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CLIENT ALERT

Greenpeace Plastics Recyclability Suit Dismissed for Lack of Standing

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In 2020, Greenpeace published a major report that purports to show that less than 15% of all plastic, including single-use plastic that is labeled as "recyclable," is actually recycled in the United States. These dramatic findings kicked off a new wave of putative class action cases against manufacturers who regularly use plastic packaging, much of which is labeled as recyclable. For example, mere days after issuance of the Greenpeace Report, Earth Island Institute sued a group of ten major companies, including Coca-Cola, Pepsi, Clorox and Nestle over the use of plastic packaging that allegedly contributes substantially to plastics pollution in California waterways.

On Monday, the United States District Court for the Northern District of California dismissed one of the more prominent recent cases, which had been filed by Greenpeace itself against Walmart. *Greenpeace, Inc. v. Walmart, Inc.,* No. 21-cv-00754-MMC (Sept. 20, 2021). Greenpeace's case, brought under the widely-used, California consumer protection law, Cal. Bus. & Professions Code §17200 ("UCL"), sought to hold Walmart liable for making what Greenpeace alleged were false and misleading "recyclable" claims for certain products. Greenpeace alleged that the claims were false, not because the products are not recyclable, because most consumers do not have access to recycling programs that could accept the products for recycling.

The court dismissed the case, accepting Walmart's argument that Greenpeace did not have standing to pursue the matter because it had not suffered "injury in fact" and that the UCL did not permit organizational standing. Walmart argued that Greenpeace was not like a consumer who had truly relied on the recyclability claims, and that Greenpeace's argument regarding diversion of association resources to address Walmart's alleged malfeasance was not sufficient. The court agreed, holding in a brief opinion: "nothing in the FAC suggests Greenpeace engaged in its investigation in reliance on a belief that the statements on which it bases its claims were true; rather, the FAC alleges the action taken by Greenpeace was in response to its belief that the challenged statements were false; in other words, Greenpeace was never misled." It added, "In sum, Greenpeace has failed to plead it took action in reliance on the truth of Walmart's representations, and, consequently, it has failed to allege it has standing to bring the § 17200 claims asserted in the FAC."

This holding could signal trouble for any future activist group in California seeking to bring a cause-related action about recyclability under §17200. If the activists already know or believe the target defendant is making false recyclability claims, then under the reasoning in *Greenpeace*, they cannot claim to have been misled or to have taken adverse actions based on their mistaken belief that the claims were true.

There are other concerns with recycling litigation of this sort, which as others have written, might counterproductively discourage recycling by creating legal risks for companies who seek to use common recyclability symbols on packaging that, assuming the municipalities were doing what is expected of them, could in fact be collected, sorted, and recycled. Indeed, the FTC Green Guides themselves do not mandate that corporations peer behind the availability of municipal recycling facilities to determine whether those facilities are *actually* recycling plastic bottles and packages as they have publicly promised to do. While global market forces may have depressed recycling, suing the companies that seek to encourage recycling through use

and labeling of materials that are recyclable hardly seems like the right move. The recent activist plaintiff push, which seeks to scare corporations into foregoing these kinds of claims, will only decrease public confidence and make it less likely that consumers engage with municipal recycling programs. In the long run, it may even further hinder the market for post-consumer recycled materials.

California's legislature recently passed SB 343, which would mandate that all rigid plastic bottles and containers sold in the state be labeled with their resin code *and* that this code *cannot* be included inside the commonly used "chasing arrows" symbol unless the product is considered "recyclable" pursuant to statewide recyclability criteria. Those criteria will mandate that the material be of a "type and form that routinely becomes feedstock used in the production of new products or packaging, as provided." A legislative analysis of the bill states that, "[b]ased on current trends, the only plastics that would likely be allowed to be labeled with a chasing arrows symbol under the considerations of this bill would be PET No. 1 and HDPE No. 2 plastic bottles and jugs." Moreover, as one recent article has noted, the new California law would restrict symbols and codes that are affirmatively *required* to be placed on plastic packages in six states. The new California law might also conflict with the FTC Green Guides because it may disallow claims of recyclability for plastics that arguably satisfy the Green Guides criteria.

California's new recycling bill is headed to Governor Newsom's desk for signature. If approved, it likely will represent a new class action litigation headache for companies doing business in California.

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