

Applying Consumer Protection Basics to Greenwashing “Recyclability” Cases

Alison Borochoff-Porte and John Cooper¹

Recent lawsuits have challenged the marketing of certain single-use plastics as “recyclable,” where the products in question are unlikely to be recycled. These “recyclability” greenwashing cases reflect growing consumer consciousness about the environmental effects of purchaser spending. The challenges raise connected consumer protection and environmental concerns, specifically whether the marketing efforts at issue mislead consumers into purchasing products that are not truly sustainable. To date, courts have approached these cases in divergent ways, with some courts dismissing such cases early in litigation based on highly literal interpretations of the term “recyclable.” The authors argue that this literalism fails to take bedrock consumer protection principles into account, including the vital concept of consumer perception.

This Article outlines several legal principles that provide an avenue for these cases to progress in a manner that would better ensure the protection of consumers and allow courts to assess their merits. Unfair and deceptive acts and practices laws serve to protect consumers from unlawful marketing practices, including environmental marketing practices. A simple application of accepted consumer protection principles suggests that the question of whether a “recyclable” label is misleading is a complex, highly factual inquiry, best left for later stages of litigation.

TABLE OF CONTENTS

<i>Introduction</i>	2
<i>I. State of single-use plastics and recycling</i>	4
<i>II. Recyclability case dismissals</i>	5
<i>III. Applying consumer protection principles to “recyclable” representations</i>	7
<i>A. Questions of deception are complex, highly factual, and best left for post-discovery</i>	7
<i>B. A practice can be deceptive regardless of the literal truth of a particular representation</i>	8

¹ Alison Borochoff-Porte is an attorney and John Cooper is a paralegal at Pollock Cohen LLP, a boutique litigation firm, where they specialize in environmental and class action cases, author Supreme Court *amicus* briefs, and investigate greenwashing matters.

C. The reasonable consumer standard is met where a significant portion of the consuming public could be misled.....11

Conclusion13

INTRODUCTION

In the second half of 2022, federal judges dismissed—in whole and in part—several “recyclability” class actions brought under state unfair and deceptive acts and practices (“UDAP”) laws,² which broadly serve to protect consumers from unfair or deceptive behavior. The cases, brought against defendants such as Coca-Cola and 7-Eleven, alleged that the companies had misrepresented certain plastic products as being “recyclable,” when in fact the products had a very low probability of ever being recycled. Consumer protection basics suggest a different outcome is warranted and that these cases should be kept in court.

The consumer protection issues raised in the cases—some of which have been newly refiled³—are germane. Global negotiations are underway to develop a legally binding United Nations treaty to help curb plastic pollution.⁴ And the Federal Trade Commission (“FTC”) recently requested public comment on potential updates to its Green Guides for the Use of Environmental Claims (“Green Guides”).⁵ FTC Chair Lina M. Khan issued a separate statement, emphasizing the role that consumer perception plays in determining whether environmental marketing is deceptive and noting that “recent reports suggest that many plastics that consumers believe they’re recycling actually end up in landfills.”⁶ The FTC has further announced that it will host a specific workshop on the issue of “recyclable” claims.⁷

² See, e.g., *Duchimaza v. Niagara Bottling, LLC*, No. 21-CV-6434, 2022 WL 3139898 (S.D.N.Y. Aug. 5, 2022); *Curtis v. 7-Eleven, Inc.*, No. 21-CV-6079, 2022 WL 4182384 (N.D. Ill. Sept. 13, 2022); *Swartz v. Coca-Cola Co.*, No. 3:21-CV-04643, 2022 WL 17881771 (N.D. Cal. Nov. 18, 2022); *Haggerty v. Bluetriton Brands, Inc.*, No. 21-CV-13904, 2022 WL 17733677 (D.N.J. Dec. 16, 2022).

In addition to UDAP claims, these cases feature additional causes of action.

³ Subsequent, amended complaints have been filed in several cases. See, e.g., *Swartz*, No. 3:21-CV-04643, First Am. Consolidated Compl., ECF No. 101 (N.D. Cal. Dec. 9, 2022).

⁴ *Historic Day in the Campaign to Beat Plastic Pollution: Nations Commit to Develop a Legally Binding Agreement*, UNITED NATIONS (Mar. 2, 2022), <https://perma.cc/BE86-J2CG>.

⁵ See *FTC Seeks Public Comment on Potential Updates to its ‘Green Guides’ for the Use of Environmental Marketing Claims*, FED. TRADE COMM’N (Dec. 14, 2022), <https://perma.cc/T9EQ-ZYDB>.

⁶ FED. TRADE COMM’N, Comm’n File No. P954501, Statement of Chair Lina M. Khan Regarding the Regulatory Review of the Guides for the Use of Environmental Marketing Claims (Dec. 14, 2022), <https://perma.cc/5A7T-QA7S>.

⁷ See *FTC to Host Workshop on “Recyclable” Claims as Part of its Ongoing Review of the Agency’s Green Guides*, FED. TRADE COMM’N (Mar. 1, 2023), <https://perma.cc/EZV7-LGXW>.

When companies make unsubstantiated claims or omissions that exaggerate the environmental friendliness of their products, it is often referred to as “greenwashing.”⁸ Concerns about greenwashing are not new, and such unsubstantiated claims receive heightened scrutiny. According to an article published in the *Journal of Public Policy & Marketing* in the 1990s, certain environmental marketing claims “receive special scrutiny from regulators and consumer and environmental interest groups because they have unique characteristics that make them especially likely to confuse or mislead consumers.”⁹ These concerns are especially acute in light of the disparity in motivation and resources that exists between the average consumer and the “vendor who often has given considerable time and attention to developing promotional techniques designed to encourage the buyer to make an unreasonable decision.”¹⁰ To address these concerns, the Federal Trade Commission has issued guidance on avoiding such deception in the form of its Green Guides since 1992.¹¹

The FTC’s interest in the issue of recyclability¹² warrants consideration of whether last year’s dismissals were premature and reignites the relevant consumer protection law question: when is it misleading, unfair, or deceptive to label a particular product “recyclable?” Several of the dismissals turned on highly literal interpretations of the term “recyclable”—focusing on whether a plastic good

⁸ See, e.g., Adam Hayes, *What Is Greenwashing? How It Works, Examples, and Statistics*, INVESTOPEDIA (Nov. 8, 2022), <https://perma.cc/9UCQ-LH2T> (“Greenwashing involves making an unsubstantiated claim to deceive consumers into believing that a company’s products are environmentally friendly or have a greater positive environmental impact than they actually do.”); Courtney Lindwall, *What Is Greenwashing?*, NATURAL RES. DEF. COUNCIL (Feb. 9, 2023), <https://perma.cc/A2GY-UKTL> (“Greenwashing is the act of making false or misleading statements about the environmental benefits of a product or practice.”); see also Sebastião Vieira de Freitas Netto et al., *Concepts and Forms of Greenwashing: A Systematic Review*, 32 ENV’T SCIS. EUR. at 6 (2020) (collecting definitions of greenwashing).

⁹ Jason W. Gray-Lee et al., *Review of Legal Standards for Environmental Marketing Claims*, 13 J.PUB. POL’Y & MKTG. 155, 155 (1994) (citations omitted).

¹⁰ Jason Cohen, *Bringing Down the Average: The Case for a “Less Sophisticated” Reasonableness Standard in US and EU Consumer Law*, 32 LOY. CONSUMER L. REV. 1, 22 (2019) (internal citation and quotation marks omitted).

¹¹ See *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62,122 (Oct. 11, 2012), <https://perma.cc/7A4V-XA5J>.

The FTC has long been aware of the need for prevention of greenwashing, and first issued its Guides for the Use of Environmental Marketing Claims—referred to as the “Green Guides”—in 1992, which “are designed to help marketers avoid making environmental claims that mislead consumers.” See *Environmentally Friendly Products: FTC’s Green Guides*, FED. TRADE COMM’N, <https://perma.cc/VBK4-WN2Q>; *Eco-Friendly and Green Marketing Claims*, FED. TRADE COMM’N <https://perma.cc/99E6-MJN6>. The Guides “apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals,” and “apply to environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium.” 16 C.F.R. § 260.1(c).

¹² See, e.g., Press Release, FED. TRADE COMM’N, *FTC to Host Workshop on “Recyclable” Claims as Part of its Ongoing Review of the Agency’s Green Guides* (Mar. 1, 2023), <https://perma.cc/49MK-G8J4> (announcing that the FTC would host a workshop “to examine ‘recyclable’ advertng claims”).

is theoretically *capable* of being recycled, as opposed to its *likelihood* of being recycled.¹³ Under such an interpretation, representations that a product is “recyclable” might always be permissible even without qualifying information about the likelihood that the product will actually be recycled and even if the product, say a plastic bottle, is in fact only recycled 1 percent of the time. More thorough analyses, however, suggest that whether a product is “recyclable” is a much more complex question.

Against a backdrop of growing concern about the environmental ramifications of consumer behavior, the courts’ embrace of a purely academic understanding of recyclability weakens a powerful tool for consumers to hold corporate actors accountable for their misleading statements and diverts consumer money from products with more well-supported environmental bona fides.

An analysis of consumer protection principles and caselaw suggests that future recyclability cases should succeed past a motion to dismiss. Whether a product representation such as “recyclable” is deemed misleading does not depend only on the technical truth of the representation. Instead, consumer protection law provides for a holistic consideration of the role of consumer perception in determining whether an environmental marketing practice is deceptive or unfair.¹⁴ Thus, the complexity of the term “recyclable” merits fuller scrutiny than can be afforded by bare reference to the dictionary as courts have done.

I. STATE OF SINGLE-USE PLASTICS AND RECYCLING

Global demand for single-use plastic is growing, with the Organisation for Economic Co-operation and Development projecting that global annual plastic use may triple by 2060 from 2019 levels.¹⁵ The quadrupling of plastic consumption over the past 30 years has great geographic and temporal reach.¹⁶ Microplastics have been found in the tissue of Arctic seafloor species¹⁷ and contribute to the sedimentary layers that some scientists believe will define the current geologic era.¹⁸

¹³ See *Curtis*, 2022 WL 4182384, at *13 (“‘Recyclable’ simply means that the product is capable of being recycled. It is about product itself, meaning its intrinsic character.”); see also *id.* at *16 (“And here, recyclable . . . means ‘can be recycled.’”); see also *Swartz*, 2022 WL 17881771, at *1 (“In everyday usage, ‘recyclable’ is an adjective that means capable of being recycled.”).

¹⁴ See, e.g., *Kalwajtys v. Fed. Trade Comm’n*, 237 F.2d 654, 656 (7th Cir. 1956) (citations omitted) (noting that to determine whether a claim is deceptive, one must “ascertain the impression that is likely to be created upon the prospective purchaser”).

¹⁵ See *Global plastic waste set to almost triple by 2060, says OECD*, ORG. FOR ECON. CO-OPERATION AND DEV. (Mar. 6, 2022), <https://perma.cc/W9AD-JJED>.

¹⁶ See *Plastic pollution is growing relentlessly as waste management and recycling fall short, says OECD*, ORG. FOR ECON. CO-OPERATION AND DEV. (Feb. 22, 2022), <https://perma.cc/HV3P-N57B>.

¹⁷ See Melanie Bergmann et al., *Plastic pollution in the Arctic*, 3 NATURE REVS. EARTH & ENV’T 323, 328 (2022).

¹⁸ See Jan Zalasiewicz et al., *The geological cycle of plastics and their use as a stratigraphic indicator of the Anthropocene*, 13 ANTHROPOCENE 4, 15 (2016).

The environmental consequences of plastics pollution have increasingly captured the attention of both domestic policymakers and international bodies.¹⁹ Consumer awareness of this problem is also on the rise. Consumers are displaying both increased attention to the environmental attributes of their chosen products and increased willingness to shape their behavior around these attributes. Domestic consumer demand and willingness to pay for sustainable products is acute.²⁰

Marketers of disposable goods recognize this trend in consumer preferences as an opportunity to differentiate their products based on relative environmental effects. And plastics manufacturers have increasingly sought to play up the supposed environmental friendliness of their products. Reporting indicates an industry push behind labeling certain plastic products “recyclable,”²¹ and the California Attorney General has announced an investigation into the plastics industry for “perpetuating a myth” around recyclability.²² Specifically, an NPR and PBS *Frontline* investigation found that “the industry spent millions telling people to recycle, because, as one former top industry insider told NPR, selling recycling sold plastic, even if it wasn’t true.”²³ The Washington Post reported that U.S. recycling rates fell “below 6 percent in 2021.”²⁴

II. RECYCLABILITY CASE DISMISSALS

A low recycling rate has combined with keen consumer interest in recycling to inspire an increase in consumer protection suits based on claims of “recyclability”—cases that challenge product labeling where there is little chance the product will be recycled. Some of these cases, such as one against Keurig for misleadingly labeling its K-Cups as recyclable, have successfully settled.²⁵ Yet there are several recent examples of recyclability cases being dismissed. Two of these cases, *Swartz* and

¹⁹ See, e.g., Mark Leon Goldberg, *A New Plastics Treaty Is Being Negotiated at the UN: What You Need to Know*, UN DISPATCH (Dec. 18, 2022), <https://perma.cc/4FA8-FUBV>.

²⁰ See, e.g., Press Release, SIMON-KUCHER & PARTNERS, *Recent Study Reveals More Than a Third of Global Consumers Are Willing to Pay More for Sustainability as Demand Grows for Environmentally-Friendly Alternatives*, BUS. WIRE (Oct. 14, 2021), <https://perma.cc/K6S3-LU7V> (discussing a 2021 study that found “[g]lobally, willingness to pay for sustainable products or services is highest in US (42 percent), with these the US also representing the highest average premium (37 percent premium)”).

²¹ See, e.g., Joseph Winters, *Inside the industry push to label your yogurt cup ‘recyclable,’* GRIST (Oct. 13, 2022), <https://perma.cc/4K9F-JNYT>; Laura Sullivan, *How Big Oil Misled The Public Into Believing Plastic Would Be Recycled*, NPR (Sept. 11, 2020), <https://perma.cc/M894-GEGU>.

²² See Press Release, STATE OF CAL. DEP’T OF JUSTICE OFFICE OF THE ATT’Y GEN., *Attorney General Bonta Announces Investigation into Fossil Fuel and Petrochemical Industries for Role in Causing Global Plastics Pollution Crisis* (Apr. 28, 2022), <https://perma.cc/V79H-HTQC>.

²³ See Laura Sullivan, *How Big Oil Misled The Public Into Believing Plastic Would Be Recycled*, NPR (Sept. 11, 2020), <https://perma.cc/M894-GEGU>.

²⁴ See Taylor Telford, *U.S. plastics recycling rate slumps below 6 percent, analysis finds*, WASH. POST (May 4, 2022), <https://perma.cc/L83L-BUBN>.

²⁵ See *Keurig Agrees to Pay \$10 Million to Settle Class Action Over Charges of Misleading Recyclable Claims*, NAT’L LAW REV. (Mar. 1, 2022), <https://perma.cc/47QF-UHVV>.

Curtis, are useful examples of a line of judicial thinking that runs counter to basic consumer protection principles.

In *Swartz et al. v. The Coca-Cola Company, et al.*, a group of consumers along with the Sierra Club alleged that the companies' "100% recyclable" labels on disposable water bottles have a tendency to mislead consumers because the caps and labels are not recyclable, many of the caps and bottles are lost in the recycling process, and domestic recycling facilities lack the capacity to process the vast majority of the recyclable bottles sold in the United States.²⁶

And in *Curtis v. 7-Eleven, Inc.*, an Illinois consumer alleged that categories of products—foam plates and cups, plastic cups, and freezer bags—sold under 7-Eleven's "24/7 Life" brand were in fact not recyclable despite being labeled as such. This included foam plates made of "No. 6 plastics" which "the vast majority of recycling facilities" in the U.S. do not accept and which "no recycling facilities in the Chicago region" accept.²⁷ In addition, the plaintiff alleged that some goods were sold without any identifying plastic resin number, rendering them impossible to sort and process at any recycling facility.²⁸

The court in *Swartz* granted the defendants' motion to dismiss in its entirety in a 2.5-page decision. The court wrote that "no reasonable consumer would understand '100% recyclable' to mean that the entire product will always be recycled."²⁹ The decision went on to assert that "a reasonable consumer would understand that making an object recyclable is just the first step in the process of converting waste into reusable material."³⁰ In essence, the court satisfied itself with an understanding of recyclability that is divorced from the likelihood that the product will in fact be recycled.

In *Curtis*, the court dismissed the claims brought with respect to the products that were labeled with identifying plastic resin numbers but denied the motion to dismiss claims regarding the unlabeled products. The court wrote that "the term 'recyclable' is about the inherent qualities of the product," cited dictionary definitions, and likewise emphasized that "recyclable" meant "capable of being recycled."³¹ The court further found that while it was "unfortunate" that "there [we]ren't any facilities nearby" that recycled No. 6 plastics, it was not deceptive.³²

²⁶ See generally *Swartz*, No. 3:21-CV-04643, Consolidated Am. Compl., ECF No. 74 (N.D. Cal. Mar. 24, 2022).

²⁷ See *Curtis*, No. 21-CV-6079, Compl., ECF No. 1-1 ¶¶ 23, 28 (N.D. Ill. Nov. 12, 2021).

²⁸ See, e.g., *id.* ¶ 32.

²⁹ *Swartz*, 2022 WL 17881771, at *1.

³⁰ *Id.*

³¹ *Curtis*, 2022 WL 4182384 at *13.

³² *Id.* at *14.

III. APPLYING CONSUMER PROTECTION PRINCIPLES TO “RECYCLABLE” REPRESENTATIONS

A review of basic and widely accepted consumer protection legal principles suggests that a different, more holistic view of whether “recyclable” representations could be deemed unfair or deceptive might dictate different outcomes for motions to dismiss recyclability greenwashing cases in the future.

Three major tenets apply. It is important to recall that these principles exist within a body of law that errs on the side of protecting consumers. Often these concepts are dense, making their application to already-complex concepts like recyclability doubly challenging. But that difficulty is precisely why it is crucial to start with a clear understanding that these concepts exist first and foremost to safeguard consumer wellbeing and should be construed in that light.

A. Questions of deception are complex, highly factual, and best left for post-discovery

Several of the courts decided the question of deception at the pleadings stage based on decontextualized readings of the term “recyclable.”³³ Precedent across numerous circuits establishes, however, that the bar for dismissal in consumer protection cases is high, and that the deceptiveness of a claim is generally a factual question not fit for decision on a motion to dismiss.

Courts in the Ninth Circuit have held that “whether a practice is deceptive will usually be a question of fact not appropriate for decision on demurrer or motions to dismiss.”³⁴ In the Seventh Circuit, the “tendency or capacity to mislead or deceive” was similarly found to be a question of fact,³⁵ and “100%” claims have specifically been deemed “a question of fact that cannot be resolved on the pleadings.”³⁶ And as a court in the Second Circuit stated, dismissals of UDAP claims at the pleadings stage “are exceptions to the norm” because “[a]lthough the inquiry into whether a product is materially misleading may be decided as a matter of law, this inquiry is generally a question of fact not suited for resolution at the motion to dismiss stage.”³⁷

³³ See, e.g., *id.* at *13 (“It is not about what happens to the product after it goes into the recycling bin. It is not about the next stage of the recycling process, or the proximity of recycling facilities in the local area, or the economics of the recycling industry. ‘Recyclable’ is a description of a quality that is intrinsic, not extrinsic, to the product.”); see also *id.* at *12 (“When a word ends with the suffix ‘able,’ it conveys an ability—it means that someone or something is able to do something It communicates that something is within the realm of possibility. It means that something can happen.”).

³⁴ *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1017 (9th Cir. 2020) (citations omitted) (internal quotation marks omitted).

³⁵ *Kalwajjys*, 237 F.2d at 656.

³⁶ *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 483 (7th Cir. 2020).

³⁷ *Cooper v. Anheuser-Busch, LLC*, 553 F. Supp. 3d 83, 95–96 (S.D.N.Y. 2021) (internal citations and quotation marks omitted); see also *Hesse v. Godiva Chocolatier, Inc.*, 463 F. Supp. 3d 453, 467 (S.D.N.Y. 2020) (“Dismissal is warranted only in a rare situation where it is impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived.” (citation, internal quotation marks, and internal brackets omitted)).

Courts repeatedly arrive at this conclusion in part because a proper analysis of a claim's deceptiveness to a reasonable consumer necessitates understanding the actual perspective of consumers. Most of us—including judges—are unequipped to draw such conclusions on our own. Rather, “[t]he reasonable consumer test requires looking at the general consuming public or targeted consumers.”³⁸ And indeed, courts of appeals have overturned district dismissals of consumer protection claims where judges offered their own “common sense” interpretations to conclude that “no reasonable consumer” would believe something.³⁹

These appellate decisions underscore the difficulties judges face when interpreting the beliefs of a “reasonable consumer.” Judges may fail to “recognize a sophistication gap between consumers and counterparties, or the incentive firms have to engage in exploitative strategic behavior.”⁴⁰ Further, judges can be prone to assuming “a relatively high degree of attentiveness, forbearance, and critical thinking,”⁴¹ among consumers, often blurring the line between how they think consumers *ought* to behave and actual consumer behavior.

According to a National Consumer Law Center treatise, a representation “may convey more than one reasonable meaning, and if one of those meanings is deceptive, it violates the UDAP statute.”⁴² Thus, even if a court believes that its interpretation is the *most* reasonable one, in many instances, it should allow UDAP claims past the motion to dismiss stage to enable thorough, evidence-backed assessment of other potentially deceptive interpretations.

B. A practice can be deceptive regardless of the literal truth of a particular representation

Even if a label or a representation is true, it can still be found deceptive.⁴³ The guiding question is whether a representation made to a consumer has the *capacity* to deceive in context. In other words, literal truth is not a complete defense since claims are not made in a vacuum. For

³⁸ *Moore*, 966 F.3d at 1018 (citations and internal quotation marks omitted).

³⁹ *See, e.g., Bell*, 982 F.3d at 482 (“‘Common sense’ does not render plaintiffs’ reading unreasonable.”); *see also Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (remanding where “the district court based its decision to grant the motion to dismiss solely on its own review of an example of the packaging”).

⁴⁰ Jason Cohen, *Bringing Down the Average: The Case for a “Less Sophisticated” Reasonableness Standard in the US and EU Consumer Law*, 32 LOY. CONSUMER L. REV. 1, 15 (2019).

⁴¹ *Id.*

⁴² *See* NAT’L CONSUMER LAW CTR., *Unfair and Deceptive Acts and Practices*, Ch. 4.2.13 (10th ed. 2021) (compiling cases supporting this proposition).

⁴³ *See, e.g., Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 761–62 (7th Cir. 2014) (“All of the applicable state consumer protection laws at issue here may be satisfied by proof that a statement is likely to mislead a reasonable consumer, even if the statement is literally true.”); *see also* Debra L. Scammon & Robert N. Mayer, *Environmental Labeling and Advertising Claims: International Action and Policy Issues*, 1 E - EUROPEAN ADVANCES IN CONSUMER RSCH 338–44 (1993) (“even factually true claims may be misleading without the inclusion of additional relevant information”).

example, California laws “prohibit . . . advertising which, although true, is either actually misleading or which has a capacity, likelihood, or tendency to deceive or confuse the public.”⁴⁴

As acknowledged by corporate counsel elsewhere, “the ‘accuracy’ of an environmental claim is evaluated from the average consumer’s point of view. Therefore, even if [a] claim is technically accurate, if a reasonable consumer would interpret the claim to mean something different, and this different interpretation is inaccurate, [one is] liable for deceptive advertising.”⁴⁵

In the context of “recyclable” labeling, whether a particular item can theoretically be recycled is not the essence of the inquiry. Rather, it should be whether the “recyclable” reference, taken in context, has the capacity to deceive. Given the complexity of environmental marketing claims, relying on simple definitions to ascertain literal truth is not only insufficient but essentially a semantic exercise that subverts the purpose of consumer protections.

Guidance from the FTC’s Green Guides and other accepted recyclability definitions is instructive. The Guides state that products should not be marketed as “recyclable” unless they “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.”⁴⁶ The Guides continue, advising marketers that they can only make unqualified claims of recyclability “[w]hen recycling facilities are available to a substantial majority of consumers or communities where the item is sold,” where substantial majority means 60 percent.⁴⁷

Defendants in these cases, and later the courts, focus on the words “can be” or “capable of being.”⁴⁸ In doing so, they suggest that the use of the phrase “recyclable,” as defined by the Guides, is permissible even when a great deal of uncertainty exists as to whether the available programs will actually recycle the product. The court in *Curtis* opined that “[t]he limited number of recycling facilities does not render 7-Eleven’s statement deceptive or misleading.”⁴⁹

Based on the courts’ entirely theoretical understandings of the word “recyclable,” a municipal facility with the proper equipment and no intention to use it would constitute a valid recycling

⁴⁴ See, e.g., *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1173 (Cal. Ct. App. 2018) (citation, internal quotation marks, and internal brackets omitted).

⁴⁵ *Green Marketing*, HOLLAND & HART LLP, <https://perma.cc/95F6-RTCZ>.

⁴⁶ 16 C.F.R. § 260.12(a) (2012).

⁴⁷ *Id.* § 260.12(b).

⁴⁸ See *Curtis*, 2022 WL 4182384 at *13 (“‘Recyclable’ simply means the product is capable of being recycled. It is about product itself, meaning its intrinsic character.”); see also *id.* at *16 (“And here, recyclable...means ‘can be recycled.’”); see also *Swartz*, 2022 WL 17881771, at *1 (“In everyday usage, ‘recyclable’ is an adjective that means capable of being recycled.”).

⁴⁹ *Curtis*, 2022 WL 4182384 at *14.

program because that facility *could* recycle the products if it chose to do so.⁵⁰ It is unclear what practical distinction exists between recycling programs and trash haulers for the courts.

Contrary to the “recyclable” definitions that courts have looked to, basic consumer protection principles demand a consideration not just of truth and falsity but also context, including the practical effects of recycling programs. For instance, the United Nations Environment Programme (“UNEP”) recognizes that “the term ‘recyclable’ is ambiguous and requires consideration of multiple aspects of packaging, as well as the local infrastructure and existence of end markets for recycled material.”⁵¹ The UNEP thus adopts a more comprehensive version of “recyclable” than some courts recently have—one set forth by the Ellen MacArthur Foundation: “A packaging or packaging component is recyclable if its successful post-consumer collection, sorting, and recycling is proven to work in practice and at scale.”⁵²

This definition, with an emphasis on efficacy “in practice and at scale,” turns on the *success* of recycling rather than whether an item is theoretically capable of being recycled. It contemplates the outcomes a consumer might suppose. The definition also aligns with the FTC’s Statement of Basis and Purpose of the Green Guides, which specifies that “[t]o make a non-deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumer or communities have access to facilities that *will actually recycle*, not accept and ultimately discard, the product.”⁵³

Robust regulatory conversation around the meaning of recyclable has existed for decades. In the early 1990s, a task force of state attorneys general advocated that “products should not be promoted as ‘recyclable’ . . . unless the particular item is currently recycled in a significant amount in the state,” and noted that “problems were attributed to the promotion of a product as ‘recyclable’ without regard to the actual recycling rate for that product.”⁵⁴ These are the types of problems the plaintiffs have raised in their recyclability lawsuits.

Taken to its logical extreme, an understanding of “recyclable,” that’s purely rooted in the intrinsic properties of the item would peg the deceptiveness of these claims to the latest advances in

⁵⁰ The court in *Curtis* suggested that recyclability is an “intrinsic” property of the item to be recycled, meaning it has to do with the product’s physical and chemical properties and not the context in which it is sold. *Id.* at *13. However, it is notable that claims regarding products lacking a resin identification code—e.g., “No. 4” or “No. 6” plastics—were allowed to proceed. The presence or absence of such a code does nothing to alter the physical or chemical properties of the product, but it does affect a facility’s knowledge of those properties and, consequently, their ability to recycle the product. This line of reasoning drives home the lack of principled distinction between intrinsic properties and the way that a product is understood by those who must interact with it.

⁵¹ UN ENV’T PROGRAMME, “*Can I Recycle This?*” *A Global Mapping and Assessment of Standards, Labels and Claims on Plastic Packaging*, 4.2.1 (2020).

⁵² *See id.* (citation and internal quotation marks omitted).

⁵³ FED. TRADE COMM’N, *The Green Guides: Statement of Basis and Purpose* 174–75, <https://perma.cc/GD99-EVTV>.

⁵⁴ STATE ATT’YS GEN. TASK FORCE, *The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising* 18 (1990), <https://perma.cc/4JGY-5U9E>.

recycling technology anywhere in the world, rather than what consumers have access to in the places they live. Potential abuse of the term would be limitless, and as the task force of state attorneys general noted, “[i]f only the technical recycling potential of the primary material is assessed, these gratuitous ‘recyclable’ claims could be made for virtually all materials, including plastics, metals, glass and paper.”⁵⁵

Given the broader regulatory context, it is arguable that courts have prematurely dismissed deception suits based on dictionary readings of “recyclable,” without proper consideration of the facts that determine whether a claim is deceptive based on the tendency it has to mislead apart from its literal truthfulness.

Although as the *Curtis* court stated, “[t]he plain meaning of th[e] term [recyclable] is straightforward,”⁵⁶ a more holistic analysis should incorporate consumer *perception* into an assessment of whether “recyclable” representations have the capacity to deceive.

C. The reasonable consumer standard is met where a significant portion of the consuming public could be misled

Some of the dismissals opine on what a reasonable consumer would believe when viewing a recyclability label, generally suggesting that consumers would not interpret “recyclable” to be anything more than a claim about the possibility that the item described *could* be recycled—with one court suggesting that “no reasonable consumer” would interpret “‘100% recyclable’ to mean that the entire product will always be recycled.”⁵⁷

The FTC’s recent call for public comment emphasizes the prominent role that consumer perception plays in determining whether a representation is deceptive. And as noted above, a deceptive claim can include words that “may be literally or technically construed so as not to constitute a misrepresentation.”⁵⁸ To determine whether a claim is deceptive, one must “ascertain the impression that is likely to be created upon the prospective purchaser.”⁵⁹

In many circuits, the reasonable consumer standard that underpins consumer protection law requires that “consumers are likely to be deceived by a representation,”⁶⁰ or that a “significant portion” of general or targeted consumers, acting reasonably, could be misled.⁶¹ The burden on

⁵⁵ *Id.* at 42.

⁵⁶ *Curtis*, 2022 WL 4182384, at * 12.

⁵⁷ *Swartz*, 2022 WL 17881771, at * 1.

⁵⁸ *Kalwajtyś*, 237 F.2d at 656 (citations omitted).

⁵⁹ *Id.* (citation omitted).

⁶⁰ *Hesse*, 463 F. Supp. 3d at 466 (citation omitted).

⁶¹ *See, e.g., Bell*, 982 F.3d at 474-75 (compiling cases).

plaintiffs is not to show that *every* reasonable consumer would be deceived. Rather, plaintiffs must base their allegations on at least one reasonable interpretation of the claim in question.⁶²

Research suggests that a significant portion of consumers exhibit confusion about the term recyclable and could in fact view the label “recyclable” to mean that the product would always or would likely be recycled.

One survey suggests that most consumers mistakenly believe that plastic is endlessly recyclable.⁶³ And the National Consumers League has written that symbols like the green, three-arrow recycle symbol “add[s] to consumer confusion,” and that “the language used on . . . packaging related to recycling or recyclability is often vague, inconsistent, and relatively unhelpful to even savvy consumers.”⁶⁴ More concretely, one article suggests that “85 percent of Americans are somewhat-to-very confident that what they throw in the recycling bin is actually recycled.”⁶⁵ In another survey, where participants were asked to describe what would happen if they were an item in a recycling bin, 32 percent of respondents said “I am turned into a new item,” versus a lower 31 percent who simply said “I am sorted/separated based on the type of product.”⁶⁶ Likewise, consumer research by a group that administers a labeling system for recyclable consumer goods, indicates that a significant portion of consumers believe that “recyclable” means an item will be recycled most of the time, and that 30 percent of consumers surveyed agreed with the claim that “recyclable” meant an item would be recycled 100 percent of the time.⁶⁷ In a separate survey of UK-based consumers, over 20 percent of those surveyed were “very reassured” that the green arrow recycling symbol meant that the product would actually be recycled.⁶⁸

It would thus appear that plaintiffs in recyclability greenwashing cases have based their claims on the plurality views of consumers faced with representations like the ones in question and put forth plausible readings of the term “recyclable.”

⁶² See NAT’L CONSUMER LAW CTR., *Unfair and Deceptive Acts and Practices*, Ch. 4.2.13 (10th ed. 2021) (compiling cases supporting this proposition).

⁶³ See *National Poll: A Survey of American Adults*, CONSUMER ACTION (2019), <https://perma.cc/3XSY-497N>.

⁶⁴ See NAT’L CONSUMERS LEAGUE, *Examining Sustainability, Consumer Choice, and Confusion in Food and Beverage Packaging* 1, 14 (2020), <https://perma.cc/EWN8-3G8B>.

⁶⁵ Suzanne Shelton, *Managing packaging perceptions vs. realities for a truly circular future*, GREEN BIZ (Sept. 2, 2019), <https://perma.cc/SLZ8-XL8E>.

⁶⁶ See Suzanne Shelton, *Americans love recycling, they have no idea how it works, and they think it might be broken*, SHELTON GRP. (Mar. 23, 2022), <https://perma.cc/XUW8-NVML>.

⁶⁷ *How consumers feel about and respond to recycling & How2Recycle: A consumer research summary*, HOW2RECYCLE (July 29, 2022), <https://perma.cc/E5PV-C5CL>.

⁶⁸ *Metal Recycles Forever logo ranks top for clarity with consumers*, CIRCULAR (Oct. 24, 2019), <https://perma.cc/W3HW-382Y>.

The court's determination in *Swartz*, that "no reasonable consumer would understand '100% recyclable' to mean that the entire product will always be recycled,"⁶⁹ compellingly demonstrates the importance of allowing for discovery and in particular, expert testimony, on issues such as consumer perception. Absent from the court's determination was any expert analysis or study to support the court's conclusory assertions of what a reasonable consumer might understand the label "recyclable" to mean. The studies cited suggest the opposite of the court's conclusion. Consumer beliefs may often be surprising, which is why it is important to avoid early, sweeping assumptions that end litigation before more informed analysis can occur.

CONCLUSION

Recyclability greenwashing cases have not disappeared. Multiple plaintiffs recently filed amended complaints. It is important that courts approach the next stage in these and similar cases with a clearer vision of the purpose of consumer protection law and the intent of the FTC's Green Guides. Granting companies limitless ability to label their products in a certain way may lead to increased deception, which would in turn deny consumers the agency not to purchase an item or to find a more sustainable alternative.

Ultimately, consumer protection laws are broad, and purposefully so. Consumer protection standards revolve around whether a statement is misleading or deceptive. Not around black-and-white assessments of truth or falsity. Whether the arguments forwarded by plaintiffs will ultimately win the day is still an open question. But to dismiss consumer protection cases at the pleading stage, disallowing fact-finding and expert discovery, needlessly insulates plastic manufacturers and sellers from accountability at a time when consumers are more invested than ever in making sure their dollars do not accelerate a global environmental crisis.

⁶⁹ *Swartz*, 2022 WL 17881771, at *1.