RG21090702 (Sup. Ct. Cal., Alameda Mar. 4, 2021). That case exceeds the scope of this article where it presented unique factual issues.

¹⁶ SAC, *Greenpeace, Inc. v. Walmart Inc.*, No. 3:21-cv-00754-MMC, ¶ 2 (Oct. 15, 2021); see also Cal. Bus. & Prof. Code § 17204. Following removal from state court, the case is now in the Northern District of California.

¹⁷ Order, *Greenpeace, Inc.*, No. 3:21-cv-00754-MMC (Sept. 20, 2021).

¹⁸ *Id.* at *2 (citing Cal. Bus. & Prof. Code § 17204).

¹⁹ *Id.*

²⁰ *Id.* at *3.

²¹ *Id.*

²² *Id.* at *4.

“furnish” such records “to any member of the public upon request.”²³ The court agreed with Walmart that the Second Amended Complaint failed to support Article III standing, a prerequisite for injunctive relief. The court reasoned that Article III standing requires specific allegations that the plaintiff is “likely to suffer future injury.”²⁴ Greenpeace argued that, in response to the alleged deception by Walmart, “it had hired a ‘recycling consultant’ who took ‘numerous photographs of the Products’ and created a ‘PowerPoint report’ that included ‘many of the photographs.’”²⁵ Greenpeace further alleged that it would “continue to spend money, staff time and other organizational resources to combat [the alleged] unsubstantiated representations.”²⁶ The court, however, found the assertion as to future expenditures to be “conclusory” and lacking in “particularized allegations of fact.”²⁷ The court allowed Greenpeace leave to amend, and a Third Amended Complaint is now before the court.

Particularly where the other organizations that have filed similar litigation all filed in California, those groups could also face difficulty in clearing statutory and constitutional Article III standing requirements. The Greenpeace case against Walmart has created helpful precedent on the defense side, even if other courts could potentially reach different conclusions.

Courts Have Yet to Opine on Motions to Dismiss in Consumer Class Actions. Plaintiff’s firms have brought at least four putative class actions, on behalf of private plaintiffs, over “recyclable” claims. In three of the actions, defendants attack the merits of the plaintiff allegations head-on in motions to dismiss that are currently pending. In those three actions, plaintiffs allege that “100% Recyclable” claims on bottled water, soda, and other beverages are deceptive where (1) PP #5 bottle caps and BOPP plastic labels on bottles are not recyclable; (2) at least 28% of the PET #1 bottles and HDPE #2 bottle caps sent to recycling facilities end up in landfills or incinerators; and (3) domestic recycling facilities only have capacity to process approximately 22.5% of the PET #1 and HDPE #2 consumed in the United States.²⁸ In the motions to dismiss, the defendants argue that the allegations are implausible where the plaintiffs conflate “recyclable” with “will be recycled,” thereby moving beyond current standards requiring a “recyclable” item only to be capable of being recycled.²⁹ Similarly, defendants argue that plaintiffs lack Article III standing where they fail to allege facts that could show that the specific products they purchased were not recycled.³⁰ In these three cases, defense victories would be significant, likely cutting off future class action demands and filings that seek to expand the current law applicable to “recyclable” claims.

The fourth consumer class action suggests that, in addition to those arguments directly attacking the merits of the allegations, other defenses are also still be available. In the fourth putative consumer class action, the plaintiff challenged claims that Hefty Recycling bags are “perfect for all your recycling needs.”³¹ The plaintiffs alleged that such claims are deceptive where the bags are made of LDPE #4, which “is not cost effective to process” domestically.

In two decisions, the court has granted in part and dismissed in part motions to dismiss. Among other holdings, the court found that the plaintiff alleged a plausible case under various California statutes and common law governing advertising and business practices.³² The court, however, dismissed claims for equitable restitution, finding neither legal nor equitable remedies are available for lack of substantiation actions brought by private plaintiffs.³³ The court also held that the plaintiff lacked Article III standing to enjoin future conduct where she

²³ SAC, *Greenpeace, Inc.*, No. 3:21-cv-00754-MMC, ¶ 77 (citing Cal. Bus. & Prof. Code § 17580).

²⁴ Order, *Greenpeace, Inc.*, No. 3:21-cv-00754-MMC, at *3 (Feb. 3, 2022).

²⁵ *Id.* at *3 (citing SAC, at ¶¶ 19, 21-22).

²⁶ *Id.* (citing SAC, at ¶ 6).

²⁷ *Id.*

²⁸ Compl., *Duchimaza v. Niagara Bottling, LLC*, No. 21-cv-6434 (S.D.N.Y. July 28, 2021); Compl., *Haggerty v. Bluetriton Brands, Inc.*, No. 21-cv-13904 (D.N.J. July 20, 2021); Compl., *Swartz v. The Coca-Cola Co.*, No. 21-cv-4643 (N.D. Cal. June 16, 2021).

²⁹ See Mot. to Dismiss, *Duchimaza*, No. 21-cv-6434, at *17-19 (S.D.N.Y. Nov. 12, 2021); Mot. to Dismiss, *Haggerty*, No. 21-cv-13904, at *17-21 (D.N.J. Feb. 15, 2022); Mot. to Dismiss, *Swartz*, No. 21-cv-4643, at *6-9 (N.D. Cal. Sept. 27, 2021).

³⁰ See Mot. to Dismiss, *Duchimaza, LLC*, No. 21-cv-6434, at *8-10; Mot. to Dismiss, *Haggerty*, No. 21-cv-13904, at *9-12; Mot. to Dismiss, *Swartz*, No. 21-cv-4643, at *9-10. Aside from these two arguments repeated in each motion to dismiss, the motions include various other arguments such as a lack of Article III standing for injunctive relief and a lack of specificity for fraud allegations.

³¹ See Compl., *Hanscom v. Reynolds Consumer Prod.*, No. 4:21-cv-03434 (N.D. Cal. May 7, 2021).

³² Order, *Hanscom*, No. 4:21-cv-03434, at *6 (N.D. Cal. Oct. 1, 2021).

³³ Order, *Hanscom*, No. 4:21-cv-03434, at *3-4 (N.D. Cal. Jan. 21, 2022). Whether private plaintiffs may bring substantiation cases

indicated that she would not purchase recycling bags in the future.³⁴ Specifically, the court pointed to a complaint allegation stating, “recyclables should be clean and dry and should be placed in a collection bin without the use of a plastic bag or liner.”³⁵

While cases by both organizations and plaintiff-consumers wind through the courts, companies may, at least, continue to see some reprieve from new filings. It appears that no new filings have occurred since July 2021, suggesting that plaintiffs may not be willing to invest in more cases if and until courts indicate a greater willingness to go along with expanding the legal requirements for making “recyclable” claims.

remains an evolving issue in California law.

³⁴ *Id.* at *7.

³⁵ *Id.*