

# The sad truth about recycling

BY GRACE Y. PARK AND GARY A. PRAGLIN

On its face, plastic recycling seems straightforward. Plastic goes in the recycling bin, and most would assume that ends the issue; the material is processed and returned to use in another form. In other words, recycled. Unfortunately, this is a false assumption. Most plastic cannot be recycled with any efficiency. A careful examination of how courts and the government treat recycling underscores the complexity of the issue.

When you toss a plastic bottle into a recycling bin, where does it go? Astonishingly, in the U.S., nine times out of ten it ends up in the same place as non-recycled items – in a landfill, incinerated, or as pollution. Advancing Sustainable Materials Management: 2018 Fact Sheet, Environmental Protection Agency, at 4 (Dec. 2020). California is marginally better – approximately 15% of single-use plastic is recycled. Senate Bill 343, Office of Senate Floor Analysis (May 20, 2021). Until 2018, California exported most of its plastics out-of-state for recycling. CalRecycle, *International Policies Impacting Markets for Recyclable Materials*, available at <https://calrecycle.ca.gov/Markets/NationalSword/>. Plastic is expensive to collect and sort at recycling facilities. Different kinds of plastics cannot be melted together, and plastic waste is often contaminated with food and other debris. Recycling Plastic is Practically Impossible – and the Problem is Getting Worse, NPR, Oct. 24, 2022. Because it is cheaper, marketers continue to rely on new “virgin” plastic for their products, *Id.*, further

exacerbating the problem.

So what does the “chasing arrows” or ♻️ symbol mean, and how is it regulated? In California, it is unlawful to make an untrue, deceptive, or misleading environmental marketing claim, whether explicit or implied. Cal. Bus. & Profs. Code § 17580.5 (adopting 16 C.F.R. § 260.1 *et seq.*). The way courts and regulators have enforced this law is a mixed bag.

The Federal Trade Commission states that if the “chasing arrows” symbol is placed in an “inconspicuous” location, such as “embed[ing the symbol] in the bottom of the container,” this “would not constitute a recyclable claim” at all and therefore could not be misrepresentative to a consumer. 16 C.F.R. § 260.12. On the other hand, at least one court has held that the marketer can be held liable for *omitting* the “chasing arrows” symbol altogether where the omission results in the failure to identify the type of plastic resin used. See *Curtis v. 7-Eleven*, Case No. 21-CV 6079, 2022 WL 4182384, \*17 (N.D. Ill. Sept. 13, 2022); Cal. Public Resources Code § 18015.

Generally speaking, people “feel good” about recycling. Claims that a product’s packaging is recyclable may lead consumers to purchase one product over another. We trust that claims by manufacturers and marketers regarding recyclability are true, and companies should be held accountable where claims are untrue, deceptive, or misleading.

If a marketer conspicuously uses the



“chasing arrows” symbol next to a phrase like “100% recyclable,” the FTC’s “Green Guides” establish guidelines for labeling. *Swartz v. Coca-Cola Co.*, 21-CV-4643, 2022 WL 17881771, at \*1 (N.D. Cal. Nov. 18, 2022); see *Duchimaza v. Niagra Bottling, LLC*, 21 CIV 6434, 2022 WL 3139898, at \*9 (S.D.N.Y. Aug. 5, 2022); *Curtis v. 7-Eleven*, Case No. 21-CV 6079, 2022 WL 4182384, at \*17 (N.D. Ill. Sept. 13,

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2022). The Green Guides state: "When recycling facilities are available to a substantial majority [or 60 percent] of consumers or communities where the item is sold, marketers can make unqualified recyclable claims." 16 C.F.R. § 260.12. Some courts have declined to hold marketers liable when it appears that recycling *facilities* are generally available in a geographic area, stating that it is not about "the processing capabilities" of recycling facilities, but rather consumers' mere access to them. *Swartz*, 2022 WL 17881771, at \*1-2; *Curtis*, 2022 WL 4182384, at \*13; *Duchimaza*, 2022 WL 3139898, at \*9.

These courts have not considered the Green Guides' warning that, if "[a]n item that is made from recyclable material, but, because of its shape, size, or *some other attribute*, is not accepted in *recycling programs*, [it] should not be marketed as recyclable." 16 C.F.R. § 260.12(d) (emphasis added). In other words, the Green Guides caution marketers to refrain from touting the recyclability of their plastic if other attributes, such as its ability to mix with other types of plastics or its contamination with food particles, makes it incapable of being recycled through a recycling program.

The court in *Smith v. Keurig Green Mountain, Inc.* said it best: "the Green Guides state that if a product is rendered non-recyclable because of its size or components – even if the product's composite materials are recyclable – then labeling the product as recyclable would constitute deceptive marketing." 393 F. Supp. 3d 837, 846 (N.D. Cal. 2019). This is particularly the case since "[m]arketers must ensure that all reasonable

interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make their claims," including "competent and reliable scientific data." 16 C.F.R. § 260.2; Cal. Bus. & Prof. Code § 17580.

While the FTC has sought notice and comment to clarify whether the Green Guides should be "revised to include guidance related to unqualified 'recyclable' claims," 87 Fed. Reg. 77766-01, it is important to note that the guidelines do not limit "recyclability" claims to consumers' general access to recycling facilities. Rather, all attributes of labeled items affecting their acceptance into recycling programs should be analyzed with respect to "recyclability" claims.

America still lacks efficient recycling systems and rules. Sadly, the consumers' desire to recycle is currently not supported by institutional practice. California has enacted legislation encouraging packaging to be biodegradable or compostable by 2032. Cal. Public Resource Code § 41821.5, but we still have a long way to go.

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