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Court Gives Greenpeace a *Fourth* Bite at the Apple in Private Recyclable-Claim Lawsuit

by Glenn G. Lammi

Despite consumers' strong interest in recycling and businesses' efforts to package products in recyclable materials, shifts in global markets have led to significant decreases in recycling. That decrease has intensified a debate over when consumer-product manufacturers can make "recyclable" statements on product packaging. Current legal standards generally permit such statements if the materials are *capable* of being recycled. That's far too broad a standard for some environmental activist groups, which want a standard under which a manufacturer must prove that its product will *actually* be recycled.

In addition to agitating for change in legislative and regulatory bodies, environmental activists have filed state-law fraud lawsuits asking courts to end-run the democratic process and find product makers' "recyclable" claims to be illegally misleading or false. So far, as discussed in an April 22, 2022 Washington Legal Foundation *Legal Backgrounder*, courts have not stepped into the shoes of legislators or regulators. But at least one court has given activist group Greenpeace every chance, and then some, to make its case.

Three times, most recently on May 10, 2022, the U.S. District Court for the Northern District of California granted Walmart's motion to dismiss *Greenpeace, Inc. v. Walmart Inc.* But each time, the court allowed Greenpeace to amend and refile its complaint with new arguments that would show that Walmart's actions or inactions had injured the group or its members.

This fourth bite at the apple is regrettably consistent with what we›ve seen from years of following food-labeling litigation in the Northern District of California, a jurisdiction Washington Legal Foundation long ago dubbed "the Food Court" for its judges' sympathy toward plaintiffs. Such multiple opportunities to amend a complaint encourages litigation based on flimsy facts and allegations and also increases plaintiffs' settlement leverage by forcing business defendants to direct more financial resources toward legal fees and court costs.

Greenpeace's First Bite

Greenpeace›s first complaint alleged that Walmart violated California›s Unfair Competition Law by making misleading "recyclable" claims on store-brand products. The court dismissed that complaint, reasoning that Greenpeace did not meet the standing-to-sue requirement under Article III of the U.S. Constitution. Greenpeace alleged that Walmart›s deceptive packaging harmed the group by requiring it to divert resources to investigate Walmart›s alleged deception of consumers. Because Greenpeace failed to show that consumers in fact relied on the alleged misrepresentation, the court found the group›s diversion of resources could not constitute the injury in fact required to

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establish standing.

Second Bite

In its second amended complaint, Greenpeace shifted its legal strategy, this time seeking an injunction against Walmart's alleged violation of the California Environmental Marketing Claims Act (EMCA). The EMCA requires businesses that make environmental-benefits claims to maintain records and furnish those records to any member of the public. Greenpeace again argued that its investigation into Walmart's supposed EMCA violation caused the group to divert resources from its larger mission. The plaintiff asserted that it had to hire a "recycling consultant" who "took numerous photos" and created a Powerpoint presentation. Because Greenpeace was seeking an injunction, it had to allege that its continued investigation would require ongoing diversion of resources. Greenpeace alleged it would suffer future injury, but the court found the claims to be "conclusory" and vague. Though Greenpeace's second attempt at establishing standing failed, the court gave the group a *third* chance.

Third Bite

Greenpeace again relied on the Environmental Marketing Claims Act, though this time it alleged an "informational injury," claiming Walmart failed to provide "information to which [Greenpeace] is entitled under EMCA." In a three-page opinion, the court found Greenpeace's pleading severely deficient. The complaint didn't even "clearly allege that [Greenpeace] ever requested such information from defendant." The court rejected Greenpeace's demand for an injunction against Walmart's future failure to provide information, reasoning that Greenpeace didn't show it was likely to shift resources to investigate Walmart's EMCA compliance.

And yet, the court gave Greenpeace at least one more shot at a viable theory of Article III standing.

Thrice Bitten, But Not Shy

Greenpeace will undoubtedly file a fourth amended complaint. If the group is willing to argue "We had to hire a recycling consultant who took pictures and created a slide deck," as a theory of injury, it won't shy away from concocting even more outlandish claims of injury. After all, keeping the case alive is arguably in Greenpeace's best financial interest—the longer it survives, the more mileage its development staff can derive from the lawsuit as a fundraising vehicle.

While Greenpeace sends out fundraising appeals that highlight its fight against faulty "recyclable" claims, the court is forced to spend taxpayer resources and Walmart must divert more money to pay its lawyers. Greenpeace and its allies will grouse that the group deserves its "day in court." But the group has had its day in court, many days, in fact, to prove that it suffered an injury that is redressable through a federal lawsuit.

Absent some Hail Mary argument Greenpeace has reserved for a fourth amended complaint, we should expect an even shorter opinion from the Northern District of California dismissing the complaint *with prejudice*.