NOTE

RECYCLED MISREPRESENTATION: PLASTIC PRODUCTS, CONSUMER PROTECTION LAW & ATTORNEYS GENERAL

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Despite more consumers paying attention to recycling symbols and labels when they purchase plastic products, few plastic products are actually recycled into new commodities. Instead, many "recyclable" plastic products end up incinerated or discarded in landfills. Consumers and environmental groups have relied on research documenting this dysfunction in the U.S. recycling market to bring consumer protection lawsuits against manufacturers, distributors, and retailers that allegedly misrepresented the recyclability of their plastic products. These cases have also implicated the Federal Trade Commission's "Green Guides," which describe the environmental marketing claims that the FTC believes are misleading to consumers. So far, plaintiffs in these cases have attained only limited success in proving their claims or reaching favorable settlements.

This space is ripe for coordinated intervention by state attorneys general. Two state attorneys general have recently filed lawsuits involving recyclability claims, and another has launched an ongoing investigation of the plastics industry. More state attorneys general, who are tasked with protecting their constituents from fraudulent business practices, should also take action against the plastics industry's recyclability misrepresentations.

By surveying the lawsuits brought by consumers and environmental groups under state consumer protection statutes in California, Illinois, Massachusetts, and New York, this Note analyzes the issues and

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opportunities likely to arise in future cases involving recycling symbols and labels. State attorneys general can use lessons learned in past cases to shape future ones. As a case study, the Note demonstrates how the New York Attorney General could structure a viable false advertising claim under state law based on the FTC's guidance on "recyclable" labels. The Note concludes by arguing that such a false advertising suit would be consistent with the New York Attorney General's function as the state's chief legal officer and beneficial for both consumers and the environment.

INTRODUCTION

When you toss a plastic cup in a blue recycling bin, where does it go? You might think that some recycling facility will eventually turn it into a new plastic cup. It's labeled "recyclable" after all. But it's very unlikely for that cup to actually be recycled into a new product. Most often plastic cups (and many similar types of plastic

waste) end up incinerated or discarded in landfills. That cup's "recyclable" label disguises a complex waste management system that has failed to properly process most types of plastic waste. Can you label that cup as "recyclable" if it never makes it to a recycling facility?

Plastic cups, and plastic products of all types, are ubiquitous. Plastic's beneficial qualities—including durability, flexibility, and a relatively low cost of production—have driven its extensive use and substitution for other materials across industries.[1] But the explosive production and consumption of plastics has also contributed to a growing environmental crisis.[2] Scientific research documenting the serious environmental and human health risks of plastic products

[1] *See* Anthony L. Andrady & Mike A. Neal, *Application and Societal Benefits of Plastics*, 364 PHIL. TRANS. R. SOC. 1977, 1980 (2009) (discussing the qualities of plastic that have made it so versatile and ubiquitous); Winston Choi-Schagrin & Hiroko Tabuchi, *Trash or Recycling? Why Plastic Keeps Us Guessing.*, N.Y. TIMES (Apr. 21, 2022), https://www.nytimes.com/interactive/2022/04/21/climate/plastics-recycling-trash-environment.html (reviewing how plastic made many modern inventions possible, such as cellphones, polyester clothing, transistor radios and medical advances); Rebecca Altman, *How Bad Are Plastics, Really?*, ATLANTIC (Jan. 3, 2022), https://www.theatlantic.com/science/archive/2022/01/plastic-history-climate-change/621033 (reviewing how manufacturers designed and marketed disposable plastics to replace paper and glass items in grocery stores, among other purposes); Mary Ellen Ternes, *Plastics: Global Outlook for Multinational Environmental Lawyers*, 35 NAT. RES. & ENV'T 36, 36–37 (2020) ("Synthetic plastic is specifically manufactured to be inert and possess no hazardous properties."). *But see* Andrey Ethan Rubin & Ines Zucker, *Interactions of Microplastics and Organic Compounds in Aquatic Environments: A Case Study of Augmented Joint Toxicity*, 289 CHEMOSPHERE 133212 (2022), https://doi.org/10.1016/j.chemosphere.2021.133212 (modeling the interactions between microplastics and toxic compounds and finding that microplastics can act as a vector to increase human health risk from attendant toxic chemicals); DAVID AZOULAY ET AL., PLASTIC & HEALTH: THE HIDDEN COSTS OF A PLASTIC PLANET 36 (2019) (listing common toxic chemical additives in plastic resins).

[2] *See* Roland Geyer et al., *Production, Use, and Fate of All Plastics Ever Made*, SCI. ADVANCES, July 2017, at 1, 1 (estimating that 8,300 million metric tons of "virgin plastics have been produced" and 6,300 million metric tons of plastic waste has been generated).

and plastic pollution has proliferated.[3] Yet plastic producers[4] continue to manufacture plastic products; some have even expanded their operations.[5] At the same time, the plastics industry has obfuscated its role in creating this environmental problem through lobbying and targeting marketing to consumers.[6] Plastic producers put the

[3] These risks arise from each stage of the lifecycle of plastic products. The lifecycle stages of plastic products include the "extraction and transport of fossil feedstock for plastic," "refining and production of plastic resins and additives," "consumer products and packaging," "toxic releases from plastic waste management," fragmentation and microplastics, and "cascading exposures as plastic degrades" in the environment. AZOULAY ET AL., *supra* note 1, at 1–2 ("At every stage of its lifecycle, plastic poses distinct risks to human health, arising from both exposure to plastic particles themselves and associated chemicals. The majority of people worldwide are exposed at multiple stages in this lifecycle."). *See also id.* at 59 (discussing research on persistent microplastics). Plastics-related greenhouse gas emissions are and will also continue to be significant contributors to overall emissions and climate change. *See* UNITED NATIONS ENV'T PROGRAMME, FROM POLLUTION TO SOLUTION: A GLOBAL ASSESSMENT OF MARINE LITTER AND PLASTIC POLLUTION 15 (2021) (noting that the "greenhouse gas emissions associated with the production, use and disposal of conventional fossil fuel-based plastics is forecast to grow to approximately 2.1 gigatons of carbon dioxide equivalent (GtCO2e) by 2040, or 19 per cent of the global carbon budget."). But "uncertainties and knowledge gaps" about plastic's health impacts, particularly the interactive and synergistic effects of accumulated plastic pollution, still remain. AZOULAY ET AL., *supra* note 1, at 2–3.

[4] This Note uses "plastic producers" and similar formulations to refer generally to players in the market for plastic products, whether at the manufacturing, distribution, or retail levels. Because most plastic pollution can be traced to a set of large, global corporations involved in manufacturing and selling consumer goods (e.g., Coca-Cola, Nestlé, PepsiCo), they have been litigation targets and would likely be defendants in future litigation. *See* GREENPEACE, BRANDED VOL. II: IDENTIFYING THE WORLD'S TOP CORPORATE PLASTIC POLLUTERS 22–25 (2019), https://brandaudit.breakfreefromplastic.org/wp-content/uploads/2022/11/branded-2019.pdf [hereinafter GREENPEACE, BRANDED VOL. II].

[5] *See* Geyer et al., *supra* note 2 (estimating that approximately 12,000 million metric tons of plastic waste will end up in a landfill or the natural environment by 2050); *infra* note 38 and accompanying text (discussing recent "virgin" plastic boom).

[6] *See* Sharon Lerner, *Waste Only: How the Plastics Industry is Fighting to Keep Polluting the World*, INTERCEPT (July 20, 2019), https://theintercept.com/2019/07/20/plastics-industry-plastic-recycling (discussing the plastics industry's lobbying against legislation imposing plastic bag bans and fees, as well as producers' campaigns to project a sustainable image). *See also* CTR. FOR INT'L ENV'T L., FUELING PLASTICS: PLASTIC INDUSTRY AWARENESS OF THE OCEAN PLASTICS PROBLEM 1, 6 (2017), https://www.ciel.org/wp-

onus on the individual: Consumers have failed to properly recycle plastic products labeled as "recyclable," and therefore they are primarily responsible for growing plastic pollution.[7]

In response, consumers have increasingly valued sustainability when choosing which products to buy.[8] Many consumers rely on the

content/uploads/2017/09/Fueling-Plastics-Plastic-Industry-Awareness-of-the-Ocean-Plastics-Problem.pdf; Laura Sullivan, *How Big Oil Misled the Public Into Believing Plastic Would Be Recycled*, NPR (Sept. 11, 2020), https://www.npr.org/2020/09/11/897692090/how-big-oil-misled-the-public-into-believing-plastic-would-be-recycled.

[7] *See* Michael Corkery, *As Costs Skyrocket, More U.S. Cities Stop Recycling*, N.Y. TIMES (Mar. 16, 2019), https://www.nytimes.com/2019/03/16/business/local-recycling-costs.html. *See also* Finis Dunaway, *The 'Crying Indian' Ad That Fooled the Environmental Movement*, CHI. TRIBUNE (Nov. 21, 2017), https://www.chicagotribune.com/opinion/commentary/ct-perspec-indian-crying-environment-ads-pollution-1123-20171113-story.html (describing an anti-litter ad in 1971 where an "Indian"—really an Italian-American actor—tears up as he sees drivers throw a bag of trash on the ground).

[8] *See Ninety-one Percent of U.S. Consumers Consider the Amount of Plastic Used in a Product When Making Purchasing Decisions*, BUSINESSWIRE (Sept. 29, 2022, 6:05 AM), https://www.businesswire.com/news/home/20220929005296/en/Ninety-one-Percent-of-U.S.-Consumers-Consider-the-Amount-of-Plastic-Used-in-a-Product-When-Making-Purchase-Decisions (reviewing a survey of 1,000 random U.S. residents finding that (1) "[n]inety-one percent of [surveyed] Americans consider the amount of plastic used in a product when making purchasing conditions," (2) that "45% believe producers . . . are most responsible for addressing and solving that plastic pollution issue," and (3) that 53% of respondents were "at least moderately willing to pay more for products that use no plastic, significantly less plastic or non-polluting plastic alternatives"); ECONOMIST INTEL. UNIT, AN ECO-WAKENING: MEASURING GLOBAL AWARENESS, ENGAGEMENT AND ACTION FOR NATURE 22 (2020), https://impact.economist.com/sustainability/ecosystems-resources/an-eco-wakening-measuring-global-awareness-engagement-and-action-for-nature ("The popularity of Google searches for sustainable goods increased by 71% between 2016 and 2020."). Survey evidence has also shown that many—but not all—consumers prefer to purchase food products from companies that they perceive as more sustainable and transparent and it has indicated that consumers would refuse to buy food products from a company whose actions do not align with their values, particularly on environmental issues. *See* Cathy Siegner, *Brand Transparency and Issue Advocacy Driving Consumer Choice*, FOODDIVE (Nov. 28, 2017), https://www.fooddive.com/news/brand-transparency-and-issue-advocacy-driving-consumer-choice/511505; Ashley Nickle, *Branding Survey Shows Advocacy Matters*, PACKER (Nov. 17, 2017), https://www.thepacker.com/news/retail/branding-survey-shows-advocacy-matters ("[N]early 60% of consumers believe brands should advocate for shoppers and their interests, with 24% reporting they boycotted a produce brand when its actions did not mesh with their values . . . . [T]he

recycling symbol and "recyclable" labels when they purchase plastic products; they think that they will ultimately recycle those products and lessen their individual contributions to pollution.[9] But few plastic products are actually recycled into new commodities today,[10] and many "recyclable" plastic products instead end up incinerated or degrading in landfills.[11] Some consumers and non-government environmental groups have taken action against plastic producers for misrepresenting the recyclability of their products.[12] Only two attorneys general, Connecticut Attorney General William Tong and Minnesota Attorney General Keith Ellison, have recently begun to litigate in this area.[13]

area with most interest was environmental issues, with 71% stating produce brands should advocate in that arena.").

[9] *See PTF: Misconceptions*, ECOLOGY CTR., https://ecologycenter.org/plastics/ptf/report9 (last visited Apr. 24, 2022) (reviewing a survey conducted in Saint Paul, Minnesota that found 7 out of 10 people believe the chasing arrows recycling symbol meant the plastic product was recyclable). *See also* Leila Abboud, *Can We Break Our Addiction to Plastic? The Future of Packaging*, FIN. TIMES (Oct. 31, 2019), https://www.ft.com/content/27cf9734-faa7-11e9-98fd-4d6c20050229 (discussing consumer attention to the negative environmental impacts of plastic packaging and interest in reusable and more sustainable alternatives). Other common labels include "environmentally friendly" and "biodegradable." *Id*.

[10] *See infra* Part I.C (discussing Greenpeace report and other research). *See, e.g.*, Sally Goldenberg & Danielle Muoio Dunn, *Wasted Potential: The Consequence of New York City's Recycling Failure*, POLITICO (Jan. 5, 2020), https://www.politico.com/states/new-york/albany/story/2020/01/05/wasted-potential-the-consequences-of-new-york-citys-recycling-failure-1243578 (discussing New York City's 18% residential recycling rate, one of the lowest big-city recycling rates in the country).

[11] *See infra* notes 47–51 and accompanying text (reviewing survey results finding that products containing the most common plastic resins are typically not collected, processed, and reused to make new plastic products).

[12] *See infra* Part II (reviewing major pending and recent cases). *See, e.g.*, Duchimaza v. Niagara Bottling, LLC*,* 619 F. Supp. 3d 395 (S.D.N.Y. 2022); Greenpeace, Inc. v. Walmart Inc., No. 21-cv-00754-MMC, 2021 WL 4267536 (N.D. Cal. Sept. 20, 2021); Smith v. Keurig Green Mountain, Inc., No. 18-cv-06690-HSG, 2020 WL 5630051 (N.D. Cal. Sept. 21, 2020); Downing v. Keurig Green Mountain, Inc., No. 20-cv-11673-IT, 2021 WL 2403811 (D. Mass. June 11, 2021).

[13] *See infra* Part III.C (discussing both Connecticut's case against Reynolds Consumer Products—filed on June 13, 2022—related to recyclability representations on their "Hefty" brand trash bags and Minnesota's case against Reynolds and Walmart—filed on June 6, 2023—related to their "recycling" labels on their branded trash bags). California Attorney General Rob Bonta announced an

State attorneys general, who are tasked with protecting consumers from fraudulent business practices, are naturally well-equipped to take action against plastic producers for false or misleading recyclability representations. The New York Attorney General has particularly broad powers to investigate and stop false advertising under New York's General Business Law (GBL). Her office can and should pursue consumer protection claims against plastic producers for engaging in false advertising related to the recyclability of their products. In the absence of comprehensive federal legislation regulating plastic production, consumption or recyclability,[14] the New York Attorney General's action on this issue could pressure plastic producers in the state to change what types of plastics they produce or, at the very least, disclose to consumers the true environmental consequences of their products. Those changes would yield significant benefits for public trust, public health, and the environment.

This Note proceeds in three parts. Part I briefly summarizes the main types of recyclable plastic products and the universe of industry players who could be potential defendants. It then reviews research documenting new recycling market dynamics that have

investigation into the plastics industry in April 2022. *See infra* Part III.C. Just prior to the publication of this Note, the New York Attorney General Letitia James filed a lawsuit against PepsiCo, Inc., Frito-Lay, Inc., and Frito-Lay North America, Inc. related to the defendants' plastic products. New York State alleges that the defendants endangered public health and the environment in and around the Buffalo River by failing to warn consumers about the risks of their single-use plastics and by misleading the public about their efforts to address widespread plastic pollution. The State's complaint includes four causes of action: (1) public nuisance; (2) strict products liability, failure to warn; (3) violations of GBL section 349; and (4) violations of Executive Law section 63(12), which provides remedies for repeated fraudulent or illegal acts. Complaint ¶¶ 10, 101–18, People *ex rel.* James v. PepsiCo, Inc., No. 814682/2023 (N.Y. Sup. Ct. Nov. 15, 2023). While this Note does not analyze New York's recent lawsuit in depth, the Note's argument—especially the litigation case study in Part III—is relevant to the GBL cause of action.

[14] Cities and states have taken the lead in banning certain plastic products—such as plastic bags and Styrofoam products—but legislation at the federal level has been limited in scope. *See* NAT. RES. DEF. COUNCIL, PLASTIC PERIL: THE WIDESPREAD AND DEVASTATING IMPACTS OF PLASTIC POLLUTION ON OUR OCEANS 4 (2020), https://www.nrdc.org/sites/default/files/plastic-peril-oceans-pollution-fs.pdf (reviewing government actions taken to reduce plastic pollution, including the Microbead-Free Waters Act of 2015, 21 U.S.C. § 331(ddd), a federal prohibition on the production and distribution of cosmetics containing plastic microbeads).

rendered many types of plastic products not recyclable. Part I also introduces the Federal Trade Commission's (FTC's) "Green Guides," which explain what should be labeled as "recyclable" under section 5 of the Federal Trade Commission Act (FTCA).[15] Part II reviews recent and pending consumer protection cases brought against plastic producers and examines the results of several cases in which consumer plaintiffs have relied on the Green Guides to varying levels of success. Part III discusses the elements of New York State's prohibition on false advertising, GBL section 350. Part III then argues that plastic producers' recyclability representations could satisfy all elements of a section 350 violation for certain types of products. The Note concludes by discussing possible benefits of action by the New York Attorney General on recycling claims.

I. PLASTIC PRODUCTS & RECYCLABILITY REPRESENTATIONS

Understanding the type of recyclable plastic products, the entities involved in their production, and the operational dynamics of the U.S. waste management industry will be crucial for the New York Attorney General—or any attorney general's office—to construct a targeted false advertising claim. Recent research documenting the declining recyclability of many plastic products would also be critical to substantiating the Attorney General's case. Finally, the FTC's Green Guides provide the mechanism for translating changes in plastic product recyclability into a legal claim. The following subsections discuss each of these key elements and how they relate to one another.

A. *Types of Plastic Products*

"Plastics" is an umbrella term for a "group of materials, either synthetic or naturally occurring, that may be shaped when soft" and then retain that given shape after they harden.[16] As summarized in Table 1, plastic resins are synthetic polymers that are often incorporated into common consumer products. Resins include polyethylene (used in beverage bottles and plastic bags); polystyrene (used to make Styrofoam cups); polypropylene (used for fibers and bottles);

[15] *See* 15 U.S.C. § 45; *infra* Part I.D.

[16] *Science of Plastics*, SCI. HIST. INST., https://www.sciencehistory.org/science-of-plastics (last visited Apr. 3, 2022). Naturally occurring plastics, in contrast, include cellulose, amber, tortoiseshell, and tar. *See id*.

polyvinyl chloride (used for vinyl, bottles, and drain pipe); and polytetrafluoroethylene, or Teflon (used for nonstick surfaces).[17] Each plastic resin type has a designated recycling code, numbered from #1 to #7.[18] Because many polymers used in plastic resins are hydrocarbons, fossil fuel producers often supply the raw materials (petroleum, natural gas liquids, ethane) for petrochemical plants to manufacture plastic resins.[19]

Plastics newly manufactured from fossil fuels are called "virgin" plastics, while those that are "recycled" are made from recovered scrap or waste plastics that have been reprocessed into useful products.[20] But "recycled" products can be lower quality or subject to less demanding uses than the products used to manufacture them.[21] For example, "primary" recycling can turn used plastic bottles into new plastic bottles of similar quality, but "secondary" recycling takes used plastic packaging and produces new flooring tiles.[22] Other recycling processes take plastic waste and use it to

[17] *See id*.

[18] *See id*. *See also* Table 1.

[19] *See* SCI. HIST. INST., *supra* note 16 ("[M]any polymers are hydrocarbons that contain only carbon and hydrogen . . . [but] polymers may also contain oxygen, chlorine, fluorine, nitrogen, silicon, phosphorus, and sulfur."). *See also* CTR. FOR INT'L ENV'T L., FUELING PLASTICS: FOSSILS, PLASTICS, & PETROCHEMICAL FEEDSTOCKS 1 (2017), https://www.ciel.org/wp-content/uploads/2017/09/Fueling-Plastics-Fossils-Plastics-Petrochemical-Feedstocks.pdf; *infra* note 26 and accompanying text (reviewing top producers of plastic polymers for plastic products).

[20] *See* ELLEN MACARTHUR FOUND., WORLD ECON. F. & MCKINSEY, THE NEW PLASTICS ECONOMY: RETHINKING THE FUTURE OF PLASTICS 17 (2016), https://www.ellenmacarthurfoundation.org/the-new-plastics-economy-rethinking-the-future-of-plastics; Adrian Merrington, *Recycling of Plastics*, *in* APPLIED PLASTICS ENGINEERING HANDBOOK 167, 169 (Myer Kutz ed., 2d ed. 2017), https://doi.org/10.1016/B978-0-323-39040-8.00009-2.

[21] *See* Merrington, *supra* note 20. In addition, recent research has documented how the toxicity risks of recycled plastic prohibit plastic used in consumer products from being recycled into post-consumer food-grade packaging. *See* STINA, ASSESSING THE STATE OF FOOD GRADE RECYCLED RESIN IN CANADA & THE UNITED STATES 9 (2021), http://www.plasticsmarkets.org/jsfcode/upload/wd_492/20211201120602_9_jsfwd_492_q2_1.pdf.

[22] *See* Merrington, *supra* note 20 ("An example of primary recycling is where PET[E] recovered from postconsumer bottles is used in the production of new bottles . . . . An example of secondary recycling is in the production of flooring tiles from mixed polyolefins.").

create energy through chemical reactions, rather than to produce new products.[23] Unlike in "mechanical" recycling, where plastic products are washed, shredded and pelletized, and the pellets are pressed into new plastic resins, "chemical recycling" deploys high heat and chemical reactions to generate chemical byproducts, some recycled plastics, and energy from burning the plastic as fuel.[24]

Table 1: Recycling Codes by Plastic Resin Type[25]

[23] *See id*. But many dispute that these processes qualify as "recycling" because they rely on incinerating plastics for fuel, which is just another form of fossil fuel energy. *See, e.g.*, Veena Singla, *"Chemical Recycling": A Summer of Disillusionment*, NAT. RES. DEF. COUNCIL (Dec. 21, 2021), https://www.nrdc.org/experts/veena-singla/chemical-recycling-summer-disillusionment.

[24] *See* Singla, *supra* note 23 (reviewing processes used for "chemical recycling," including pyrolysis, gasification, depolymerization, and solvent-based processes, as well as the significant toxic emissions from these processes due to chemical additives to plastics designed to enhance their materials properties). EPA is currently considering whether to modify and increase regulations on facilities deploying chemical recycling processes. *See* E.A. Crunden, *'Failure' or Solution? EPA Weighs Plastics Recycling Plan*, GREENWIRE (Feb. 28, 2022), https://www.eenews.net/articles/failure-or-solution-epa-weighs-plastics-recycling-plan.

[25] JOHN HOCEVAR, GREENPEACE, CIRCULAR CLAIMS FALL FLAT: COMPREHENSIVE U.S. SURVEY OF PLASTICS RECYCLABILITY 3 (2020), https://www.greenpeace.org/usa/research/report-circular-claims-fall-flat.

B. *Industry Players*

There are numerous companies involved in the lifecycle of plastic products, which includes production, distribution, recycling and/or disposal. Large oil and gas producers, like ExxonMobil and Dow Chemical, are the biggest sources of polymers used in manufacturing single-use plastic products.[26] Plastic "converters," like Novolex, Berry Global, and Amcor, manufacture and occasionally distribute final plastic products, such as food packaging, plastic film, and disposable plastic utensils.[27] Retailers and distributors, like PepsiCo, Unilever, and Walmart, transport and sell these products to consumers.[28] Companies are also engaged at multiple steps in the process. For example, Coca-Cola invests in and partners with local bottling operations around the world, and then it sells bottled beverages to consumer-facing retailers or directly to consumers.[29] These major companies together play a significant role in bringing plastic products to consumers. In addition, specialized recycling operations,[30] private waste transporters and landfill owners (like Waste

[26] *See* MINDEROO FOUND., PLASTIC WASTE MAKERS INDEX 12 (2023), https://cdn.minderoo.org/content/uploads/2023/02/04205527/Plastic-Waste-Makers-Index-2023.pdf

[27] *See* ALICE MAH, PLASTIC UNLIMITED: HOW CORPORATIONS ARE FUELLING THE ECOLOGICAL CRISIS AND WHAT WE CAN DO ABOUT IT 16 (2022) (describing plastics converters, which sit "[i]n the middle of the plastics value chain, sandwiched between the consumer goods giants and the plastics producers"); John Kalkowski, *2019 Top 25 Converters: Scaling the Peaks*, FLEXIBLE PACKAGING (July 8, 2019), https://www.packagingstrategies.com/articles/101707-top-25-converters-scaling-the-peaks (reviewing the operations of large U.S. converters).

[28] *See* GREENPEACE, BRANDED VOL. II, *supra* note 4, at 24–25 (gathering survey data on the most common brands represented in post-consumer plastic waste); Greenpeace, Inc. v. Walmart Inc., No. 21-cv-00754-MMC, 2021 WL 4267536, at *1 (N.D. Cal. Sept. 20, 2021) (discussing Greenpeace's allegations that Walmart's "private label brands" products are false and misleading to the consumer).

[29] *See* Class Action Complaint ¶¶ 22–26, Swartz v. Coca-Cola Co., No. 21-cv-04643 (N.D. Cal. June 16, 2021) [hereinafter *Swartz* Class Action Complaint]; Complaint ¶¶ 22–26, Sierra Club v. Coca-Cola Co., No. 21-cv-04644 (N.D. Cal. June 16, 2021) [hereinafter *Sierra Club* Complaint] (describing Coca-Cola's plastic operations); *The Coca-Cola System*, THE COCA-COLA COMPANY, https://www.coca-colacompany.com/about-us/coca-cola-system (explaining Coca-Cola's system of investing in and setting up third-party bottling facilities).

[30] *See* Singla, *supra* note 23 (discussing Agilyx, a company that runs a "chemical recycling" plant). *See also infra* Part II.C (discussing TerraCycle, Inc.'s operations as a private recycling company).

Management), and local governments (where taxes on residents pay for recycling services) are all involved with handling plastic products after consumers have used them.[31] Any litigation concerning the recyclability of plastic products could implicate all these players, but thus far the largest plastic product manufacturers, distributors, and retailers have been the targets of litigation.[32] They would also be likely targets for future litigation in New York.

C. *Debunking the Claim That Most Plastic Products Are Easily Recyclable*

The plastic recycling system in the United States—and around the world—is staggeringly dysfunctional. Recent market dynamics have further reduced the rate at which many common consumer plastic products are actually recycled into new products. Only about nine percent of the 8.3 billion metric tons of virgin plastic ever produced globally has been recycled, with seventy-nine percent of those plastic tons accumulating in landfills or in the natural environment.[33] As of 2015, the United States recycled just over nine percent of its plastic waste, but that figure has further decreased in recent years as recycling costs have increased and international buyers of U.S. plastic products have imposed restrictions or moratoria on purchases.[34] In 2021, environmental organizations estimated the rate of

[31] *See* Corkery, *supra* note 7. Companies like Waste Management are often involved in collecting and hauling waste, recycling, and running landfills. *See id*.

[32] *See* discussion *infra* Part II.

[33] *See* Geyer et al., *supra* note 2. *See also* U.N. ENV'T PROGRAMME, THE STATE OF PLASTICS: WORLD ENVIRONMENT DAY OUTLOOK 4–5 (2018), https://wedocs.unep.org/bitstream/handle/20.500.11822/25513/state_plastics_WED.pdf?sequence=1&isAllowed=y. In contrast, paper recycling, for example, has been very successful; the annual rate of U.S. post-consumer paper recycling has increased from 21.3% in 1980 to 68.2% in 2018. *See* LAST BEACH CLEANUP & BEYOND PLASTICS, THE REAL TRUTH ABOUT THE U.S. PLASTIC RECYCLING RATE 5 (2022), https://static1.squarespace.com/static/5eda91260bbb7e7a4bf528d8/t/62b2238152acae761414d698/1655841666913/The-Real-Truth-about-the-US-Plastic-Recycling-Rate-2021-Facts-and-Figures-_5-4-22.pdf.

[34] *See* Lerner, *supra* note 6 (noting decline in U.S. recycling rate since 2015 and flagging China's "National Sword policy"); Corkery, *supra* note 7 (discussing recent restrictions that Thailand and India have imposed on U.S. companies as part of purchasing their waste and, in 2018, China's decision to stop buying recyclable materials from the United States as part of its National Sword policy); HOCEVAR,

U.S. plastic recycling to be between five and six percent.[35] U.S. municipalities that provide recycling services have either raised taxes to cover increased recycling costs or suspended their recycling programs altogether because the international markets for many plastic products are increasingly restricted.[36] Large waste management companies and landfill owners, such as Waste Management, can still cover their operating costs and have reaped significant profits from their recycling activities—but the actual volume of materials recycled has still suffered.[37] In addition, relatively cheap crude oil and natural gas supplies have driven a recent boom in high-quality virgin plastic products that are cheaper than recycled options; this shift has further exacerbated the U.S. recycling market's financial problems.[38]

supra note 25, at 6 (discussing how China's Operation National Sword followed earlier restrictions on imports of certain plastic products beginning in 2013). U.S. exports of plastic waste that were "previously counted as 'recycled'" have also decreased due to increased limits on plastic imports "set by countries under the Basel Convention Plastic Waste Amendments," which went into effect on January 1, 2021. LAST BEACH CLEANUP & BEYOND PLASTICS, *supra* note 33, at 3. *See also Basel Convention Plastic Waste Amendments*, U.N. ENV'T PROGRAMME: BASEL CONVENTION, http://www.basel.int/Implementation/ Plasticwaste/Amendments/Overview/tabid/8426/Default.aspx (last visited May 12, 2022). The United States did not ratify those amendments. *See Amendments to Annexes II, VIII and IX to the Basel Convention*, U.N. ENV'T PROGRAMME: BASEL CONVENTION, http://www.basel.int/Countries/StatusofRatifications/PlasticWasteamendments/tabid/8377/Default.aspx (last visited May 12, 2022) (listing signatories to the amendments).

[35] *See* LAST BEACH CLEANUP & BEYOND PLASTICS, *supra* note 33, at 2. EPA hasn't published updates to its data since releasing 2018 estimates in 2020. *See id*. But The Last Beach Cleanup and Beyond Plastics compiled their 2021 estimates using data from the National Academies of Science, Engineering & Medicine; latest U.S. trade data on exports; and recycling numbers published by the waste industry. *See id*. at 6. Because some plastic waste collected under the pretense of recycling is actually incinerated, the "true plastic recycling rate may be even lower." *Id.* at 2.

[36] *See* Corkery, *supra* note 7 ("While there remains a viable market in the United States for scrap like soda bottles and cardboard, it is not large enough to soak up all of the plastics and paper that Americans try to recycle. The recycling companies say they cannot depend on selling used plastic and paper at prices that cover their processing costs, so they are asking municipalities to pay significantly more for their recycling services.").

[37] *See id*.; Lerner, *supra* note 6 (noting decline in U.S. recycling rate since 2015).

[38] *See* HOCEVAR, *supra* note 25, at 7.

These market dynamics have negatively impacted the recyclability of many plastic consumer products. Based on data from the Environmental Protection Agency (EPA), the most common resins in plastic products are LDPE #4 (24.1 percent), PP #5 (22.8 percent), HDPE #2 (17.7 percent), and PETE #1 (14.8 percent).[39] EPA documented as early as 2018 that, while PETE #1 and HDPE #2 plastic products are recycled at rates above the average for all plastic products, plastics PVC #3, LDPE #4, PP #5, and PS #6 are recycled at low or negligible amounts compared to all plastic waste generated in the United States.[40] Environmental groups have further substantiated these developments and incorporated more recent data.

For example, Greenpeace released a major report in early 2020, *Circular Claims Fall Flat*, that surveyed the U.S. plastic product waste collection, sortation, and reprocessing systems to determine whether recyclability claims on consumer products were accurate.[41] Based on their data and federal guidance on what "recyclable" labels are misleading (which Part I.D discusses), Greenpeace found that companies putting "recyclable" symbols or labels on many of their products are potentially liable for misrepresenting those products and deceiving consumers. Greenpeace then updated its survey and reaffirmed these conclusions in a 2022 follow-up report.[42]

[39] *See* EPA, ADVANCING SUSTAINABLE MATERIALS MANAGEMENT: 2018 TABLES AND FIGURES 11 tbl.8 (2020), https://www.epa.gov/sites/default/files/2021-01/documents/2018_tables_and_figures_dec_2020_fnl_508.pdf (presenting data in Table 8 on plastic waste generated by resin type, in thousands of tons). The author calculated these percentages from Table 8 by dividing the "Generation" figures for each resin by "Total Plastics in MSW." *See id*.

[40] *See id*. (showing in Table 8 the total amount of plastics recycled by resin type as a percentage of all plastics generated in municipal waste streams (MSWs)). EPA calculated that, as a percentage of all plastic waste in MSWs, 8.7% of plastic products (containing any resin types) were recycled. Products containing PETE #1 and HDPE #2 were recycled at 18.5% and 8.9%, respectively, of generated plastic waste. Products containing PVC #3, LDPE #4, PP #5, and PS #6 were all recycled at relatively lower (4.3% for LDPE #4) or near-zero rates (all other resins). *See id*.

[41] *See* HOCEVAR, *supra* note 25, at 7. Greenpeace relied on (1) lists of the types of plastic products accepted in the curbside recycling bins of the 367 U.S residential material recovery facilities, as posted by The Last Beach Cleanup and the Recycling Partnership; and (2) EPA data on the reprocessing capacity of facilities that recycle plastic products. *See id*. at 7, 18–20. The surveys were conducted in 2019 and verified in 2020. *See id*. at 18.

[42] *See* GREENPEACE, CIRCULAR CLAIMS FALL FLAT AGAIN (2022), https://www.greenpeace.org/usa/reports/circular-claims-fall-flat-again.

Consumer and environmental groups have taken notice and brought litigation based on these developments, as Part II discusses. Greenpeace utilized guidelines from the FTC concerning which plastic products should accurately be labeled as "recyclable"[43] and determined that many types of plastic products are not economically and functionally recyclable in today's markets, as Table 2 summarizes. Greenpeace's research found that two specific categories of plastic products can accurately be labeled as "recyclable" based on current recycling facility policies and capacities. PETE #1 and HDPE #2 bottles and jugs—such as plastic water bottles, milk jugs, and shampoo containers—generally comply with the FTC guidelines and are recyclable.[44] A majority of the U.S. population has access to municipal services that collect the bottles and jugs, U.S. material recovery facilities (MRFs) accept them, and plastic reprocessing facilities then economically recycle the bottles and jugs into new plastic products.[45]

But PETE #1 and HDPE #2 products of other types, such as plastic clamshells or trays, are not accurately labeled as recyclable because the current waste management system in the United States is not able to collect and recycle them consistent with the Green Guides.[46] In fact, plastic resins #3 through #7, when used in many different plastic products and labeled as recyclable, are generally labeled inaccurately for the same reason.[47] Those resins are included in single-use plastic food service items (cutlery, straws, stirrers, wrappers, etc.), plastic films, Styrofoam containers, and coffee

[43] *See infra* Part I.D (reviewing the legal status and content of the FTC's Green Guides).

[44] *See* Table 1; GREENPEACE, *supra* note 42, at 10 (including polyethylene terephthalate (PETE) and high-density polyethylene (HDPE)). The relevance of the FTC Green Guides is explained in detail in Part I.D and Part III.B.2.

[45] *See* GREENPEACE, *supra* note 42, at 10, 27–28.

[46] *See id*. at 2, 9, 11 (applying to PETE #1 and HDPE #2 *not* used in bottles or jugs, e.g. cookie trays, salad domes (PETE #1) or freezer bags (HDPE #2)—all falling within the category of *thermoforms*).

[47] *See* HOCEVAR, *supra* note 25, at 3–4, 7 ("Current viable markets in the U.S. only exist for PETE #1 and HDPE #2 plastic bottles and jugs. China was the primary destination for other types of plastic waste and there is minimal demand and reprocessing capacity for them in the U.S."); GREENPEACE, *supra* note 42, at 10–11 (reaffirming that plastics #3 to #7 are generally not available in the quantities necessary to justify investments in mechanical recycling).

pods, as examples.[48] Of that group of products, tubs and containers made from PP #5 are most accepted by U.S. MRFs, but only twenty-nine percent of the total U.S. population has access to the collection of PP #5 tubs and containers.[49] Moreover, an MRF's acceptance of a PP #5 tub or container does not guarantee that the product will be recycled into a new plastic product—as the very limited domestic reprocessing capacity for PP #5 post-consumer waste illustrates.[50] Instead, PP #5 tubs and containers, like most other plastic products, are collected and then incinerated or deposited in landfills.[51]

Finally, plastic recycling conditions are unlikely to improve in the near future because of the decrease in the international demand for U.S. recyclables and increase in domestic virgin plastic production.[52] For example, the rates at which MRFs accepted plastic products decreased for all plastic types other than PETE #1 and HDPE #2 in the two years between Greenpeace's comprehensive surveys.[53]

D. *The Federal Trade Commission's "Green Guides"*

At the national level, under the FTCA, the FTC regulates claims and labels relating to the environmental benefits of products.[54] The FTC's "Green Guides" set forth the Commission's "views about environmental marketing claims" and provide standards and examples to help marketers avoid making unfair or deceptive environmental claims under section 5 of the FTCA.[55] The Green

[48] *See* Table 1; HOCEVAR, *supra* note 25, at 3–4 (including polyvinyl chloride (PVC), low-density polyethylene (LDPE), polypropylene (PP), polystyrene (PS) and other types of plastic resins); GREENPEACE, *supra* note 42, at 11 (summarizing that single-use plastic food service items incorporate plastic resins of all types).

[49] *See* GREENPEACE, *supra* note 42, at 10.

[50] *See id*. at 10–11.

[51] *See* HOCEVAR, *supra* note 25, at 4; GREENPEACE, *supra* note 42, at 10.

[52] *See* HOCEVAR, *supra* note 25. *See also supra* notes 34–36 and accompanying text.

[53] *See* GREENPEACE, *supra* note 42, at 9; Table 1.

[54] *See* 15 U.S.C. §§ 41–58. The FTCA states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful," and it empowers the FTC to commence proceedings "in the public interest" against entities using unlawful, unfair, or deceptive acts or practices. 15 U.S.C. § 45.

[55] *See* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.12(a) (2020); HOCEVAR, *supra* note 25, at 15. *See also* Matthew A. Karmel,

Guides are not agency rules, but they identify the types of claims that the FTC may find are deceptive under the FTCA.[56] Because the FTC Green Guides include guidance on what recyclability representations comport with the FTC's understanding of the FTCA, and many states have incorporated the Green Guides into their laws or regulations, the Guides provide a useful rubric for evaluating whether plastic producers' advertising and labeling of their products are "misleading" to consumers.

First, the Green Guides contain standards and examples to explain what constitutes unfair or deceptive marketing related to recyclability. The most crucial piece of the FTC's guidelines for labeling a product as "recyclable" is that the plastic product is actually used to make another plastic product. Under the Green Guides, a "product or package should not be marketed as recyclable unless it 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."[57] Representing that a product is "recyclable" when it cannot be recycled under *established* systems of collection, separation, and recovery is deceptive.[58] As an example, the FTC notes that a container burned in incinerator

Deceptive Environmental Marketing? Recent Challenges to Advertisements for "Recyclable" and "Compostable" Coffee Pods, RIKER DANZIG ENV'T L. BLOG (July 23, 2019), https://riker.com/environmental-law/deceptive-environmental-marketing-recent-challenges-to-advertisements-for-recyclable-and-compostable-coffee-pods/. The Green Guides apply to "environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means." 16 C.F.R. § 260.1(c) (2023). The Green Guides also provide guidance on how producers may use "recycled content" in a non-misleading way, 16 C.F.R. § 260.13, which mirrors the guidance for using "recycled" as a label on products, 16 C.F.R. § 260.12.

[56] *See FTC Issues Revised "Green Guides:" Will Help Marketers Avoid Misleading Environmental Claims*, FED. TRADE COMM'N (Oct. 1, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/10/ftc-issues-revised-green-guides ("The Green Guides are not agency rules or regulations. Instead, they describe the types of environmental claims the FTC may or may not find deceptive under Section 5 of the FTC Act.").

[57] 16 C.F.R. § 260.12(a). Furthermore, the FTC may seek enforcement actions against claims, acts, and practices it deems deceptive or unfair based on these standards; successful enforcement actions may result in prohibitions on advertising as well as fines. *See id.* § 260.1(a).

[58] *See id.* § 260.12(a); *see also* HOCEVAR, *supra* note 25, at 15.

facilities to produce heat and power is not "recyclable," as it cannot be processed into another product or package.[59] Labeling that container as "recyclable" would therefore be misleading to consumers. Moreover, marketers should ensure that a "reasonable basis" of "competent and reliable scientific evidence" supports their compliance with the Guides' "recyclable" definition *before* marketing recyclability claims to the public.[60]

Table 2: Greenpeace 2022 Recycling Survey Results by Plastic Resin Type[61]

Plastic Item	**(A) % of Total (375) U.S. Municipal Recycling Facilities That Accept Item**	**(B) Access (%) of U.S. Population to Municipal Collection of Item**	**(C) U.S. Reprocessing Capacity for Post-Consumer Plastic Type**	**(D) Can Product be Labeled as "Recyclable" per U.S. FTC Green Guides?**
PETE #1 Bottles & Jugs*	100%	60%	Marginal 20.9%	***Yes***

[59] *See* 16 C.F.R. § 260.12(a) ex. 3.

[60] *Id.* § 260.2. "Scientific evidence" is defined as "tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results." *Id*.

[61] GREENPEACE, *supra* note 42, at 9 (citations omitted); JOHN HOCEVAR, *supra* note 25, at 10, 12.

Column (A): Percent determined from 2020 and 2022 U.S. MRF Surveys (details provided in Appendix A.1 of GREENPEACE).

Column (B): According to the Recycling Partnership, about 56% of U.S. residents have access to established curbside or on-property reycling collection transported to MRFs and 4% have access to established drop off systems. The access for the total population was determined by adjusting for U.S. residents who have access to established municipal recycling collection systems (detailed provided in Appendix A.3 of GREENPEACE).

Column (C): Details provided in Appendix A.2 of GREENPEACE.

Column (D): Overall assessement of whether the specific product can legitimately be claimed or labeled as recyclable based on total population access (B) and the likelihood of collected materials being reycled into new products (C). The FTC Green Guides require that a significant (>60%) portion of the total U.S. population have access to established recycling programs to claim an item as recyclable, and the collected products must be manufactured into new items.

Plastic Item	(A)	(B)	(C)	(D)
HDPE #2 Bottles & Jugs*	100%	60%	Marginal 10.3%	***Yes***
PP #5 Tubs & Containers	52%	29%	Low/ Insufficient <5%	No
PP #5 or PS #6 Coffee Pods	0%	0%	Low/ Insufficient <5%	No
Plastic Clam-shells† (PETE #1, PVC #3, PS #6)	11%	6%	Low/ Insufficient <5%	No
Plastics Cups (PP #5, PS #6, Other #7)	9%	5%	Low/ Insufficient <5%	No
Plastic Trays† (PETE #1, PP #5, Other #7)	5%	3%	Low/ Insufficient <5%	No
Plastic Bags & Films‡ (HDPE #2, LDPE #4)	1%	0%	Low/ Insufficient <5%	No
EPS Food Service (PS #6)	1%	1%	Low/ Insufficient <5%	No
Plastic Lids & Caps (Loose) (PP #5, PS #6)	2%	1%	Low/ Insufficient <5%	No
Plastic Plates (PS #6)	2%	1%	Low/ Insufficient <5%	No
Plastic Cutlery, Straws & Stirrers (PP #5, PS #6)	0%	0%	Low/ Insufficient <5%	No
Plastic Food Wrappers & Pouches (Multiple Types)	0%	0%	Low/ Insufficient <5%	No

* Bottles cannot have non-recyclable or non-sortable shrink sleeves.

† The PETE used in clamshells and trays is not the same as that used in bottles and jugs.

‡ Plastic bags are accepted by municipal systems. This does not include plastic bags collected by drop-off at private retail operations because the FTC requirements are based on established municipal collection systems.

Second, the Green Guides permit "unqualified recyclable claims" in limited cases.[62] In general, marketers should clearly and prominently qualify recyclability claims to avoid consumer deception. Qualifications may be very broad statements, such as "[t]his product [package] may not be recyclable in your area," or more specific statements concerning the percentage of consumers or communities that have access to facilities recycling the item.[63] But the Green Guides also allow marketers to omit qualifications when recycling facilities are available to a "substantial majority" (which the FTC defines as at least sixty percent) "of consumers or communities where the item is sold."[64] As a separate exception, marketers may use unqualified claims for a product if the entire product, "excluding minor incidental components," is recyclable.[65] The Guides do not generally define "minor, incidental components," but they provide the example of a soft drink bottle labeled "recycled" and made entirely from recycled materials, except for its bottle cap, which is unrecyclable.[66] Because the bottle cap is a minor, incidental component of the product, the bottle's unqualified recycled claim is not deceptive. Although the goal of these guidelines is to prevent consumer deception, the Green Guides give plastic producers some discretion in adding qualifications based on what producers perceive is the level of consumer access to recycling facilities or the composition of their products.

Third, the Green Guides intersect significantly with state consumer protection law. The Green Guides do not mandate that the FTC take action to enforce them, and they do not generally preempt state or local laws.[67] But a majority of states have incorporated the

62 16 C.F.R. § 260.12(c). Unqualified recycling claims are also permitted for "recycled content" representations. *See id.* § 260.13(c).

63 *See id.* § 260.12(b)(2).

64 *Id.* § 260.12(b)(1). The FTC does not define in the Green Guides what qualifies as a "community."

65 *Id.* § 260.12(c).

66 *Id.* § 260.3(b) ex. 2.

67 *See id.* § 260.1(b) ("These guides do not preempt federal, state, or local laws."). Instead, the FTC reserves the authority to pursue enforcement actions

FTC's guidance on section 5 of the FTCA—including the Green Guides—into their statutes and regulations.[68] The states generally fall into four "buckets."

(1) Thirteen states, including California, Minnesota, and New York,[69] explicitly incorporate the Green Guides as the standard for lawful use of the terms or symbols representing that a product is "recycled," "recyclable," or "reusable."[70] Businesses then commit a violation of the state's statutes or regulations when their products fail to comply with the Green Guides.

(2) Twenty-seven states have codified a rule that the FTC's interpretation of section 5 of the FTCA should guide how courts and legislatures construe their general state consumer protection law.[71] This group includes Connecticut, Illinois, and Massachusetts.[72] The Green Guides—including their definition of "recyclable"—then function as a persuasive source of authority for determining what constitutes unfair or deceptive acts or practices under state law.

under the FTCA if and when it finds that a marketer made environmental claims "inconsistent with the Guides" or materially misleading to consumers. *Id.* § 260.1(a). Moreover, the FTC also states that "compliance with [state or local] laws . . . will not necessarily preclude Commission law enforcement under the FTC Act." *Id.* § 260.1(b).

68 *See* CONNOR J. FRASER, STATE ENERGY & ENV'T IMPACT CTR., WHAT'S IN A LABEL? THE FTC'S GREEN GUIDES IN CONTEXT 4 (2023), https://stateimpactcenter.org/files/Whats-in-a-Label-The-FTC-Green-Guides-Issue-Brief.pdf (summarizing trends in statutes and regulations from 36 states and territories).

69 *See* CAL. BUS. & PROF. CODE § 17580.5 (Deering 2023); MINN. STAT. ANN. § 325E.41(1)(a) (West 2023); N.Y. COMP. CODES R. & REGS. tit. 6, § 368-1.3 (2023). For example, New York's regulations state that "[a] person may only use the term 'recyclable' on a product or package that is in conformance with Section 260.12 of the Federal Trade Commission's 'Guides for the Use of Environmental Marketing Claims' published in 16 CFR Part 260 . . . ." N.Y. COMP. CODES R. & REGS. tit. 6, § 368-1.3(a).

70 *See* FRASER, *supra* note 68, at 4.

71 *See id*.

72 *See* CONN. GEN. STAT. ANN. § 42-110b (West 2023); 815 ILL. COMP. STAT. ANN. 505/2 (LexisNexis 2023); MASS. GEN. LAWS ch. 93A, § 2(b) (2023). For example, Connecticut's statute states that "the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act . . . as from time to time amended." CONN. GEN. STAT. ANN. § 42-110b(b).

(3) Twelve states reference the FTC's interpretation of section 5 of the FTCA (which includes the Green Guides, among other guidance) as the "floor" for state regulations concerning environmental marketing claims.[73] These provisions apply to regulations on "recyclable" products, if the state chooses to promulgate them. For example, Florida's code requires that "[a]ll substantive rules" relating to its state statutes prohibiting unfair and deceptive acts and practices "not be inconsistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of [FTCA section 5]."[74] Three states (New Mexico, New York, and Pennsylvania) have so far issued regulations that explicitly reference the Green Guides; those regulations fall into the first "bucket" above.[75]

(4) Fourteen states incorporate the FTC's rules, regulations, and guidance under section 5 of the FTCA as the standard for a *defense* against state consumer protection claims. Two such states (California and Rhode Island) explicitly state that compliance with the Green Guides functions as a shield for liability.[76] New York, by contrast, has a more general defense provision that would be relevant in any future false advertising claim based on recyclability claims.[77]

Because of states' widespread incorporation of the FTC's guidance, businesses violating the Green Guides potentially expose themselves to unfair or deceptive environmental claims from the FTC or state.

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[73] *See* FRASER, *supra* note 68, at 4.

[74] FLA. STAT. ANN. § 501.205 (West 2023).

[75] *See* N.M. CODE R. § 12.2.5.6 (LexisNexis 2023); 52 PA. CODE § 54.6 (2023); N.Y. COMP. CODES R. & REGS. tit. 6, § 368-1.3(a) (2023).

[76] *See* CAL. BUS. & PROF. CODE § 17580.5(b)(1) (Deering 2023); 6 R.I. GEN. LAWS ANN. § 6-13.3-4 (West 2023). For example, California's statute states that "[i]t shall be a defense to any suit or complaint brought under this section that the person's environmental marketing claims conform to the standards or are consistent with the examples contained in the 'Guides for the Use of Environmental Marketing Claims' published by the Federal Trade Commission." CAL. BUS. & PROF. CODE § 17580.5(b)(1).

[77] *See infra* Part III.B.2 (discussing the "complete defense" provision under New York's GBL).

Finally, the FTC is currently reviewing the Green Guides and paying particular attention to "recyclable" labels. The FTC voted to open public comment on the Green Guides in December 2022—its first review in over a decade.[78] It signaled interest in new evidence concerning consumer perceptions of environmental claims and noted that "recyclable" labels on plastic products are a concern. FTC Chair Lina M. Khan wrote that "recent reports suggest that many plastics that consumers believe they're recycling actually end up in landfills" and, therefore, the FTC plans to consider whether "recyclable" labels should reflect "where a product ultimately ends up, not just whether it gets picked up from the curb."[79] Many comments—including those from a coalition of sixteen state attorneys general and from EPA—support revising the Green Guide's definition of "recyclable" to better account for the current recycling market dynamics and rates at which plastic products are actually reprocessed into other plastic products.[80]

II. CONSUMER PROTECTION CASES AGAINST PLASTIC PRODUCERS

During the past four years, consumers and environmental groups have filed several lawsuits against plastic producers in California, Illinois, Massachusetts, and New York. These cases seek to hold plastic producers responsible for the effects of plastic pollution and allege a variety of state law claims, including public nuisance,

[78] *See* Press Release, Fed. Trade Comm'n, FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims (Dec. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims.

[79] Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77,766, 77,770 (proposed Dec. 20, 2022). The FTC then hosted a workshop on recyclable claims where it heard from expert panels and solicited more public comments. *See Talking Trash at the FTC Recycled Claims and the Green Guides*, FED. TRADE COMM'N (May 23, 2023), https://www.ftc.gov/media/talking-trash-ftc-recyclable-claims-green-guides-may-23-2023.

[80] *See* States of California et al., Comment Letter on Green Guides Review at 29–33 (Apr. 24, 2023), https://www.regulations.gov/comment/FTC-2022-0077-0987; EPA, Comment Letter on Green Guides Review at 3–4 (Apr. 20, 2023), https://www.regulations.gov/comment/FTC-2022-0077-1366.

negligence, failure to warn, and defective design.[81] Many plaintiffs have based their consumer protections claims on research—predominately Greenpeace's *Circular Claims Fall Flat* studies—finding that many types of plastic products are practically not recyclable.[82] Common causes of action in those cases have included false or misleading advertising; unlawful, unfair, and deceptive business practices; and breach of express warranty.

To date no government plaintiff has filed a case in New York against plastic producers that involves recyclability representations.[83] One case in New York, *Duchimaza v. Niagara Bottling, LLC*, discussed in Part II.B, involved a consumer's allegations related to the recyclability of water bottles.[84] It provides an important

[81] *See, e.g.*, Earth Island Inst. v. Crystal Geyser Water Co., 521 F. Supp. 3d 863 (N.D. Cal. 2021); *Swartz* Class Action Complaint, *supra* note 30; *Sierra Club* Complaint, *supra* note 30.

[82] *See* Connor Fraser, *Plastics in the Courtroom: The Evolution of Plastics Litigation*, STATE ENERGY & ENV'T IMPACT CTR.: BLOG (July 15, 2022), https://stateimpactcenter.org/insights/plastics-in-the-courtroom-the-evolution-of-plastics-litigation (documenting litigation trend of "Disputing Recyclability Representations with Consumer Protection Law"). *See, e.g.*, Complaint ¶ 11, Greenpeace, Inc. v. Walmart Inc., No. RG20082964 (Cal. Super. Ct., Cnty. of Alameda Dec. 16, 2020) [hereinafter *Greenpeace* Complaint]. *See also* Part II.B (discussing the cases in detail).

[83] *See Search*, PLASTICS LITIGATION TRACKER, https://plasticslitigationtracker.org/ (last updated Aug. 9, 2023) (filtering for "Government" plaintiffs yields only four cases from Connecticut, Minnesota, Pennsylvania, and Texas). The only other related case in New York involving plastic products is an ongoing federal securities law case against a "biodegradable" plastics alternative producer, Danimer Scientific, Inc. *See* Complaint at 2, Rosencrants v. Danimer Scientific, Inc., No. 21-cv-02708 (E.D.N.Y. May 14, 2021). The plaintiffs in those cases—shareholders in Danimer Scientific—filed their suits in 2021 as class actions and they alleged that Danimer made false and misleading statements about its business, including overstatements of the biodegradability of its core product, "Nodax." *See id*. The consolidated cases are currently pending in the Eastern District of New York. *See* Order Consolidating Related Actions, Appointing Lead Plaintiff, and Approving Lead Plaintiff's Selection of Counsel, Rosencrants v. Danimer Scientific, Inc., No. 21-cv-02708 (E.D.N.Y. Sept. 24, 2021). *But see supra* note 13 (discussing the New York Attorney General's very recent case against PepsiCo).

[84] *See* Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395 (S.D.N.Y. 2022). The case involved a New York consumer, who brought a purported class action against Niagara Bottling Co. related to their manufacturing, distribution, marketing, and sale of Kirkland brand water bottles labeled "100% recyclable." *See id*. *See also infra* Part II.B.

model for future consumer protection litigation in the state. The major cases filed in other jurisdictions provide additional analogues for how the Attorney General's office could, at a high level, structure its false advertising case in New York. In particular, lawsuits in California exemplify the range of plastic products and defendants that the New York Attorney General might target through litigation. Recent decisions in *Duchimaza* and a similar Illinois case highlight the opportunities and challenges associated with using the FTC Green Guides. One case brought by Greenpeace in California demonstrates that building a link between consumers' purchasing decisions and defendant's recyclability representations is crucial—and a task that a state attorney general, as a consumer representative, may be able to more effectively accomplish because of her unique statutory authority.[85] Finally, settlements in cases in Massachusetts and California provide examples of viable consumer protection claims and potential mechanisms for using litigation to secure changes in plastic producer behavior. This Part reviews each group of cases in detail.

A. *Products & Defendants in Ongoing Cases*

Although many entities are involved in delivering plastic products to consumers,[86] cases filed recently predominantly involve manufacturers, distributors, or retailers of plastic products.[87] Several cases in California—where the majority of recyclability cases have been filed—illustrate how the New York Attorney General's office might adjust the scope of plastic products and defendants included in a future consumer protection suit. Because this is a burgeoning area of litigation, it would be worthwhile for the Attorney General's office to evaluate different approaches, including the

[85] *See* Greenpeace, Inc. v. Walmart Inc., No. 21-cv-00754, 2021 WL 4267536, at *3 (N.D. Cal. Sept. 20, 2021); *infra* Part III.A (describing the New York Attorney General statutory enforcement powers).

[86] *See supra* Part I.B (describing players in the plastics industry).

[87] *See* Fraser, *supra* note 82 (reviewing trends in cases involving recyclability representations). One recent case also involved a private third-party provider of recycling services, TerraCycle, Inc. *See infra* notes 197–208 and accompanying text. The State Energy & Environmental Impact Center maintains a tracker of federal and state court cases involving plastics. *See Plastics Litigation Tracker*, STATE ENERGY & ENV'T IMPACT CTR., https://plasticslitigationtracker.org (last updated Aug. 9, 2023).

causes of action chosen in other states. On balance, focusing on a narrow set of products has proved more fruitful so far.

One approach would be to target a wide set of major plastic manufacturers and retailers, dispute the accuracy of the labels on their various consumer products, and deploy a combination of state law claims. For example, the Earth Island Institute in 2020 filed an extensive complaint against major plastics producers, including Crystal Geyser Water, Clorox, Coca-Cola, PepsiCo and Nestlé, among others.[88] Earth Island initially alleged, among a variety of causes of action, that the defendants had violated the false advertising and unfair competition prohibitions in California's Consumer Legal Remedies Act (CLRA) because the defendants had incorrectly and misleadingly represented that their products were "recyclable" when they are not under the standards in the Green Guides.[89] Earth Island also asserted that the defendants had breached express warranties to their consumers concerning the recyclability of their products; it brought this claim under California's version of section 2-313 of the Uniform Commercial Code.[90] Earth Island elaborated that the defendants' recyclability representations constituted affirmations of fact about their products and therefore were part of the "basis of the bargain" between defendants and consumers.[91]

Earth Island's claims are pending in the Superior Court of California, County of San Mateo.[92] Most recently, the court ruled on

[88] *See* Complaint, Earth Island Inst. v. Crystal Geyser Water Co., No. 20-CIV-01213 (Cal. Super. Ct., Cnty. of San Mateo Feb. 26, 2020) [hereinafter *Earth Island* Complaint]. When Earth Island amended its complaint in October 2023, it dropped its claim against two industry defendants, Mondelez International and Mars. *Compare id.* ¶¶ 28–68 (ten defendants), *with* First Amended Complaint ¶¶ 29–61, *Earth Island*, No. 20-CIV-01213 [hereinafter *Earth Island* First Amended Complaint] (eight defendants).

[89] *See* CAL. CIV. CODE § 1770 (Deering 2023); *Earth Island* Complaint, *supra* note 88, ¶¶ 145–52, 161–65.

[90] *See* CAL. COM. CODE § 2313 (Deering 2023) (describing when express warranties are created, in line with the Uniform Commercial Code); *Earth Island* Complaint, *supra* note 88, ¶¶ 179–83.

[91] *See Earth Island* Complaint, *supra* note 88, ¶¶ 181–82.

[92] Defendants had removed the case to the U.S. District Court for the Northern District of California and the district judge remanded the case in a February 2021 decision finding that plaintiff's claims did not raise any bases for federal jurisdiction. *See* Earth Island Inst. v. Crystal Geyser Water Co., 521 F. Supp. 3d 863, 868, 880 (N.D. Cal. 2021). When the Earth Island Institute filed a motion to remand the

the defendants' motion to dismiss on the merits. It granted the defendants' motion on Earth Island's CLRA and breach of express warranty claims due to insufficient factual allegations, but the court permitted Earth Island to amend its pleadings.[93] Earth Island

case, the defendants argued that the plaintiff's claims implicated several bases for federal jurisdiction, including that they involved federal common law, arose in "federal enclaves," and occurred on navigable waters, among others. *See id*. at 869, 878–79. The district court judge rejected all of these asserted bases for federal jurisdiction, including the argument that the plaintiff's public nuisance claims could be brought only under federal common law and were therefore preempted by the federal environmental statutes. *See id*. at 876. Similar procedural debates have played out extensively in litigation against fossil fuel producers, and plaintiffs bringing state law cases—including consumer protection claims—against fossil fuel producers have generally prevailed in keeping their cases in state court. *See, e.g.*, Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020); Connecticut v. Exxon Mobil Corp., No. 20-CV-1555, 2021 WL 2389739 (D. Conn. June 2, 2021). The Tenth Circuit recently rejected defendant fossil fuel producers' appeal of an order to remand their case to state court, where a city and two counties in Colorado had originally brought suit. *See* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1246–47 (10th Cir. 2022). The Tenth Circuit's decision followed the Supreme Court's decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1543 (2021), which concluded that U.S. Courts of Appeal must consider all of defendants' asserted grounds for removal when they appeal remand decisions. Following the district court's order on Earth Island's motion to remand, the defendants filed a motion to dismiss for lack of personal jurisdiction, which the court denied in a June 2022 order. *See* Order Denying Specially Appearing Defendants' Motion to Quash Summons and Dismiss for Lack of Personal Jurisdiction at 1, Earth Island Inst. v. Crystal Geyser Water Co., No. 20-CIV-01213 (Cal. Super. Ct., Cnty. of San Mateo June 2, 2022). The Superior Court determined that the plaintiffs had alleged sufficient facts to demonstrate the first two required prongs for specific jurisdiction ("purposeful availment" and "a connection between the forum and the specific claim at issue"). *See id*. at 2. But the defendants had not posited any argument or evidence to demonstrate that, on the third prong, the "exercise of jurisdiction would be unreasonable." *Id*. at 3. The defendants sought a writ of mandamus from the California Court of Appeal, First Appellate District, but the court denied their petition in July 2022. *See* Notice of Entry of Order Denying Petition for Writ of Mandate at 2, Earth Island Inst. v. Crystal Geyser Water Co., No. 20-CIV-01213 (Cal. Super. Ct., Cnty. of San Mateo July 11, 2022).

[93] In his brief order, Judge Swope found that Earth Island had not alleged sufficient facts to establish standing as a "consumer" that had purchased plastic products for "personal, family, or household purposes" under the CLRA. *See* Order Sustaining Defendants' Demurrers to Plaintiff's Complaint and Granting in Part and Denying in Part Plaintiff's Request for Judicial Notice at 2–3, *Earth Island*, No. 20-CIV-01213. Earth Island also had not sufficiently alleged "actual reliance on Defendants' alleged misrepresentations" of their plastic products. *See id*. at 2.

subsequently made numerous changes to its claims. In its amended complaint, Earth Island pared its causes of action down to two: (1) violations of the California Unfair Competition Law (UCL), and (2) "nuisance."[94] Earth Island's allegations that the defendants misrepresented their products as recyclable in California now relate to its UCL cause of action. Because the UCL outlaws conduct that "violates a legislatively declared policy," Earth Island also alleges that the defendants' representations run afoul of the FTC's Green Guides, California's Environmental Marketing Claims Act (EMCA), and California's policy of substantiating environmental marketing claims (especially those related to plastic products).[95] The parties will soon brief whether the court should dismiss these amended complaints.[96]

An alternative approach to structuring a claim would be to target specific plastic products and/or specific representations on those

And Earth Island's breach of express warranty claim was infirm for the same reason of insufficient facts. *See id*. at 3.

[94] *See Earth Island* First Amended Complaint, *supra* note 88, ¶¶ 254–89 (outlining two causes of action); CAL. BUS. & PROF. CODE §§ 17200, 17500 (Deering 2023) (defining "unfair competition" to mean "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," including untrue or misleading statements). *See also* Connor J. Fraser, *The Public Plastic Nuisance: Life in Plastic, Not So Fantastic*, 98 N.Y.U. L. REV. 2055, 2058–59, 2059 n.11 (2023) (discussing the *Earth Island* case as part of larger argument that New York public nuisance law applies to plastic pollution).

[95] *Earth Island* First Amended Complaint, *supra* note 88, ¶ 255. *See* Fresno Motors, LLC v. Mercedes Benz U.S.A., LLC, 771 F.3d 1119, 1135 (9th Cir. 2014) (stating that California's UCL treats violations of other laws, related to business activity, as unlawful practices actionable under the UCL and subject to its remedies); Pemberton v. Nationstar Mortg., LLC, 331 F. Supp. 3d 1018, 1050 (S.D. Cal. 2018) (quoting McVicar v. Goodman Global, Inc., 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014)) (citing Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 813 (N.D. Cal. 2011)) (explaining that conduct is unfair under the UCL if the plaintiffs show that the defendants' actions contradict "public policy," tied to "specific constitutional, statutory, or regulatory provisions"—even if they do not violate any law); *Earth Island* First Amended Complaint, *supra* note 88, ¶¶ 233, 259–67 (citing other laws and policy). *See also supra* Part I.D (discussing the Green Guides); *infra* notes 101–02 (discussing California's EMCA); CAL. PUB. RES. CODE § 42355.5 (Deering 2023) (declaring the state's policy that "environmental marketing claims, whether explicit or implied, should be substantiated by competent and reliable evidence to prevent deceiving or misleading consumers about the environmental impact of plastic products").

[96] *See* Case Management Order #7, *Earth Island*, No. 20-CIV-01213.

products through a variety of consumer protection claims.[97] This approach has so far proven more popular than Earth Island's. A trio of additional cases, as well as those that subsequent sections of this Note explore, illustrate this approach.

In June 2021, plaintiffs filed two class action lawsuits in the Northern District of California against the Coca-Cola Company, BlueTriton Brands, Inc., and Niagara Bottling, all of which are leading sellers of bottled beverages.[98] The defendants in those two cases represent a narrower slice of industry players than the *Earth Island* defendants. The plaintiffs, consumers in one case (*Swartz v. Coca-Cola Company*) and a national environmental advocacy group in the other (*Sierra Club v. Coca-Cola Company*), allege that the defendants violated California consumer protection laws by claiming their single-use bottles were "100% recyclable," as shown in Figure 1, when in fact they are not.[99] Similar to Earth Island's case, the consumer plaintiffs asserted violations of California's CLRA for false or misleading advertising.[100] But both plaintiffs also directly asserted causes of action under California's EMCA, which makes it unlawful to make environmental marketing claims that are "untruthful" or "deceptive."[101] Several other states have enacted laws like California's that target environmental claims on certain products;

[97] Connecticut Attorney General Tong's case against Reynolds Consumer Products, Inc. also follows this claim structure, as it argues that the recycling labels on "Hefty" brand "Recycling" trash bags violate Connecticut consumer protection statutes. *See* Complaint, State v. Reynolds Consumer Prods. Inc., No. HHD-CV-22-6156769-S (Conn. Super. Ct. June 13, 2022) [hereinafter *Reynolds* Complaint]. *See also infra* Part III.C.

[98] *See Swartz* Class Action Complaint, *supra* note 29; *Sierra Club* Complaint, *supra* note 29. The plaintiffs have since consolidated their claims before the same judge, although the Sierra Club is not alleging any claims against Niagara Bottling. *See* Consolidated Complaint, Muto v. Coca-Cola Co., No. 21-cv-04643 (N.D. Cal. Mar. 24, 2022).

[99] *See* Sebastien Malo, *Calif. Consumers Sue over Plastic Bottles' 'Deceptive' Recycling Labels*, REUTERS (June 17, 2021), https://www.reuters.com/legal/litigation/calif-consumers-sue-over-plastic-bottles-deceptive-recycling-labels-2021-06-17; *Swartz* Class Action Complaint, *supra* note 29; *Sierra Club* Complaint, *supra* note 29.

[100] *See Swartz* Class Action Complaint, *supra* note 29, ¶¶ 79–87.

[101] *See* CAL. BUS. & PROF. CODE § 17580.5 (Deering 2023); *Swartz* Class Action Complaint, *supra* note 29, ¶¶ 116–20; *Sierra Club* Complaint, *supra* note 29, ¶¶ 73–77.

New York unfortunately has not.[102] But general false or misleading advertising laws in New York could encompass recyclability claims, as Part III discusses. Finally, the consumer plaintiffs included claims of fraud and negligent misrepresentation.[103] The cases have been assigned to Judge Donato for consideration together. The defendants moved to dismiss the plaintiffs' initial complaint and renewed their motion to dismiss the plaintiffs' first amended complaint.[104] The court dismissed the plaintiffs' claims but granted them leave to amend their filings in its orders on both motions.[105] In his orders, Judge Donato determined, and then reiterated, that the plaintiffs had not alleged facts to plausibly show that a reasonable consumer would interpret the "100% recyclable" label on the defendants' products to mean that existing recycling programs in California can recycle the product.[106] The plaintiffs subsequently filed another amended complaint in August 2023, and the defendants again moved to dismiss their case.[107]

[102] *See* Sheila A. Millar et al., *The Changing Face of Environmental Marketing Claims*, PACKAGINGLAW.COM (Aug. 16, 2021), https://www.packaginglaw.com/special-focus/changing-face-environmental-marketing-claims (discussing environmental marketing claim laws passed in California, Washington, Maryland, Alabama, Florida, Indiana, Michigan, Minnesota, Rhode Island and Wisconsin).

[103] *See Swartz* Class Action Complaint, *supra* note 29, ¶¶ 99–115.

[104] *See* Swartz v. Coca-Cola Co., No. 21-CV-04643, 2023 WL 4828680, at *1 (N.D. Cal. July 27, 2023) (reviewing procedural history in case).

[105] *See id*. at *1, *4; Swartz v. Coca-Cola Co., No. 21-CV-04643, 2022 WL 17881771, at *2 (N.D. Cal. Nov. 18, 2022).

[106] *See Swartz*, 2022 WL 17881771, at *2; *Swartz*, 2023 WL 4828680, at *4. Judge Donato has reasoned that "recyclable" means only capable of being recycled, not a "promise" that an object will actually be recycled. *Swartz*, 2023 WL 4828680, at *4 (quoting *Swartz*, 2022 WL 17881771, at *1). Furthermore, he attributes plaintiff's alleged deceptions to "economic, processing, and contamination issues," "importation policy," and "the economics of the recycling business"—all "forces and circumstances well beyond defendants' control." *Swartz*, 2023 WL 4828680, at *4.

[107] *See* Second Amended Consolidated Complaint, *Swartz*, No. 21-CV-04643; Notice of Motion and Consolidated Motion to Dismiss Second Amended Complaint, *Swartz*, No. 21-CV-04643.

Figure 1: Example Label from *Swartz*[108]

In April 2022, another consumer in San Francisco filed a purported class action against Walgreens for misrepresentations related to their reusable plastic grocery bags.[109] Elisa Bargetto purchased Walgreens' bags—made from plastic film—based on their "recyclable" labels and alleges that the bags contain deceptive representations because they are not recyclable in California.[110] Figure 2 shows the bag's design. As Bargetto argues, consumers like her do not have access to recycling programs that accept Walgreens' bag, MRFs in the state cannot sort out the bags, and no end markets exist for facilities to convert the bags into new plastic products.[111] The inclusion of "Store Drop-Off" on the bags is especially problematic because there is not a "comprehensive takeback system" in the state for the bags, per the California Recycling Commission.[112] Similar to cases like *Swartz* and *Earth Island*, Bargetto therefore alleges that Walgreens' labels violate several state statutes—California's UCL, EMCA, CLRA, and False Advertising Law—as well as constitute a

[108] *Swartz* Class Action Complaint, *supra* note 29, ¶ 30.

[109] *See* Class Action Complaint ¶¶ 2, 7, Bargetto v. Walgreen Co., No. 22-cv-02639, 2022 U.S. Dist. LEXIS 237233 (N.D. Cal. filed Apr. 29, 2022).

[110] *See* Second Amended Complaint ¶ 7, Bargetto v. Walgreen Co., No. 22-cv-02639, 2022 U.S. Dist. LEXIS 237233 (N.D. Cal. Sept. 30, 2022) [hereinafter *Bargetto* Second Amended Complaint].

[111] *See id*. ¶ 4.

[112] *See id*. ¶ 39.

breach of express warranty and unjust enrichment.[113] Her claims also rely on the Green Guides (as setting the standard for lawful use of environmental marketing claims) and California's SB 270, which prohibits stores from selling or distributing reusable grocery bags made from plastic film unless the bags are "recyclable in the state."[114]

Figure 2: Example Label from *Bargetto*[115]

Walgreens filed a motion to dismiss all causes of action for lack of jurisdiction and failure to state a claim. In a December 2022 order, Judge Thompson in the Northern District of California granted in part and denied in part Walgreens' motion—preserving the majority of Bargetto's class action claims.[116] The decision illustrates how careful pleading related to a particular product creates a viable set of state consumer protection claims.

113 *See id*. ¶¶ 54–112.

114 *See* CAL. PUB. RES. CODE §§ 42281(b)(1)(C), 42283; *Bargetto* Second Amended Complaint, *supra* note 110, ¶¶ 1, 14.

115 *Bargetto* Second Amended Complaint, *supra* note 110, ¶ 33.

116 *See* Order on Motion to Dismiss at 11, *Bargetto*, 2022 U.S. Dist. LEXIS 237233 (No. 22-cv-02639).

First, Judge Thompson found that Bargetto's UCL claims, which relied on SB 270's requirements, were not ripe for review and therefore not justiciable. Because SB 270 provides for a system for challenging recycling certifications in state court, and Bargetto went directly to federal court, she had not exhausted her administrative remedies.[117] The district court therefore lacked Article III jurisdiction over that claim.[118] Second, Judge Thompson denied Walgreens' motion to dismiss the rest of Bargetto's claims. In particular, she credited Bargetto's pleadings as sufficiently alleging that the labels on Walgreens' bags are misleading because the bags are not actually "recyclable."[119] Bargetto's allegations that Walgreens' bags could not be collected, sorted, or reused in plastic products with established end markets were not "mere conclusions but supported with particularity."[120] Moreover, in that reasoning, Judge Thompson cited and applied the Green Guides' definition of "recyclable."[121] As a result, Bargetto's EMCA, CLRA, False Advertising Law, breach of express warranty, and unjust enrichment claims could all proceed in federal court.[122] The parties have begun discovery,[123] and *Bargetto* represents a favorable precedent for similar claims in California and other states.

B. *Cautionary Tales*

Only a limited number of consumer protection claims involving recyclability have reached the merits stage. While one plaintiff is litigating viable claims (*Bargetto*), and some parties have settled (which the next section summarizes), several courts have issued decisions dismissing other claims, at least in part. This section analyzes what three key decisions[124]—all unfavorable to the plaintiffs'

[117] *See id*. at 5.

[118] *See id*. at 4.

[119] *See id*. at 6.

[120] *See id*. at 9.

[121] *See id*. at 8.

[122] *See id*. at 11.

[123] *See* Stipulated Order RE: Discovery of Electronically Stored Information, *Bargetto*, 2022 U.S. Dist. LEXIS 237233 (No. 22-cv-02639).

[124] The three decisions in Part II.B are not the only ones but they exemplify important trends in how courts have considered consumer protection cases involving recyclability claims. *See also, e.g.*, Order Sustaining Defendants' Demurrers

claims—mean for future litigation in New York. Together, they demonstrate that linking defendants' recyclability representation to the purchasing decisions of consumers is critical, as is alleging facts sufficient to confer standing for all requested remedies, particularly in federal court. The following decisions also highlight that courts may interpret the meaning of "recyclable" in the Green Guides narrowly while evaluating their state consumer protection statues to preclude consumer claims. These decisions therefore provide valuable guidance for the litigation case study in Part III.

1. *Greenpeace v. Walmart, Inc.* (California)

Based on its *Circular Claims Fall Flat* report, Greenpeace filed a case against Walmart in 2020 for unlawful, unfair, and deceptive business practices. It alleged that Walmart's plastic packaging was actually not recyclable, even though the defendant had marketed it as such to consumers.[125] The products at issue were Walmart's "private label" products made from plastic resins #3 to #7.[126] Figure 3 and Figure 4 provide examples of the recyclability representations listed on two products' labels. Greenpeace argued that Walmart violated California's UCL, False Advertising Law, and EMCA.[127]

to Plaintiff's Complaint and Granting in Part and Denying in Part Plaintiff's Request for Judicial Notice at 2–3, Earth Island Inst. v. Crystal Geyser Water Co., No. 20-CIV-01213 (Cal. Super. Ct., Cnty. of San Mateo May 26, 2023); Order Re Motion to Dismiss at 3, Swartz v. Coca-Cola Co., No. 21-cv-04643 (N.D. Cal. Nov. 18, 2022).

125 *See Greenpeace* Complaint, *supra* note 82, ¶ 2.

126 *See id*.

127 *See id*. ¶ 3. *See also* CAL. BUS. & PROF. CODE §§ 17200–10 (Unfair Competition Law), 17500–09 (False Advertising Law), 17580.5 (Environmental Marketing Claims Act) (Deering 2023).

Figure 3: Walmart Plastic Cup[128]

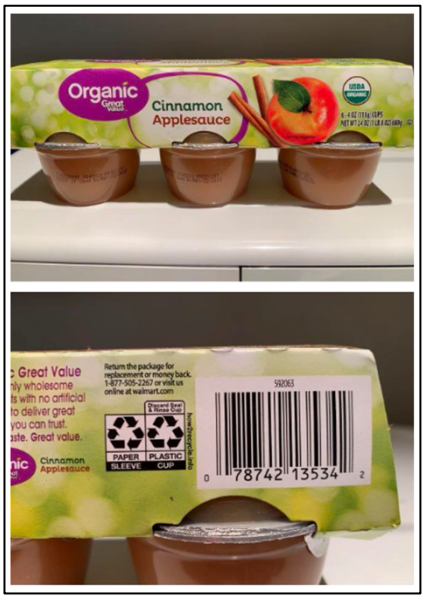

Figure 4: Walmart Plastic Cap[129]

[128] *See* Third Amended Complaint ¶¶ 54, 59, Greenpeace, Inc. v. Walmart, Inc., No. 21-cv-00754 (N.D. Cal. Feb. 18, 2022) [hereinafter *Greenpeace* Third Amended Complaint].

[129] *See id.*

The decisions in Greenpeace's ongoing case against Walmart illustrate several difficulties associated with bringing recyclability claims against plastic producers, particularly for environmental organizations suing on their own behalf. Greenpeace based its standing on injuries to its own processes and mission, rather than as a representative of its members.[130] In a September 2021 opinion, Judge Chesney ruled that Greenpeace lacked Article III standing because it had failed to plead facts sufficient to allege that it acted in reliance on Walmart's recyclability representations as an organization.[131] In particular, the court said that Greenpeace's staff was not "misled" because it conducted an investigation of Walmart's plastic recyclability claims (for which it asserted an economic injury) while suspecting that such claims were false, not true.[132] This decision highlights the importance of linking a defendant producers' recyclability representations to a consumer's purchasing decision, which aligns with the results in *Downing* and *Smith*, discussed in Part II.C.1. Although some states, like New York, do not require consumer plaintiffs to plead justifiable reliance[133] in statutory consumer protection claims, this connection between defendant and producer is also relevant to causation, which is still required for making out a false or misleading advertising claim in both California and New York.

Greenpeace subsequently amended its complaint twice to instead allege injury to its organization based on Walmart's failure to maintain public written records supporting its recyclability representations, as required by California's EMCA.[134] It sought to enjoin

[130] *See id.* ¶ 13. Greenpeace is a non-profit, public interest organization with over 3 million global members. *See About*, GREENPEACE, https://www.greenpeace.org/usa/about (last visited July 13, 2023).

[131] *See* Greenpeace, Inc. v. Walmart Inc., No. 21-cv-00754, 2021 WL 4267536, at *2 (N.D. Cal. Sept. 20, 2021).

[132] *See id*. ("Here, nothing in the [Complaint] suggests Greenpeace engaged in its investigation in reliance on a belief that the statements on which it bases its claims were true; rather, the [Complaint] 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.").

[133] *See infra* note 224 and accompanying text.

[134] *See Greenpeace* Third Amended Complaint, *supra* note 128, ¶ 3 (quoting CAL. BUS. & PROF. CODE § 17580(a)) (reviewing the California EMCA's requirement that "anyone who manufactures or distributes a consumer good and

Walmart from making unsubstantiated recycling representations on its products and to compel Walmart to substantiate its recyclability claims in its advertising or labeling for the public.[135] To satisfy Article III standing, Greenpeace asserted an injury in fact from diverting its organizational resources to inform the public about Walmart's unsubstantiated recycling representations.[136] The district court found that Greenpeace's alleged facts were insufficient to establish the likelihood of a future injury necessary to confer standing in federal court, but it twice afforded Greenpeace leave to amend its pleadings to cure this deficiency.[137] In June 2022, Greenpeace stipulated to the dismissal of its case rather than filing another amended complaint.[138] As the above discussion of *Swartz* notes, California is one of a small number of states that have passed laws specifically regulating environmental marketing claims, and California's EMCA requires companies to maintain records that support the environmental claims on their products.[139] New York does not have an analogous law. But Greenpeace's continued fight to establish standing in this case illustrates the general difficulties that organizations may have in bringing false advertising claims against plastic

represents in advertising or on the label that it is not harmful to, or is beneficial to, the natural environment . . . must maintain written records supporting the validity of any such representation.").

135 *See* Greenpeace, Inc. v. Walmart Inc., No. 21-cv-00754, 2022 WL 591451, at *1 (N.D. Cal. Feb. 3, 2022).

136 *See Greenpeace* Third Amended Complaint, *supra* note 128, ¶ 13.

137 *See* Order Granting Defendant's Motion to Dismiss Third Amended Complaint ¶¶ 2–3, *Greenpeace*, No. 21-cv-00754 (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016); City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983)) (finding that plaintiff has "failed to sufficiently allege, for purposes of Article III standing, an 'informational injury' . . . [or] facts demonstrating it is likely, in the future, to divert resources as a result of defendant's alleged failure to provide plaintiff with information to which it is entitled under EMCA.").

138 *See* Stipulation per L.R. 6-1(b); Order at 2, *Greenpeace*, No. 21-cv-00754 (restating procedural history of case and specifying plaintiff's deadline to file a "Fourth Amended Complaint" as June 3, 2022); Joint Stipulation for Dismissal Pursuant to FRCP 41(a)(1)(A)(ii) at 1, *Greenpeace*, No. 21-cv-00754 (stating that the parties "stipulate to the dismissal of this action without prejudice").

139 *See Greenpeace* Third Amended Complaint, *supra* note 128, ¶ 3; *supra* notes 101–02 and accompanying text (discussing California's EMCA and other states that have passed similar laws).

producers on their own behalf, at least in federal court.[140] Instead, membership organizations like Greenpeace could seek associational standing on behalf of their members, which Greenpeace did not plead in its case against Walmart. Consumers representing themselves or classes of similarly situated purchasers have generally been more successful at keeping their cases in federal court, as the following cases illustrate. But issues with both standing and the merits will still arise for consumer plaintiffs too.

2. *Curtis v. 7-Eleven, Inc.* (Illinois)

In October 2021, a consumer who purchased "24/7 Life" branded foam cups, foam plates, party cups, and freezer bags—all marked "recyclable"—from a 7-Eleven store in Chicago filed a lawsuit against 7-Eleven, Inc. in Illinois state court.[141] The consumer alleged three claims on behalf of a purported consumer class: (1) deceptive practices under the Illinois Consumer Fraud and Deceptive Business Practices Act; (2) breach of express warranty; and (3) unjust enrichment.[142] Her claims relied on assertions that the products she purchased were not "recyclable" under the FTC Green Guides because their plastic materials were very unlikely to be accepted and reused by local recycling facilities.[143] The products

[140] In the order dismissing Greenpeace's Second Amended Complaint, the district court indicated that it would remand the case if Greenpeace could not establish Article III standing in future pleadings. *See* Greenpeace, Inc. v. Walmart Inc., No. 21-cv-00754, 2022 WL 591451, at *2–3 (N.D. Cal. Feb. 3, 2022).

[141] *See* Class Action Complaint & Jury Demand ¶¶ 3–7, Curtis v. 7-Eleven, Inc., No. 2021CH05029 (Ill. Cir. Ct. Oct. 1, 2021) [hereinafter *Curtis* Class Action Complaint].

[142] *See id*. ¶¶ 49–59, 60–64, 65–68. The Illinois Consumer Fraud and Deceptive Business Practices Act states that "[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." 815 ILL. COMP. STAT. ANN. 505/2 (West 2021).

[143] *See Curtis* Class Action Complaint, *supra* note 141, ¶¶ 54–56. The plaintiff stated that "[c]onduct that is deceptive under the FTC's regulations is also *per se* deceptive under the ICFA." *See id*. ¶ 55. The Illinois Consumer Fraud and Deceptive Business Practices Act states that, when courts construe violations of the state's deceptive acts and practice statute, "consideration shall be given to the

included labels per Figure 5 and Figure 6 and plastic resins PP #5 (party cups) and PS #6 (foam plates, foam cups); the freezer bags were unlabeled and their plastic resin, polyethylene, could be PETE #1, HDPE #2, or LDPE #4.[144] In addition, the consumer provided evidence that the foam plates and freezer bags she purchased lacked individual Resin Identification Codes (RICs), which alert recycling facilities to the products' constituent plastic resins.[145] The "recyclable" labels on those products was also deceptive to consumers under the same legal authorities because the missing RICs would prevent recycling facilities from properly sorting and processing the products.[146]

Figure 5: 7-Eleven Foam Cups & Plates[147]

interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act." 815 ILL. COMP. STAT. ANN. 505/2.

144 *See* Curtis v. 7-Eleven, Inc., No. 21-cv-6079, 2022 WL 4182384, at *7–8 (N.D. Ill. filed Sept. 13, 2022).

145 *See Curtis* Class Action Complaint, *supra* note 141, ¶¶ 22, 32. Table 1 provides examples of RICs by resin type. Figure 5 shows that the RIC number for the foam plates appears on the packaging but not each plate.

146 *See Curtis* Class Action Complaint, *supra* note 141, ¶ 19.

147 *See Curtis*, 2022 WL 4182384, at *2–3.

Figure 6: 7-Eleven Freezer Bags[148]

The developments in *Curtis* demonstrate additional hurdles that consumer plaintiffs might face in future litigation, particularly those related to relying on the FTC Green Guides. After removing the case to federal district court, 7-Eleven filed a motion to dismiss the claims, and Judge Seeger granted in part and denied in part the motion in a September 2022 order.[149] The opinion included three important legal conclusions. First, the consumer had sufficiently alleged an injury-in-fact for standing in federal court as an individual and as a class representative for other consumers who had suffered "substantially similar" financial injuries from relying on similar "recyclable" labels on 7-Eleven products.[150] But the court concluded that the consumer lacked standing to seek an injunction compelling 7-Eleven to cease its advertising practices because there was a "low" probability she would be misled by the same labels in the future—"[s]he is unlikely to be fooled twice."[151] The court that considered a consumer complaint in New York in *Duchimaza*, discussed in the next section, came to the same conclusion on a consumer's standing to seek an injunction.[152]

148 *See id.*

149 *See id.* at *2.

150 *See id*. at *15, *19. Since the court was considering defendant's motion to dismiss, it reserved the issue of determining the scope of a consumer class for later litigation stages. *See id*. at *19.

151 *Id*. at *21, *23. *See Curtis* Class Action Complaint, *supra* note 141, ¶ 59 (seeking injunction prohibiting defendant's "unfair and deceptive advertising practices").

152 Other judges have recently come to the opposite conclusion. *See* Peterson v. Glad Prods. Co., No. 23-cv-00491, 2023 WL 4600404, at *1, *3–5 (N.D. Cal.

Second, the court held that the consumer had not stated a deceptive practices claim related to unavailability of recycling facilities under Illinois' consumer protection statute.[153] The court interpreted "recyclable" without reference to the FTC Green Guides (but with reference to several dictionaries) to mean "capable of being recycled," an "intrinsic" quality of a product divorced from "what happens in the product after it goes in the recycling bin."[154] The limited number of recycling facilities available to handle 7-Eleven's product did not render the "recycling label" deceptive; "recyclable," in the court's reasoning "does not mean 'Will Be Recycled at a Facility Near *YOU*!'"[155] Therefore, 7-Eleven was not on the hook for deceptive labels as the consumer had entered the transaction with "unreasonable expectations" that their purchased plastic products would *actually* be recycled.[156] To hold otherwise, the court reasoned, would invite a flood of litigation by any consumer against any manufacturer.[157] Judge Seeger's decision on this point illustrates two important risks: (1) that courts may or may not find the FTC Green Guides persuasive while interpreting "deceptive" practices or "misleading" advertising[158] and (2) that, even if the Green Guides are persuasive, courts in future litigation may interpret "recyclable" very narrowly to mean capable of being recycled *in theory* based on the product's constituent plastic materials.

July 17, 2023) (holding that plaintiff, who alleged that recycling claims on Glad's bags are deceptive, established standing to seek an injunction against Glad's selling the bags or using "recycling" representations in connection with the advertising and sale of any other bags); Swartz v. Coca-Cola Co., No. 21-CV-04643-JD, 2023 WL 4828680, at *2 (N.D. Cal. July 27, 2023) (determining that consumer plaintiffs, who challenge defendants' recyclability representations on their beverage bottles, established standing to seek injunctive relief).

153 *See Curtis*, 2022 WL 4182384, at *34.

154 *Id*. at *25–27.

155 *Id*. at *28.

156 *See id*. at *32–33.

157 *See id*. at *32.

158 Although the relevant Illinois statute states that "consideration shall be given" to the FTC's guidance under section 5(a) of the FTCA, *see* 815 ILL. COMP. STAT. ANN. 505/2 (West 2021), Judge Seeger does not explicitly mention that requirement. *See Curtis*, 2022 WL 4182384, at *33–34. Even if Judge Seeger, in theory, considered the Green Guides' definition of "recyclable" (without mentioning it in his order), he still could have found the FTC's guidance unpersuasive.

Third, and in contrast, Judge Seeger held that the consumer had stated a deceptive practices claim related to the missing RICs on the foam plates and freezer bags.[159] Without the essential information provided by the RICs, recycling facilities could not sort and process the foam plates and freezer bags, and therefore 7-Eleven failed to provide information necessary for products to be "recyclable."[160] Unlike the "extrinsic" issue of recycling industry capacity, whether the product contains a RIC number is "intrinsic" to the product and within 7-Eleven's control.[161] The consumer's claims survived as they pertained to the lack of RICs. In addition, the decision permitted the consumer's breach of express warranty and unjust enrichment claims to go forward to the extent they related to the lack of RIC designations.[162] 7-Eleven has since filed an answer to those claims, and the parties are participating in discovery.[163] The court's decision on RICs signals that consumer protection claims involving similarly unlabeled plastic products in New York would likely be very strong.

3. *Duchimaza v. Niagara Bottling, LLC* (New York)

Eladia Duchimaza, a New York City resident, purchased multi-bottle packs of "Kirkland"-branded water bottles, labeled as "100% Recyclable," from Costco on several occasions.[164] In July 2021, she filed a lawsuit in federal court against Niagara Bottling, the manufacturer and distributor of the water bottles sold at Costco.[165] She asserted five claims on behalf of a proposed class of New York consumers: (1) deceptive and unfair trade practices under New York GBL[166] section 349; (2) false advertising under GBL section 350;

159 *See Curtis*, 2022 WL 4182384, at *35.

160 *See id*. at *34.

161 *See id*. at *35.

162 *See id*. at *37.

163 *See* Joint Status Report, *Curtis*, 2022 WL 4182384 (No. 21-cv-6079) (providing update on depositions, expert reports, and discovery deadlines).

164 *See* Class Action Complaint ¶ 10, Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395 (S.D.N.Y. 2022) (No. 21-cv-06434) [hereinafter *Duchimaza* Class Action Complaint].

165 *See id*.

166 *See infra* Part III.A (describing the requirements of New York GBL as part of case study).

(3) common law fraud; (4) breach of express warranty; and (5) unjust enrichment.[167] Duchimaza alleged that Niagara's manufacturing and distribution of water bottles labeled "100% Recyclable" misled her and other consumers because the bottles were not "recyclable" per the FTC Green Guides due to low recycling capacity in New York.[168] She had reviewed the labels (represented in Figure 7), "understood them as representations by [the defendant] that the Products were, in fact, 100% recyclable," and attested that she would not have purchased them at their higher price had she known they were not, in fact, one hundred percent recyclable.[169] Under the GBL, she asserted that Niagara had engaged in deceptive acts and practices and false advertising by "[f]undamentally misrepresent[ing] the characteristics and quality of the Products" to induce consumers to purchase them.[170] She asked the court to order Niagara to pay damages, including interest, to the certified class; stop using the "100% recyclable" labels on its water bottles; and engage in a corrective advertising campaign.[171]

[167] *Duchimaza* Class Action Complaint, *supra* note 164, ¶¶ 42–53, 54–64, 65–72, 73–79, 80–85.

[168] *See id*. ¶¶ 24–34.

[169] *See id*. ¶ 10.

[170] *Id*. ¶ 49.

[171] *See id*. ¶ 86.

Figure 7: Example Labels from *Duchimaza*[172]

Niagara of course moved to dismiss Duchimaza's case and, in an August 2022 order, Judge Engelmayer dismissed all of her claims with prejudice except for her breach of express warranty claim.[173] Similar to the judge's standing analysis in *Curtis*, Judge Engelmayer determined that the plaintiff had sufficiently pled an injury in fact (the "price premium" paid for the water bottles) traceable to Niagara's conduct to seek damages.[174] But the plaintiff had not shown

[172] *Id.* ¶ 22.

[173] *See* Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 420 (S.D.N.Y. 2022). The court also concluded that the plaintiff failed to allege facts sufficient to show fraudulent intent (for fraud claim) or meaningfully distinguish its unjust enrichment claim from the other claims, which proved fatal. *See id.* at 417. The plaintiff is now unable to file an amended complaint on these claims, with the exception of the breach of express warranty claim (which may be brought only on an individual basis in New York). *See id.* at 410.

[174] *See id.* at 409.

the possibility of future injury (repurchasing the water bottles) to support standing for her requested injunctive relief.[175] Unlike in *Curtis*, the judge accepted that the term "recyclable" was a term of art, informed by the FTC Green Guides.[176] But Judge Engelmayer ultimately concluded that the plaintiff had relied on a "flawed" reading of the FTC Green Guides (whose focus is the "availability of recycling facilities, not the incidence of recycling") in her GBL claims.[177] Because Duchimaza's complaint lacked assertions that facilities did not exist in her community—"whether defined as New York City, New York State, or some other subdivision of the state"—or were not available to less than a "substantial majority" (sixty percent) of consumers, she failed to show that Niagara had violated the Green Guides.[178] Therefore, her GBL claims failed.[179] Moreover, even if recycling incidence was the proper framing, the judge said, the plaintiff failed to cite New York-specific data on the processing of water bottles into new plastic products.[180] Finally, the judge characterized the bottle cap and plastic label on Niagara's water bottles (both made with PP #5 plastic) as "minor, incidental components," which could be nonrecyclable without the "100% Recyclable" label violating the Green Guides.[181] With Judge

[175] *See id*. at 410.

[176] *See id*. at 412. Judge Engelmayer relied on the Green Guides despite New York statutes and regulations not including a "construction"-type provision that requires consideration of the FTC's guidance on section 5 of the FTCA. *See* FRASER, *supra* note 68, at 4.

[177] *See Duchimaza*, 619 F. Supp. 3d at 413. In *Swartz v. Coca-Cola*, Judge Donato applied a similar interpretation of the Green Guides' definition of "recyclable," relevant to California state law, to "100% recyclable" labels on soft-drink bottles. Because the defendant plastics industry producers correctly represented that the bottles *can* be recycled, not that they *will* be recycled, "[n]o reasonable consumer would understand '100% recyclable' to mean the entire product will always be recycled." Swartz v. Coca-Cola Co., No. 21-cv-04643, 2022 WL 17881771, at *3–5 (N.D. Cal. Nov. 18, 2022). *See supra* note 106 and accompanying text (discussing opinion).

[178] *Duchimaza*, 619 F. Supp. 3d at 413.

[179] *See id*. at 413–14.

[180] *See id*.

[181] *See id*. at 414. The opinion refers to polypropylene (PP) and biaxially oriented polypropylene (BOPP), a specific form of PP. *Id.* at 402. The plastic resin identification code for both PP and BOPP (as a subset of PP) is #5. GREENPEACE, *supra* note 42, at 2.

Engelmayer's order knocking nearly all her claims out of the case, Duchimaza chose not to proceed.[182]

In addition to the decision in *Curtis*, the *Duchimaza* decision demonstrates that the future GBL claims involving recyclability representations would face two sets of powerful counterarguments from the plastics industry in New York. First, on standing in federal court: Even if the plaintiff alleges facts connecting consumers' purchasing decisions to the defendants' representations, those facts do not meet the injury-in-fact requirement for injunctive relief, which requires a likely future injury from purchasing the product as currently labeled.[183] Second, on the application of the FTC Guides to the defendants' conduct: The court should read the Green Guides as concerning the *availability* of facilities that could recycle a product, rather than the *incidence* of that product being recycled. Under this reasoning, the plaintiff must show that there are no facilities in the "community," however defined, that would accept the plastic product. Despite highlighting these counterarguments, the *Duchimaza* decision also confirms that the FTC Green Guides are relevant for evaluating New York GBL claims and that a "price premium" model of consumer injury is a valid framework under the GBL.[184] Part III explores the consequences of the *Duchimaza* order in more detail while examining how the New York Attorney General's office could construct a viable GBL claim.

C. *Settlement Successes*

While they do not establish favorable legal precedents, the settlements in three cases illuminate the types of recyclability claims that are likely to be viable and the settlement agreements that could compel plastic producers to improve their business practices.

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[182] *See* Duchimaza v. Niagara Bottling, LLC. No. 21-cv-06434-PAE (S.D.N.Y. Aug. 16, 2022) (order closing case following plaintiff's failure to timely replead).

[183] Judge Seeger in *Curtis* relied on the same reasoning and came to the same conclusion. *See supra* notes 150–51 and accompanying text. Part III.A discusses the New York Attorney General's statutory authorization to seek injunctive relief on behalf of injured consumers in the state. *See infra* note 214 and accompanying text.

[184] *See Duchimaza*, 619 F.Supp. 3d at 409, 412.

1. *Smith v. Keurig* (California) & *Downing v. Keurig* (Massachusetts)

In 2018 and 2020, consumer classes filed lawsuits against Keurig in federal courts in California and Massachusetts, respectively.[185] The consumers alleged that their classes have been deceived by Keurig's advertising and labeling of their "K-cup" pods as "recyclable," when in fact the pods are too small and often contaminated with too much food waste to be recycled, as Greenpeace first documented in *Circular Claims Fall Flat*.[186] Figure 8 provides an example of a representative label on Keurig packaging. Both consumer cases asserted false or misleading advertising claims and unlawful, unfair, and deceptive business practices claims under their respective state's statutes, similar to the causes of action in the cases discussed above. Importantly, the consumer plaintiffs alleged that they would not have purchased Keurig's products had they not been labeled as recyclable.[187] Both district courts denied Keurig's motions to dismiss these claims and Judge Gilliam first certified a statewide consumer class and then approved a settlement related to a nationwide consumer class.[188] In particular, the Massachusetts district

185 *See* Smith v. Keurig Green Mountain, Inc., No. 18-cv-06690, 2020 WL 5630051 (N.D. Cal. Sept. 21, 2020); Downing v. Keurig Green Mountain, Inc., No. 20-cv-11673, 2021 WL 2403811 (D. Mass. June 11, 2021). Smith originally filed her claim in California state court and defendants removed. *See Smith*, 2020 WL 5630051, at *1.

186 *See Downing*, 2021 WL 2403811, at *1 (reviewing both the allegations and Keurig's internal investigation prior to releasing the product showing that only thirty percent of their pods could be successfully recycled). *See also* HOCEVAR, *supra* note 25, at 10.

187 *See Downing*, 2021 WL 2403811, at *7 (finding that Downing pled injury and causation elements of his state unfair and deceptive advertising claim); *id.* at *8 ("The remaining 'missing facts' do not matter for the purposes of establishing Downing's injury: Downing has adequately pled that (1) he saw an advertisement of the type in circulation since June 2016 that touted the Pods recyclability; (2) enticed by the promise of recyclability, he purchased the pods . . . ."); Smith v. Keurig Green Mountain, Inc., 393 F. Supp. 3d 837, 844 (N.D. Cal. 2019) (noting that Smith "has sufficiently alleged an injury-in-fact" and noting that Smith's "complaint alleges that if Plaintiff knew the Pods were not recyclable, she would have sought 'other coffee products that are otherwise compostable, recyclable or reusable'").

188 *See Downing*, 2021 WL 2403811, at *8 (denying motion to dismiss); *Smith*, 393 F. Supp. 3d at 850 (denying motion to dismiss); *Smith*, 2020 WL 5630051, at *12 (certifying class in California); Smith v. Keurig Green Mountain, Inc., No.

court denied Keurig's motion to dismiss on the grounds that the consumers had not received an advertised benefit, and so their economic loss was likely foreseeable to Keurig and an injury traceable to Keurig's conduct.[189] The Keurig decisions again highlight the importance of consumers' purchasing decisions to claim viability, and they provide a model for how plaintiffs can prove a convincing injury related to recyclability representations and calculate their requested restitution, which Part III discusses in detail for a potential New York false advertising case.[190]

Figure 8: Keurig Label from *Smith*[191]

18-cv-06690, 2023 WL 2250264, at *2, *11–12 (N.D. Cal. Feb. 27, 2023) (noting that the plaintiff amended the complaint to incorporate a nationwide class—"all Persons in the United States who purchased Keurig's Pods for personal, family or household purposes within the Class Period"—and approving a settlement related to that nationwide class).

189 *See Downing*, 2021 WL 2403811, at *7.

190 *See infra* Parts III.B.3, III.C (discussing the plaintiff injury and causation requirement, as well as models for plaintiff restitution).

191 Complaint ¶ 19, Smith v. Keurig Green Mountain, Inc., No. RG18922722 (Cal. Super. Ct., Cnty. Of Alameda Sept. 28, 2018) [hereinafter *Smith* Complaint].

Following the decisions, Keurig and the plaintiffs in both cases entered into negotiations over a nationwide settlement, which the parties finalized and the courts approved in early 2023.[192] The agreement includes several material terms. First, Keurig cannot "label, market, advertise, or otherwise represent" its pods as "recyclable" "without 'clearly and prominently including a revised qualifying statement, "Check Locally – Not Recycled in Many Communities,"' in close proximity to" and in a similar font as any labels representing recyclability.[193] Second, the agreement includes a $10 million settlement fund that would pay out as follows: "$5 per household without proof of payment" for the pods, $0.35 per ten pods purchased with proof of payment (to a maximum of thirty-six dollars), and any remaining amounts to the Ocean Conservancy and Consumer Reports.[194] Both Smith and Downing will also receive class representative awards.[195]

The *Smith-Downing* settlement exemplifies how settlements could help accomplish consumer protection and environmental goals. Settlements from false advertising and deceptive practices claims can incorporate binding commitments from plastics industry players to present more truthful information to consumers. They also can compensate consumers for paying a premium for "greenwashed" products but not receiving the advertised environmental benefit. In fact, the litigation and settlement process itself can pressure plastic producers to change their business practices or their products themselves. For example, the settlement agreement acknowledged that Keurig began modifying its pods "in 2021 to include a more easily peelable lid;" while not a settlement term, that product design change will likely improve the recyclability of the

192 *See Smith*, 2023 WL 2250264, at *1–2; Joint Motion to Stay Pending Settlement, Downing v. Keurig Green Mountain, Inc., No. 20-cv-11673 (D. Mass. Sept. 9 2020) (staying case while settlement negotiations in *Smith* proceeded); Stipulated Dismissal with Prejudice, Downing v. Keurig Green Mountain, Inc., No. 20-cv-11673 (D. Mass. Apr. 18, 2023) (stating that the settlement in *Smith* resolved Downing's claims).

193 Marissa Heffernan, *Keurig Agrees to $10 Million Settlement, Recycling Disclaimer*, RES. RECYCLING (Mar. 1, 2022), https://resource-recycling.com/recycling/2022/03/01/keurig-agrees-to-10-million-settlement-recycling-disclaimer.

194 *See id*.

195 *See id*.

plastic pods in the future.[196] The *Smith-Downing* settlement could therefore be an important model for future settlement negotiations in New York.

2. *Last Beach CleanUp v. Terracycle, Inc.* (California)

In a third case from 2021, The Last Beach CleanUp (LBC) relied on Greenpeace's *Circular Claims Fall Flat* report to sue recycling startup TerraCycle, Inc. and nine of its partner organizations, including Proctor & Gamble and the Coca-Cola Company.[197] TerraCycle partners with brands to collect and recycle hard-to-recycle packaging and single-use plastics, such as those used for baby food and cosmetics.[198] Partner brands label their qualifying plastic products with the TerraCycle logo; Figure 9 provides an example. Partner brands then pay TerraCycle fees based on the amount of waste collected and recycled, and it is free for consumers to sign up for TerraCycle's recycling programs and send their plastic waste directly to TerraCycle by mail or collection site.[199] But LBC alleged that TerraCycle and defendants had violated several of California's consumer protection laws (UCL, False Advertising Law, and EMCA) as they had failed to disclose to consumers that TerraCycle's programs have strict participation limits that prevented most consumers from accessing the free recycling programs.[200] In addition, LBC alleged that TerraCycle did not substantiate that it actually recycled collected products into new plastic products consistent

196 *Id*.

197 *See* Complaint ¶¶ 17–26, Last Beach CleanUp v. TerraCycle, Inc., No. RG21090702 (Cal. Super. Ct., Cnty. of Alameda Mar. 4, 2021) [hereinafter *LBC* Complaint]. The partner organizations named as co-defendants in the case are CSC Brands LP, Gerber Products, Late July Snacks LLC, L'Oreal USA S/D, Materne North America, Coca-Cola Company, Clorox Company, Procter & Gamble Company, and Tom's of Maine, Inc. *See id*.

198 *See* Dieter Holger, *TerraCycle Partners Including Coca-Cola, P&G to Change Recycling Labels After Settling Lawsuit*, N.Y. TIMES (Nov. 15, 2021, 2:46 PM), https://www.wsj.com/articles/terracycle-partners-including-coca-cola-p-g-to-change-recycling-labels-after-settling-lawsuit-11637005586 (mentioning Gerber baby food and Burt's Bees cosmetics).

199 *See id*. *See also Discover Our Recycling Process*, TERRACYCLE, https://www.terracycle.com/en-US/about-terracycle/our_recycling_process (last visited Jan. 8, 2024).

200 *See LBC* Complaint, *supra* note 197, ¶¶ 2, 5.

with the Green Guides.[201] The TerraCycle labels were therefore allegedly misleading or deceptive to reasonable consumers under the Green Guides because they presented "unqualified" recycling claims when a substantial majority of consumers did not have access to recycling facilities.[202] Similar to Earth Island, LBC alleged that it was injured because it spent organizational resources investigating and publicly rebutting the defendants' misleading advertising claims.[203]

Figure 9: Gerber Label & TerraCycle Logo[204]

After the defendants removed the case to federal court, the parties quickly settled in November 2021.[205] The defendants agreed to

201 *See id*. ¶ 3.

202 *See supra* notes 62–63 and accompanying text.

203 *See LBC* Complaint, *supra* note 197, ¶¶ 7, 14.

204 *Free Recycling Programs*, TerraCycle, https://www.terracycle.com/en-US/brigades?utf8=✓ &query=gerber& commit=Apply+filters (last visited May 13, 2022).

205 *See* Holger, *supra* note 198. *See also* Defendant Gerber Products Company's Notice of Removal, Last Beach CleanUp v. TerraCycle, Inc., No. No. 21-cv-06086 (N.D. Cal. Aug. 6, 2021).

remove "100% recyclable" labels from TerraCycle's products and include disclaimers on product packaging if consumer access to TerraCycle's programs is limited.[206] TerraCycle also agreed not to incinerate any collected waste—although it maintained that it had never previously incinerated any plastic collected.[207] Finally, TerraCycle agreed to hire a third party auditor to review their recycling practices and to share annual summary reports with LBC and TerraCycle's partner companies.[208]

A court never ruled on the merits of LBC's claims, although *Greenpeace v. Walmart* suggests that LBC may have struggled to establish a causal connection between their alleged injury and the defendants' actions.[209] But the settlement reached in *Last Beach CleanUp v. TerraCycle* provides another example of how litigation can pressure plastic producers (and private recyclers) to label their products more accurately and agree to disclose more information about their recycling practices to the public. The settlement also illustrates how consumer protection settlement agreements can incorporate commitments from plastics industry players to make changes to their operations. All of these settlement elements would be important for structuring a plastics consumer protection claim that could maximally benefit New Yorkers, as discussed in Part III.C.

III. LITIGATION CASE STUDY: NEW YORK

The cases discussed in Part II represent the beginning of a wave of litigation concerning plastic products.[210] Consumer protection claims related to plastic recyclability representations are one new frontier for law enforcement and the New York Attorney General's office could leverage them to address a serious environmental issue. The remainder of this Note discusses how the Attorney General's office could—in light of lessons drawn from recent and pending

206 *See* Holger, *supra* note 198.

207 *See id*.

208 *See id*.

209 *See supra* Part II.B. LBC is a private, non-profit environmental organization like Greenpeace. *See* Holger, *supra* note 198.

210 *See* Sarah J. Morath et al., *Plastic Pollution Litigation*, 36 NAT. RES. & ENV'T 41, 44 (2021) (discussing how plastics could be the next toxic tort and predicting that more litigation is on the horizon). *See also infra* Part III.C (discussing recent actions by state attorney generals against the plastics industry).

cases—structure a viable claim under New York's GBL section 350. It concludes that existing research on recyclability representations, when combined with FTC guidance on what types of claims are "misleading" to consumers, provides a strong foundation upon which the New York Attorney General could build a false advertising claim against major plastic manufacturers and retailers.

A. *New York General Business Law*

In New York, the Attorney General has extensive authority to investigate and file civil enforcement suits when she finds evidence that a party is engaging in "fraudulent or illegal acts or otherwise demonstrat[ing] persistent fraud."[211] Specific statutory grants of authority enhance this general power. This Note focuses on New York State's GBL sections 349 and 350, which make false advertising unlawful.[212] Section 349 states that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."[213] Section

[211] N.Y. EXEC. LAW § 63(12) (Consol. 2023).

[212] The Attorney General also has broad authority to investigate and litigate securities fraud under the Martin Act, *see* N.Y. GEN. BUS. LAW § 352 (Consol. 2023), for example. It seems plausible that plastic producers could be susceptible to the types of securities fraud claims that governments have pursued against fossil fuel producers, who allegedly misled investors by underestimating or obscuring the costs of climate change and new regulations to their businesses. *See, e.g.*, Commonwealth v. Exxon Mobil Corp., 187 N.E.3d 393 (Mass. 2022) (alleging false and misleading advertising and deceptive business practices). Moreover, litigation against Danimer Scientific, Inc. in New York indicates that a securities fraud action related to a company's overstated recyclability benefits might also be possible for the Attorney General's office. *See* Complaint at 2, Rosencrants v. Danimer Scientific, Inc., No. 21-cv-02708 (E.D.N.Y. May 14, 2021) (alleging that Danimer made false and misleading statements about its company to shareholders, including overstating the biodegradability of its plastic alternative). *See also supra* note 83. But the Martin Act seems to be a less attractive pathway than a case under GBL section 350 because of the Attorney General's previously unsuccessful case against Exxon under the Martin Act. *See* People *ex rel.* James v. Exxon Mobil Corp., 119 N.Y.S.3d 829 (N.Y. Sup. Ct. 2019) (finding that Exxon's alleged misrepresentations were insufficient to prove liability under the Martin Act after applying the "total mix" of information standard). Plastic pollution's impacts are different from those related to climate change: more localized and perhaps visible, but with costs that have been studied and modeled less. It is not clear whether a Martin Act suit against plastic producers would inevitably be difficult, and analysis beyond the scope of this Note could shed additional light on that question.

[213] N.Y. GEN. BUS. LAW § 349(a).

349 also empowers the Attorney General to pursue enforcement actions and seek injunctive and monetary relief when she "shall believe from evidence satisfactory to [her] that any person, firm, corporation or association . . . has engaged in or is about to engage in any of the acts or practices stated to be unlawful."[214]

Most relevant to plastic recyclability representations is the GBL's prohibition on "false advertising," which GBL section 350 designates as unlawful.[215] False advertising is defined as "advertising, including labeling, of a commodity . . . if such advertising is misleading in a material respect."[216] Importantly, what counts as "misleading" is "not only representations made by statement, word, design, device, sound, or any combination thereof [on the product], but also the extent to which the advertising fails to reveal facts material in the light of such representations."[217] Fraud need not be repeated to be actionable and the Attorney General can seek to enforce sections 349 and 350 when consumer fraud is at its "incipiency."[218]

To establish a false advertising claim under section 350, a plaintiff must allege three main elements: (1) consumer-oriented conduct that is (2) materially misleading and that (3) caused the injury suffered by the plaintiff.[219] This standard is identical to that used by courts to adjudicate deceptive acts or practices under GBL section 349, so section 349 caselaw is informative for structuring a

214 N.Y. GEN. BUS. LAW § 349(b). *See also infra* Part III.C discussion of potential remedies.

215 *See* N.Y. GEN. BUS. LAW § 350.

216 N.Y. GEN. BUS. LAW § 350-A.

217 *Id*.

218 *See* State by Lefkowitz v. Colo. State Christian Coll. Of Church of Inner Power, Inc., 346 N.Y.S.2d 482, 488 (N.Y. Sup. Ct. 1973).

219 *See* Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 744 (N.Y. 1995); City of New York v. Smokes-Spirits.com, Inc., 911 N.E.2d 834, 839 (N.Y. 2009) (stating required elements for a claim by a consumer plaintiff under GBL 349).

section 350 case.[220] As the *Duchimaza* case demonstrates, New York courts evaluate section 349 and section 350 claims together.[221]

Courts' have interpreted GBL sections 349 and 350 in ways that make them particularly favorable provisions under which the New York Attorney General could bring false advertising claims against plastic manufacturers and retailers. First, when the Attorney General brings a deceptive acts or practices action under GBL sections 349 or 350, she does not need to allege an injury in order to make a prima facie case; in contrast, individual consumers must allege an injury traceable to the defendant's conduct.[222] Courts have highlighted that this interpretation of sections 349 and 350 furthers their core purposes: to protect the public and ensure an "'honest market place' where 'trust,' and not deception, prevails."[223] Second, the Attorney General is not required to prove that the defendant(s) had an intention to mislead the public, nor is she required to prove "justifiable reliance" by the consumer on a defendant's

[220] *See, e.g.*, Ideal You Weight Loss Ctr., LLC v. Zillioux, 106 N.Y.S.3d 495, 498 (N.Y. App. Div. 2019) (citing Goshen v. Mutual Life Ins. Co., 774 N.E.2d 1190, 1195 n.1 (N.Y. 2002)) (holding that the standard for recovery under the law for false advertising under section 350 is "identical" to the standard in section 349); Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 395, 411 (S.D.N.Y. 2022) (collecting cases substantiating that "[a]lthough GBL § 350 is specific to false advertising, its standards are identical to those of § 349"). *See also* Cline v. TouchTunes Music Corp., 211 F. Supp. 3d 628, 635 (S.D.N.Y. 2016) ("The only difference between the two is that Section 350 more narrowly targets deceptive or misleading advertisements, while Section 349 polices a wider range of business practices.").

[221] *See Duchimaza*, 619 F. Supp. 3d at 411 (analyzing the GBL section 349 and section 350 claims using the same standard).

[222] *See Colo. State Christian Coll.*, 346 N.Y.S.2d at 489 (citing People v. Federated Radio Corp., 154 N.E. 655, 657 (N.Y. 1926)) (finding that in the case brought by the attorney general that "the test of false advertising must be the 'capacity to deceive' and no specific injuries need be established"). *See also* N.Y. GEN. BUS. LAW § 349(h) (Consol. 2023) (consumer cause of action).

[223] *See Goshen*, 774 N.E.2d at 1195 (citations omitted).

representations.[224] These rulings lower the already low bar for the Attorney General to plead a false advertising case.[225]

B. *Establishing the Elements of a Section 350 Violation*

The New York Attorney General's office could persuasively argue that plastic producers' advertising and labeling of their products as "recyclable" satisfies each of the three required elements of a false advertising violation under section 350. The following subsections address each element in turn.

1. Consumer-Oriented Conduct

The Attorney General must allege that plastic producers have engaged in "consumer-oriented" conduct that could "potentially affect similarly situated consumers."[226] The scope of the GBL is broad, so sections 349 and 350 could apply to "virtually all economic activity."[227] A "consumer" is an "individual or natural person who purchases goods, services, or property primarily for personal, family, or household purposes"—typically not a business.[228] But the

[224] *See* Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995); M&T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 570 (E.D.N.Y. 2010) (applying New York Law). This distinguishes attorney general claims under GBL sections 349 and 350 from common law fraud claims, which require proof of both of those elements. *See M & T Mortg. Corp.*, 736 F. Supp. 2d at 560–61.

[225] *See* Pelman *ex rel.* Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005) (stating that claims under GBL section 349 are not subject to the same pleading-with-particularity requirements of Federal Rule of Civil Procedure 9(b)); *Duchimaza*, 619 F. Supp. 3d at 411 ("Claims under GBL §§ 349 and 350 need not meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b)."); Leonard v. Abbot Labs., Inc., No. 10-CV-4676, 2012 WL 764199, at *19 (E.D.N.Y. Mar. 5, 2012) ("Read together, *Pelman* and *Smoke-Spirits.com* establish a categorical rule that NYCPA claims, regardless of whether they 'sound in fraud,' or are premised on specific misrepresentations rather than an 'advertising scheme', are not subject to the heightened pleading requirement of Rule 9(b).").

[226] *Oswego Laborers'*, 647 N.E.2d at 745. *See also* Plavin v. Group Health Inc., 146 N.E.3d 1164, 1169 (N.Y. 2020).

[227] Karlin v. IVF America, Inc., 712 N.E.2d 662, 665 (N.Y. 1999).

[228] BitSight Techs., Inc. v. SecurityScorecard, Inc., 40 N.Y.S.3d 375, 378 (N.Y. App. Div. 2016) (quoting Cruz v. NYNEX Info. Res., 703 N.Y.S.2d 103, 106 (N.Y. App. Div. 2000)) (reasoning that the term "consumer" is associated with goods or services related to personal, family or household purposes). *But see* Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender &

statute does not reach private contractual disputes between parties,[229] transactions executed between sophisticated parties on technical issues,[230] or "single shot" transactions that are not ordinarily recurring consumer deals.[231] Courts have also held that GBL sections 349 and 350 apply to all businesses operating in the State of New York, although "the deception of a consumer must occur in New York" for allegedly misleading advertising to be actionable under the GBL.[232]

Co., 171 N.E.3d 1192, 1197 (N.Y. 2021) (reasoning that "there is not textual support in GBL § 349 for a limitation on the definition of 'consumer' based on use" because such a limit would be "contrary to the legislative intent to protect the public against all forms of deceptive business practices"); *id.* at 1197–98 (quoting *Oswego Laborers'*, 647 N.E.2d at 744) (stating that, "given the text and purpose of GBL § 349, the Court has explained that an act or practice is consumer-oriented where it has 'a broader impact on consumers at large'").

[229] *See* Yellow Book Sales & Distrib. Co. v. Hillside Van Lines, Inc., 950 N.Y.S.2d 151, 154 (N.Y. App. Div. 2012) (finding no false advertising claim when a misrepresentation "had no impact on consumers or the public at large").

[230] *See* Denenberg v. Rosen, 897 N.Y.S.2d 391, 396 (N.Y. App. Div. 2010) ("This case involves professional services surrounding the design and implementation of a tax-driven, sophisticated, individual private pension plan costing millions of dollars.").

[231] *See* Genesco Ent. v. Koch, 593 F. Supp. 743, 752 (S.D.N.Y. 1984) (defining single shot transactions as those "involving complex arrangements, knowledgeable and experienced parties and large sums of money . . . [where] [t]he nature of alleged deceptive government practices with respect to such a transaction are different in kind and degree from those that confront the average consumer who requires the protection of a statute against fraudulent practices.").

[232] Goshen v. Mutual Life Ins. Co., 774 N.E.2d 1190, 1195 (N.Y. 2002). Courts have diverged in their interpretations of the GBL's territorial reach; for example, some courts have required that a plaintiff view an allegedly deceptive representation in New York, but other courts have considered a broader set of factors related to "where the underlying deceptive 'transaction' takes place, regardless of the plaintiff's location or where the plaintiff is deceived." Horn v. Medical Marijuana, Inc., 383 F. Supp. 3d 114, 127 (W.D.N.Y. 2019) (quoting Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 123 (2d Cir. 2013)). Courts taking the latter approach, like the Second Circuit in *Cruz*, require that "some part of the underlying transaction . . . [have] occurred in New York" but examine the "quantity and quality of the connections to New York in deciding whether a plaintiff has standing for purposes of Sections 349 and 350." *Cruz*, 720 F.3d at 124; *Horn*, 383 F. Supp. 3d at 127. The following facts were insufficient to confer standing under these GBL sections, even under a broader view of their territorial scope: Although defendants' marketing was available to New York consumers, plaintiffs (who were New York residents) viewed defendants' marketing outside New York, entered into online transactions with the foreign (not New York-based) defendants, had the products

The Attorney General would have a strong affirmative case that recyclability representations on plastic products are "consumer-oriented conduct." First, many of the plastic products studied by Greenpeace in its *Circular Claims Fall Flat* reports are consumer goods used primarily for personal, family, or household purposes, such as plastic packaging, Styrofoam containers, and plastic straws, as summarized in Table 1. They are available to the general public, who are "mere consumer[s]" and not a "circumscribed class of individuals" with greater sophistication or complex contractual arrangements for plastic bottles or to-go containers.[233] In *Duchimaza*, Judge Engelmayer did not question that GBL sections 349 and 350 would apply to Niagara's Kirkland-brand water bottles.[234] Second, consumers' general lack of sophistication when buying plastic products—whose convenience and low price may be the main points of attraction over all else, including environmental impacts[235]—indicates an imbalance of market power. The "competitive tactics" of "relatively more powerful business[es]" impact the choices of "groups of similarly-situated consumers."[236] Recent developments in the recycling market that favor the production of "virgin" plastics over the reprocessing of "recycled" plastics bolster this point about limited consumer choice.[237] In fact, the technical nature of how to define "recyclable" under the Green Guides supports the idea that many "similarly situated" consumers could be and are duped by "recyclable" representations on products that are not functionally

shipped into New York, and consumed at least part of the products in New York. *See Horn*, 383 F. Supp. 3d at 128 (granting summary judgment to defendants on GBL claims). *See also* Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47, 52 (2d Cir. 1992) ("By its own terms, therefore, GBL § 349 applies to the acts or practices of every business operating in New York.").

233 *See* Plavin v. Group Health Inc., 146 N.E.3d 1164, 1167 (N.Y. 2020) (finding consumer-oriented conduct in case of open enrollment for health insurance, which "resembles the sort of sales marketplace—characterized by groups of similarly-situated consumers subjected to the competitive tactics of a relatively more powerful business—that GBL claims were intended to address").

234 *See* Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 410–15 (S.D.N.Y. 2022) (stating required elements and discussing only the materially misleading prong in evaluating motion to dismiss).

235 *See* Altman, *supra* note 1 ("The rosy future of plastics was in disposables . . . 'in the trash can'—and polystyrene was one of the go-to resins.").

236 *Plavin*, 146 N.E.3d at 1170.

237 *See supra* notes 35–38 and accompanying text.

recyclable.[238] Finally, while the geographic limitation on conduct cognizable under section 350 noted above may cabin possible defendants and products, the market for plastic products and the production of plastic waste in New York, particularly in New York City, are still significant.[239]

2. Materially Misleading Conduct

The Attorney General must next allege facts sufficient to show that plastic producers' recyclability representations were "materially misleading" to consumers. The applicable standard for determining what is covered by this element of section 350 is those acts "likely to mislead a reasonable consumer acting reasonably under the circumstances," which is an objective inquiry.[240] Both representations and omissions may be materially misleading, particularly when the defendant "business alone possesses material information relevant to the consumer and fails to provide [it].[241] Courts have also emphasized that material information is information that shapes a consumer's choice of product and, therefore, that materially misleading information "undermine[s] the consumer's ability to evaluate his or her market options and make a free and intelligent

[238] Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995). *See supra* Part I.D. *See also* Choi-Schagrin & Tabuchi, *supra* note 1 (discussing how consumers often "wish-cycle" by attempting to recycle products that are not labeled recyclable and properly should be trash, such as chip bags, bubble wrap, and even dirty diapers).

[239] Total U.S. generation of municipal solid waste in 2018 was 292.4 million tons, of which plastic waste was 12.2 percent or 35.7 million tons. *See National Overview: Facts and Figures on Materials, Wastes and Recycling*, U.S. EPA, https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/national-overview-facts-and-figures-materials#NationalPicture (last visited Jan. 8. 2024). For comparison, New York City generates more than 14 million tons of waste each year, of which plastic waste represents approximately 14 percent. *See* CITY OF NEW YORK, PLANYC UPDATE APRIL 2011, at 136, 139 (2011), https://www.nyc.gov/html/planyc/downloads/pdf/publications/planyc_2011_planyc_full_report.pdf. Based on these figures, a rough estimate of New York City's annual plastic waste is nearly 2 million tons, accounting for nearly 5.5% of national annual plastic waste.

[240] *See Oswego Laborers'*, 647 N.E.2d at 745; Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 412 (S.D.N.Y. 2022). *See also supra* notes 219–20 (noting the same standard applies to GBL 349 and 350 cases).

[241] *See Oswego Laborers'*, 674 N.E.2d at 745. *See also* Krobath v. S. Nassau Cmtys. Hosp., 178 A.D.3d 807, 809 (N.Y. App. Div. 2019).

choice."[242] Because the FTC's Green Guides provide guidance on what uses of "recyclable" are "misleading" to consumers, it's also important to note that GBL section 349(d) establishes a "complete defense" for defendants if their act or practice "is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the [FTC]."[243] GBL section 350-d includes a similar safe harbor for false advertising claims and courts have interpreted it to cover the same conduct as that covered by section 349(d).[244] In addition, New York courts have construed the GBL safe harbor provisions to cover "regulations by other federal agencies as well," not just the FTC.[245]

The Attorney General could satisfy this second element by relying on the FTC's Green Guides as the relevant standard for what is materially misleading to consumers and then applying the Guides to show that plastic producers' recyclability representations are likely to materially mislead a reasonable consumer. But the Attorney General would likely need to respond to defendants' counterarguments that (a) the Green Guides are not relevant to determining what is "materially misleading" under the GBL; (b) even if the Green Guides are relevant, defendants' representations did not violate the Green Guides and mislead reasonable consumers; and (c)

[242] N. State Autobahn, Inc. v. Progressive Ins. Grp. Co., 102 A.D.3d 5, 13 (N.Y. App. Div. 2012). *See also In re* Sling Media Slingbox Advertising Litigation, 202 F. Supp. 3d 352, 360 (S.D.N.Y. 2016) (citing Bildstein v. MasterCard Int'l Inc., 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004)).

[243] N.Y. GEN. BUS. LAW § 349(d) (Consol. 2023). *See also supra* Part I.D (discussing the thirteen other states that have similar "defense" provisions referencing the FTC's interpretation of section 5 of the FTCA).

[244] *See* N.Y. GEN. BUS. LAW § 350-d ("In any such action it shall be a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York."). *See, e.g.*, *In re* Frito-Lay N. Am., Inc. All Nat. Litig., No. 12-MD-2413, 2013 WL 4647512, at *21 (E.D.N.Y. Aug. 29, 2013) (quoting Marcus v. AT&T Corp., 938 F. Supp. 1158, 1173 (S.D.N.Y. 1996)) (stating that "[c]ourts have construed § 350-d to be congruent with § 349(d)").

[245] Am. Home Prods. Corp. v. Johnson & Johnson, 672 F. Supp. 135, 144 (S.D.N.Y. 1987) ("Although § 350-c [and § 350-d] refer[] only to regulations administered by the Federal Trade Commission ('FTC'), the New York courts have construed that statute to cover *regulations by other federal agencies* as well.") (emphasis added). *See In re Frito-Lay*, 2013 WL 4647512, at *21 (stating the same point).

their compliance with the Green Guides provides a "complete defense" to the Attorney General's GBL claims. The Attorney General could likely neutralize each set of counterarguments.

a. Relevance of the Green Guides to the GBL

A violation of the Green Guides must be probative of whether representations are "materially misleading" under GBL sections 349 and 350. Although the court in *Curtis*, for example, expressed skepticism about relying on the Green Guides in interpreting Illinois's analogous deceptive practices statute,[246] New York courts have stressed that they should interpret GBL sections 349 and 350 to align with the FTCA and the FTC's interpretations of the statute. In interpreting "deceptive practices" and, therefore, "false advertising" under the GBL, the Court of Appeals and other courts have noted that the GBL is "modeled" on the antifraud provisions of the FTCA,[247] and they have "in large measure relied on the [FTCA's] definition of such practices" in interpreting the GBL.[248] Since the FTC has stated that the Green Guides "provide the Commission's views on how reasonable consumers likely interpret certain claims," the FTC guidelines are persuasive to judges considering a prima facie case in New York.[249] In *Duchimaza*, Judge Engelmayer utilized this interpretive frame when evaluating the "100% Recyclable" label on Niagara's bottles, although in that case the "parties agreed that the term 'recyclable' is a term of art and that the FTC Green Guides inform its meaning."[250] In addition, courts have found that

246 *See* Curtis v. 7-Eleven, No. 21-cv-6079, 2022 WL 4182384, at *33 (N.D. Ill. Sept. 13, 2022) ("It is not clear how useful those Green Guides are when evaluating the views of a reasonable consumer at a convenience store. Your average consumer at 7-Eleven probably doesn't have the FTC's policy statements at his or her fingertips when picking up a bag of foam plates for the backyard BBQ."). But the Illinois Consumer Fraud and Deceptive Business Practices Act states that "consideration shall be given" to the interpretations of the FTC on section 5 of the FTCA, which includes the Green Guides. *See* 815 ILL. COMP. STAT. ANN. 505/2 (West 2021).

247 *See* 15 U.S.C. § 45.

248 Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995). *See* Genesco Ent. v. Koch, 593 F. Supp. 743, 752 (S.D.N.Y. 1984).

249 15 U.S.C § 260.1(d).

250 Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 412 (S.D.N.Y. 2022).

whether a statement or conduct is "per se illegal" is probative of whether that statement or conduct is "materially misleading."[251] As Part I.D notes, New York's regulations make it unlawful to use the term "recyclable" without conforming with the FTC Green Guides.[252] Those regulations further support the point that a product's failure to comply with the Green Guides indicates that its recyclability claims are "materially misleading" to consumers.

b. Application of the Green Guides to Defendants' Representations

The Attorney General can persuasively show that plastic producers' noncompliance with the FTC's guidelines on recyclability representations result in "recyclable" labels or symbols that are materially misleading to New York consumers. The basic logic works as follows: No waste management facility in the United States is likely to accept, for example, a plastic coffee pod made with plastic PP #5 or PS #6, according to Greenpeace's research; therefore the pod will not be recycled into a new plastic product.[253] The pod cannot 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," which characterizes the products that the FTC states should be labeled as "recyclable."[254] It is thus "deceptive to misrepresent, directly or by implication, that a product or package is recyclable" by labeling the coffee pod as such.[255] The Attorney General could build on this reasoning to make similar arguments for other plastic products made with the plastic

[251] *See* Lum v. New Century Mortg. Corp., 19 A.D.3d 558, 559 (N.Y. App. Div. 2005) (dismissing a GBL section 349 cause of action because "there was no materially misleading statement, as the record indicated that [one mortgage origination fee], which is *not per se illegal*, was disclosed to the plaintiff") (emphasis added).

[252] *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 368-1.3(a) (2023) ("A person may only use the term 'recyclable' on a product or package that is in conformance with Section 260.12 of the Federal Trade Commission's 'Guides for the Use of Environmental Marketing Claims' published in 16 CFR Part 260 . . . .").

[253] *See supra* Table 1 and Table 2; HOCEVAR, *supra* note 25, at 3–4. *See also supra* Parts I.C–D.

[254] *See* Guide for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.12(a) (2020).

[255] *Id.*

types that are not functionally recyclable in today's recycling market: cosmetic containers and plastic clamshells (PVC #3), plastic bags and wraps (LDPE #4), microwavable containers (PP #5), foam cups (PS #6), and ketchup bottles (Other #7). Table 3 summarizes Greenpeace's recycling data from its 2022 survey by plastic resin type. Linking section 350's "materially misleading" standard to the Green Guides would provide New York courts with a reference point for determining how reasonable consumers likely view "recyclable" labels or symbols on many more types of plastic products.

Table 3: Greenpeace 2022 Recycling Estimates[256]

Plastic Type	**Estimate of Current U.S. Recycling/Reprocessing for Post-Consumer Plastic Waste**
PETE #1	20.9%
HDPE #2	10.3%
PVC #3	Negligible
LDPE #4	Less than 5%
PP #5	Less than 2%
PS #6	Less than 1%
Other #7	Negligible

The results in *Duchimaza* indicate how the Attorney General's office can strengthen its affirmative argument on this element. In *Duchimaza*, the court noted that the plaintiff had conceded the plastic resins in Niagara's water bottles (PP #1 and HDPE #2) are "widely considered to be the 'most recyclable' plastics."[257] The court, in dismissing the claims, then focused on the absence of evidence showing that facilities did not exist in New York to recycle those plastic types or, alternatively, did not process those types consistent with the Green Guides.[258] By limiting a future GBL claim to representations on products with plastic resins #3 to #7, the Attorney General would have a stronger factual basis to argue that the plastic products are not recycled in fact and therefore are not "recyclable" under the Green Guides. After *Duchimaza*, it would also be prudent

256 *See* GREENPEACE, *supra* note 42, at 27.

257 Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 413 (S.D.N.Y. 2022).

258 *See supra* notes 177–80 and accompanying text.

to include in any pleading New York-specific statistics on recycling capacity, if available, tied to the products or plastic types at issue. That type of evidence would help support the argument that facilities are not available to a "substantial majority" of consumers in the state for the specific product.[259] For example, Earth Island's amended complaint included California-specific recycling data—even granular statistics for specific waste sortation and MRFs in the state—to support its argument that many of the defendants' products were not practically recyclable in California.[260] That data also distinguished among plastic products and resin types.[261] Even if a future court were to follow Judge Engelmayer's reasoning in interpreting the Green Guides to turn on recycling availability, rather than incidence, similar facts for New York's recycling system would bolster the Attorney General's case.

Moreover, the Attorney General should consider relying on other cases where courts have used federal guidelines to determine whether an advertised characteristic is "materially misleading"

[259] *See Duchimaza*, 619 F. Supp. 3d at 413 ("The [Complaint], however, does not contain any allegations to this effect. It does not allege that recycling facilities do not *exist* in Duchimaza's community—whether defined as New York City, New York State, or some other subdivision of the state—or are available to fewer than the 60% of consumers that the Green Guides use as the minimal definition of a "substantial majority."); *id.* ("In any event, assuming that a claim of '100% recyclability' could be misleading based not on the limited availability of recycling facilities but on the limited incidence of recycling in fact—and such a theory of liability would not align easily with the dictionary definition of 'recyclability' as meaning 'capable of being recycled,'—the [Complaint] does not plead sufficient facts to support it, either.").

[260] *See Earth Island* First Amended Complaint, *supra* note 88, ¶¶ 90–107 (identifying examples of defendants' products allegedly mislabeled as "recyclable"); *e.g.*, *id.* ¶¶ 146–48, 163–65 (discussing data on recycling by defendant product type in California, including statistics for specific waste sortation and material recovery facilities in the state).

[261] *See, e.g.*, *id.* ¶ 176 (providing data for PET #1); *id.* ¶¶ 194–95 (providing data for PP #5 and PS #6 plastic); *id.* ¶ 200 (drilling down to the county-level in California for products with plastic resins #3 to #7). California's EMCA, for which New York does not have an analogous statute, may facilitate access to this granular information; the EMCA requires advertisers putting environmental marketing claims on their products to maintain written records of the "information and documentation supporting the validity of the [environmental] representation." CAL. BUS. & PROF. CODE § 17580(a) (West 2023). *See supra* notes 101–02 and accompanying text.

under the GBL. For example, in *Colpitts v. Blue Diamond Growers*,[262] the Southern District of New York found that a plaintiff's false advertising and deceptive business practices claims under GBL sections 350 and 349 could proceed against manufactures of "smokehouse" almonds.[263] In that case, the plaintiffs alleged that the almond packaging represented to reasonable consumers that the smoky flavor of the almonds resulted from a process of smoking them over a fire, not from artificial flavoring added to the almonds and listed as an ingredient on the packaging.[264] The plaintiffs cited the Food and Drug Administration's (FDA's) regulations under the Food, Drug and Cosmetic Act (FDCA) that established flavor-related labeling requirements for food products.[265] The FDA regulations required that producers clearly disclose to consumers when they used artificial flavors that simulate the flavors produced through a specific production process.[266] The *Colpitts* court found that the defendant had failed to comply with FDA regulations by using the "smokehouse" label without employing an actual smoking production process to make its almonds.[267] It stressed that "smokehouse" was a label that connotes the use of a certain process to consumers (much like "recyclable") and that differs from other labels that generally describe a product, such as "vanilla."[268] Therefore, the defendant's "failure to comply with [FDA regulations] made reasonable consumers more likely to purchase the [almonds], including a higher price than competitors' almonds," and so the use

262 527 F. Supp. 3d 562 (S.D.N.Y. 2021).

263 *See id*. at 579–80.

264 *See id*. at 572.

265 *See id*. at 579. This reference to the FDCA and FDA regulations in determining what is "materially misleading" under the GBL is consistent with courts' consideration of agency regulations beyond just the FTC's when evaluating the GBL's "safe harbor" provisions. *See supra* notes 243–44 and accompanying text.

266 *See Colpitts*, 527 F. Supp. 3d at 579 (citing 21 C.F.R. § 101.22(i) (2022)).

267 *See id*. at 579, 581.

268 *See id*. at 581–82 (distinguishing case from other food label decisions where "vanilla" was found not be a misleading label because it could describe a general flavor or the use of vanilla bean or extract as an ingredient).

of the label "smokehouse" was "misleading."[269] The court then denied the defendant's motion to dismiss the plaintiff's claim.[270]

Producer defendants would certainly challenge this application of the Green Guides and argue that their products did not contain "materially misleading" statements to consumers. The Attorney General's office could structure its claim to minimize the potency of this counterargument based on lessons from *Duchimaza* and *Curtis*. First, defendants may assert that their products contained representations that were permissibly "unqualified" or included disclosures to consumers in line with the Green Guides. As Part I.D notes, the Green Guides permit "unqualified" recycling claims when recycling facilities are available to sixty percent of "consumers or communities where an item is sold."[271] Alternatively, the Guides give producers the power to qualify any recyclability claims in very broad ways, as long as they disclose to consumers that they *may* not be able to recycle a product in their community.[272] But the Guides do not define what counts as a "community" or "access" to recycling facilities, and existing caselaw applying the Guides is limited.

In the face of this uncertainty as to how courts might consider these issues of Green Guide compliance, the Attorney General could effectively focus its claims on plastic products that are labeled in very absolute ways without any qualifications, such as with labels stating that the product is "100% recyclable."[273] It would then be much more difficult for defendants to argue that they complied with the Green Guides—though still possible, as *Duchimaza* illustrates. This product selection strategy seems to also undergird the plaintiffs' outstanding claims against single-use bottle producers in *Swartz* and *Sierra Club*.[274] In their amended complaint in the

[269] *Id*. at 579, 581–82. Although the defendants' alleged violations of the FDCA that were relevant to the court's consideration of the plaintiff's GBL claims, the GBL sections 349 and 350 claims were "free-standing claims of deceptiveness." *Id*. at 579–80.

[270] *See id*. at 592.

[271] 16 C.F.R. § 260.12(b)(1). *See supra* notes 62–64 and accompanying text.

[272] *See supra* notes 62–64 and accompanying text.

[273] *See* Swartz v. Coca-Cola Co., No. 3:21-cv-04643 (N.D. Cal. June 16, 2021); Sierra Club v. Coca-Cola Co., No. No. 3:21-cv-04644 (N.D. Cal. June 16, 2021) (alleging that Coca-Cola's plastic bottles were misleadingly labeled as "100% recyclable," when in fact they could not be recycled).

[274] *See supra* notes 98–103 and accompanying text.

consolidated *Swartz* case, the plaintiffs added the results of a consumer survey about the meaning of the defendants' recyclability representations.[275] An independent firm conducted a survey of California consumers, each of whom reported purchasing bottled water in the six months prior to the survey, and asked them several questions about the "100% recyclable" labels on the defendants' single-use bottles.[276] The survey found that (1) more than ninety percent of respondents, who viewed examples of the defendants' packaging, believed that their label indicated the entire bottle, including its label and cap, was recyclable; (2) more than eighty-six percent of respondents believed that the defendants' labels meant the "entire product (including the bottle, label, and cap) will actually be recycled by facilies in the state of California," if the consumer properly disposed the bottle in a recycling bin; and (3) more than sixty-one percent of respondents believed that products labeled "100% recyclable" were "more capable of being completely recycled" than products labeled only "recyclable."[277] The *Swartz* plaintiffs do not specify the sample size of the independent survey. But the *Swartz* survey results suggest that surveys could be one compelling way for plaintiffs to provide a court with quantitative data relevant to how the reasonable consumer would view the defendants' labels. Moreover, focusing on the veracity of unqualified recycling claims for one specific defendant likely contributed to the successful arguments in *Bargetto* and the eventual settlements for Smith, Downing, and LBC.[278]

In addition, *Curtis* and *Duchimaza* provide more detail on the types of products that the Attorney General should investigate or scrutinize closely. Judge Seeger's decision not to dismiss the plaintiff's claims regarding the foam plates and freezer bags missing RICs indicates that similar products in New York present a favorable GBL case—especially given the court's limited interpretation of the Green Guides, based on an intrinsic-versus-extrinsic distinction in *Curtis*.[279] In contrast, Judge Engelmayer's decision, which found

[275] *See* Second Amended Consolidated Complaint ¶¶ 6–7, Swartz v. Coca-Cola Co., No. 21-CV-04643-JD, 2023 WL 4828680 (N.D. Cal. Aug. 17, 2023).

[276] *See id.* ¶¶ 43–53.

[277] *Id.* ¶¶ 47–49, 53.

[278] *See supra* notes 197–208 and accompanying text.

[279] *See supra* notes 153–57 and accompanying text.

that the bottle caps and plastic labels on Niagara's bottles were "minor, incidental components" within the meaning of the Green Guides,[280] suggests that the Attorney General's office should be especially careful if the product at issue includes similar nonrecyclable parts, or avoid altogether litigation involving products with smaller components. The Green Guides do not define "minor, incidental components," although they give the example that bottle caps fall within the exception.[281] The *Duchimaza* court relied on a dictionary definition of "minor" and found that the labels were "patently inferior in size, degree, and importance" and therefore also fell within the exception.[282] If products that might violate the GBL contain similar components that are *not* recyclable under the Green Guides, it is very likely that defendants would argue that they are "minor, incidental components" based on the examples in *Duchimaza*.

c. GBL "Complete Defense" & the Green Guides

Based on the cases that Part II discusses, future New York defendants surely will assert the section 350-d affirmative defense that their recyclability representations complied with all FTC standards in the Green Guides and therefore were not "materially misleading."[283] They may point to Judge Engelmayer's conclusion in *Duchimaza* that the FTC Green Guides were "regulations" within the meaning of the sections 349 and 350 complete defenses because they "establish[] commercial practices regarding recyclability claims."[284] But it's not clear that this conclusion is correct.

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[280] *See supra* note 181 and accompanying text.

[281] *See* Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 414 (S.D.N.Y. 2022); 16 C.F.R. § 260.3(b) (2023) ("Example 2: A soft drink bottle is labeled 'recycled.' The bottle is made entirely from recycled materials, but the bottle cap is not. Because the bottle cap is a minor, incidental component of the package, the claim is not deceptive.").

[282] *See Duchimaza*, 619 F. Supp. 3d at 415.

[283] *See supra* notes 243–45 and accompanying text (reviewing the "complete defense" for defendants if their act or practice "is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the [FTC]").

[284] *Duchimaza*, 619 F. Supp. 3d at 411–12 (quoting Smith v. Keurig Green Mountain, Inc., 393 F. Supp. 3d 837, 845 (N.D. Cal. 2019)).

Courts applying New York law have refused to extend the GBL's safe harbor defense to situations where defendants arguably complied with guidance from a federal agency when that guidance was not promulgated in a formal rule or regulation. For example, in *In re Frito-Lay North America, Inc. All Natural Litigation*, a consolidated multi-district litigation, plaintiffs brought a putative class action, including New York GBL claims, and alleged that Frito-Lay and its parent company, PepsiCo, deceptively labeled and marketed as "All Natural" various products.[285] The products included Tostitos, SunChips, and Fritos Bean Dip products, which allegedly "contained unnatural, genetically-modified organisms."[286] The defendants argued that they had complied with the FDA's guidance on the term "natural" as used in food labeling and therefore that they had a complete defense under the GBL.[287] But the court reasoned that the FDA's guidance was non-binding and not clearly within the "rule and regulations" category of GBL sections 349(d) and 350-d.[288] The court ultimately concluded that the GBL "safe harbors" afforded the defendants no protection from the claims.[289] Similarly, courts have reasoned that GBL sections 349(d) and 350-d did not apply when, for example, defendants relied on letters from the FDA approving health claims on infant formula labels or EPA's approval of herbicide labels under the Federal Insecticide, Fungicide, and Rodenticide Act.[290]

The same logic applies to the Green Guides. The Green Guides "do not operate to bind the FTC or the public" but set forth the FTC's "views about environmental claims" to help marketers avoid

285 *See In re* Frito-Lay N. Am., Inc. All Nat. Litig., No. 12-MD-2413, 2013 WL 4647512, at *1–2 (E.D.N.Y. Aug. 29, 2013).

286 *Id.* at *1.

287 *See id*. at *20–22.

288 *See id*. at *13–14, *21–22. The court also noted that the FTC studied the term "natural," notified the public of a proposed rule related to the term's use, and eventually terminated that rulemaking in 1983. *See id.* at *14.

289 *See id*. at *22.

290 *See* Greene v. Gerber Products Co, 262 F. Supp. 3d 38, 69–71 (E.D.N.Y. 2017) (finding that the GBL "safe harbor" provisions did not apply when defendant relied on a letter from the FDA approving certain qualified health claims on its infant formula labels); Carias v. Monsanto Co., No. 15-CV-3677, 2016 WL 6803780, at *8 (E.D.N.Y. Sept. 30, 2016) (concluding the same when defendant relied on EPA's approval of its Roundup product label).

making unfair, deceptive, or misleading claims.[291] They are not regulations that require the FTC to act when industry players violate their terms.[292] The Attorney General therefore could persuasively argue that the *Duchimaza* court misinterpreted the GBL's complete defense provision. The Green Guides can function as a relevant rubric for evaluating the GBL's "materially misleading" element without constituting a regulation for purposes of the "complete defense" in sections 349 and 350. In fact, the coalition of sixteen state attorneys general that recently commented on the Green Guides made the same general point: The FTC should revise the Guides to make clear that "compliance with the Guides is not a 'safe harbor' from liability under those more rigorous standards, or from liability for deception generally."[293]

3. Plaintiff Injury & Causation

As noted above, the Attorney General, when suing on behalf of the public, is not required to allege or prove the injury element of a section 350 claim that individual plaintiffs typically must satisfy.[294] Courts have nevertheless considered injuries, often economic, sustained by regular consumers in evaluating cases brought by the State as a consumer representative.[295] Moreover, causation is still an important factor in establishing a prima facie case, as the Attorney General would need to connect a defendant's representations to a consumers' injuries.[296] The injuries suffered by consumers also may

[291] *See* 16 C.F.R. § 260.1(a) (2023).

[292] *See id*. ("[The Green Guides] do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides.").

[293] States of California et al., *supra* note 80, at 7.

[294] *See supra* note 222 and accompanying text.

[295] *See, e.g.*, People *ex rel.* Spitzer v. Applied Card Sys., Inc., 27 A.D.3d 104, 107 (N.Y. App. Div. 2005) (advertised "pre-approved" credit limits not received by consumers); People *ex rel.* Cuomo v. Nationwide Asset Servs., 888 N.Y.S.2d 850, 862–65 (N.Y. Sup. Ct. 2009) (representations that debt settlement services "typically save [consumers] 25% to 40% off" their total indebtedness was misleading and didn't take account of fees paid by consumers).

[296] *See* Harris v. Dutchess Cnty., 25 N.Y.S.3d 527, 540 n.10 (N.Y. Sup. Ct. 2015) (stating that "[r]eliance and causation are twin concepts, but they are not identical" and that causation must still be proven) (citation omitted); Stutman v. Chem. Bank, 731 N.E.2d 608, 612 (N.Y. 2000) (finding that plaintiffs must still

not be "indirect or derivative" of a third party's actions.[297] Incorporating evidence of consumer injuries traceable to the defendants' recyclability representations would thus bolster a future section 350 case. After the decisions in *Greenpeace v. Walmart* and the settlements in *Smith* and *Downing*, this link may be critical to the case's viability.[298] In addition, the defendants would likely dispute actual and proximate causation. Choosing products and defendants carefully could sap the strength of those counterarguments.

First, as in *Duchimaza* (and the cases against Keurig and 7-Eleven),[299] incorporating direct evidence from New York consumers who purchased plastic products labeled "recyclable" based on that representation would make for a strong prima facie case. The court in *Duchimaza* did not question that Eladia Duchimaza had been injured under the GBL because she paid a "price premium" for bottles labeled as "100% Recycled;" moreover, it found that these alleged facts were sufficient to confer Article III standing for her damages claim.[300] As Judge Engelmayer wrote, "[s]ubstantial economic harm is plainly the type of injury for which parties may seek redress in federal court."[301] As another example, in *Greene v. Gerber Products Co.*, Judge Brodie in the Eastern District of New York

prove causation even if they were not required to prove reliance under GBL section 349); Small v. Lorillard Tobacco Co., 720 N.E.2d 892, 897 (N.Y. 1999) (quoting Oswego Laborers' Loc. 214 v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995)) (stating that a consumer must allege facts sufficient to show that they fell victim to the defendant's misrepresentations and that those misrepresentations caused "actual, although not necessarily pecuniary, injury").

297 *See* City of New York v. Smokes-Spirits.com, Inc., 911 N.E.2d 834, 838–40 (N.Y. 2009) (finding that NYC, acting in its capacity as a consumer, could not allege a GBL section 349(h) claim based on lost tax revenues from consumers buying cigarettes from out-of-state retailers online).

298 *See supra* Parts II.B–C.

299 *See id*.

300 *See* Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 408–09 (S.D.N.Y. 2022). *See also supra* note 234 and accompanying text.

301 *Duchimaza*, 619 F. Supp. 3d at 409 (quoting United States v. Cambio Exacto, S.A., 166 F.3d 522, 528 (2d Cir. 1999)). *See also* Segedie v. Hain Celestial Grp., No. 14-cv-5029, 2015 WL 2168374, at *12 (S.D.N.Y. May 7, 2015) (finding that plaintiff had alleged injury in fact by claiming they paid a price premium due to the product being labeled "natural" or "all natural"). But Duchimaza's allegations were not sufficient to establish a likely future injury, traceable to Niagara's practices and advertising, that would confer standing for prospective injunctive relief. *See supra* note 175 and accompanying text.

determined that a putative class of consumers sufficiently stated false advertising claims under GBL section 350 against infant formula manufacturers, who had advertised the "allergenic benefits" of their formulas.[302] The court determined that the injury prong was satisfied by the representative plaintiff's allegations that she had paid a premium for the product because of a defendant's representations, despite her not pleading details of comparable products with lower prices.[303] The representative plaintiff had alleged that she did not receive the benefit of the bargain—a reduced risk of allergies for her infant—despite paying for that benefit.[304] *Greene* parallels the situation of many environmentally conscious consumers buying "recyclable" products (likely sold at a premium) that purport to offer them a benefit: the comfort of knowing their purchase would not contribute to more waste in landfills and the environment.[305] Although mere "frustration and disappointed expectations" do not give rise to a cognizable cause of action under New York law, tying consumer expectations to a monetary amount per product would enhance the Attorney General's argument on both plaintiff injury and causation.[306]

Second, plastic producers would likely dispute both actual and proximate causation in a GBL section 350 case. Looking beyond the effect of recyclability representations on consumers' purchasing decisions, plastic producers would likely argue that other parties—primarily waste management operators, local governments, and consumers themselves—were intervening actors whose actions were the real cause of plastic products ending up in landfills and the environment.[307] Taking a cue from companies sued for their involvement in the prescription opioid crisis, plastic producers could assert that the connection between their operations and plastic pollution is attenuated and, therefore, they were not the proximate cause of the

302 *See* Greene v. Gerber Prods. Co., 262 F. Supp. 3d 38, 67 (E.D.N.Y. 2017).

303 *See id*. at 69.

304 *See id*. at 68.

305 *See supra* notes 8–9 and accompanying text.

306 *See* Harris v. Dutchess Cnty., 50 Misc. 3d 750, 770–71 (N.Y. Sup. Ct. 2015).

307 This argument would be consistent with the plastics industry's campaigns to conceal and downplay their role in perpetuating plastic pollution and maintaining a dysfunctional recycling system. *See supra* notes 6–7 and accompanying text. *See also supra* Part I.C (discussing current U.S. recycling market trends).

pollution.[308] The Attorney General could address both counterarguments by carefully selecting the plastic products and defendants for a section 350 case. Rather than deploying a wide net, as the plaintiffs did in *Earth Island*,[309] the Attorney General's office could narrow its claims to include only the specific defendants and products for which research provides robust evidence of misleading labeling, as Greenpeace did in its recent suit against Walmart[310] or the consumer plaintiffs did in their suits against Keurig and TerraCycle.[311] Focusing on manufacturers and retailers of plastic products made with plastic resins #3 through #7 would be prudent because of their low functional recycling rates and very likely noncompliance with FTC guidelines, as summarized in Table 2 and Table 3. Lawsuits against manufacturers and retailers of primarily plastic bottles (made of PETE #1 and HDPE #2) would be vulnerable to the counterargument that consumers failed to recycle an otherwise recyclable, Green Guides-compliant product.[312] Plastic producers could

[308] *See, e.g.*, California v. Purdue Pharma L.P., No. 30-2014-00725287, 2021 WL 5227329, at *9–10 (Cal. Super. Ct. Nov. 11, 2021); Oklahoma *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 728–29 (Okla. 2021) (denying liability under state public nuisance law for pharmaceutical companies who allegedly contributed to creating the public nuisance through their production and sales practices because plaintiffs failed to establish a sufficient causal link). *But see* Jan Hoffman, *CVS, Walgreens and Walmart Fueled Opioid Crisis, Jury Finds*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/health/ walmart-cvs-opioid-lawsuit-verdict.html (reviewing outcome in New York case finding opioid distributors and retailers liable for creating a public nuisance). Defendants have made these arguments in public nuisance cases related to plastic pollution, where causation is a critical, but likely difficult to establish, component of any plaintiff's case. *See* Fraser, *supra* note 94, at 2077–78, 2094–100 (discussing caustion in general and under New York law, as applied to plastic pollution inundating or obstructing public waterways or lands).

[309] *See supra* note 88 and accompanying text.

[310] *See Greenpeace* Complaint, *supra* note 82, ¶ 2 (basing claims on Walmart's plastic products and packaging made from plastic types #3–7).

[311] *See* Order Granting Plaintiff's Motion for Class Certification, Smith v. Keurig Green Mountain, Inc., No. 18-cv-06690, 2020 WL 5630051, at *1 (N.D. Cal. Sept. 21, 2020) (challenging representations related to Keurig's "K-Cups"). *See also* Part II.C (reviewing the settlement in the LBC's suit against TerraCycle and partner companies).

[312] This argument may undermine plaintiffs' arguments in the cases against The Coca-Cola Company, a bottle manufacturer and distributor, and limit the defendants against which the Earth Island Institute's claims could prevail.

then argue that consumers were truly at fault and the problem of plastic pollution due to those products was one of individual failure at a large scale. Although Niagara did not raise this argument in *Duchimaza*, that case involved water bottles composed predominately from PP #1 and HDPE #2, and so Duchimaza's case would have been vulnerable to causation counterarguments had she successfully alleged facts to show that Niagara's "100% Recyclable" labels were materially misleading.[313]

C. *Policy Implications and the Attorney General's Role*

If the New York Attorney General were to bring a GBL section 350 case based on recyclability representations, it would be a relatively narrow set of claims that would implicate a subset of players in the plastics industry. Despite the potential claim's narrowness, the Attorney General's action to address false "recyclable" labels would align with her position's core consumer protection function and would be beneficial as a matter of environmental policy.

First, the Attorney General would be acting to secure relief for injured consumers. Litigation under New York's consumer protection statutes, like GBL section 350, is squarely in the wheelhouse of the Attorney General, who is charged with protecting the legal interests of New York's residents.[314] With a viable false advertising case against producers of consumer plastic products, the Attorney General could obtain both injunctive relief and restitution for consumers under section 350.[315] Through settlement or court order,

[313] *See* Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 402 (S.D.N.Y. 2022). The bottle caps and labels on the water bottles were made from plastic PP #5, but the court determined that those product parts were "minor, incidental components" for which Niagara did not need to qualify its labels. *See supra* note 181 and accompanying text.

[314] *See* N.Y. EXEC. LAW § 63(1), (8) (Consol. 2023) ("The attorney general shall . . . [p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state . . . [and] [w]henever in [the attorney-general's] judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice.").

[315] Section 349 states that the Attorney General may bring an enforcement action under the GBL to "*enjoin* such unlawful acts or practices and obtain *restitution* of any moneys or property obtained directly or indirectly by any such unlawful acts or practices." N.Y. GEN. BUS. LAW § 349(b) (Consol. 2023) (emphasis

plastic producers could agree to correct their marketing or advertising, which would have environmentally beneficial effects, as discussed below. The Attorney General could also secure compensation for consumers, particularly if the products they purchased were more expensive because they were labeled as "recyclable." For example, the consumer class in the Keurig cases relied on a model that calculated their damages based on the "price premium" they paid because of the recyclability claims on the coffee pods, and the district court in California approved that model for settlement negotiations and the final nationwide agreement based on the model.[316] The Southern District of New York in both *Duchimaza* and *Colpitts* framed the plaintiff's injury in "price premium" terms when applying GBL sections 349 and 350, which further suggests that a price premium method is a fair framework for restitution that is consistent with New York law.[317] Finally, as Greenpeace stated in *Circular Claims Fall Flat*, "[a]ccurate recycling claims and labels" serve the "valuable function[]" of providing consumers with "truthful advertising," which is an end by itself; New York courts have recognized the same value of truthful advertising when interpreting the GBL.[318] Tackling a widespread consumer problem and attaining tangible results for constituents is a way for the Attorney General to support an honest marketplace and build public trust in her office.[319]

Second, a false advertising case led by the New York Attorney General could help to hold the plastics industry accountable for growing plastic pollution. In the absence of legislative action on

added). That provision is also applicable to section 350. *See supra* note 221 and accompanying text.

316 *See* Smith v. Keurig Green Mountain, Inc., No. 18-cv-06690, 2020 WL 5630051, at *9–10 (N.D. Cal. Sept. 21, 2020) ("The methodology to calculate a price premium in this manner thus represents a plausible method to calculate damages consistent with Plaintiff's liability case."). *See also* Order Granting Final Approval of Class Action for Settlement and Motion for Attorneys' Fees, Smith v. Keurig Green Mountain, Inc., No. 18-cv-06690 (N.D. Cal. Nov. 2, 2018).

317 *See Duchimaza*, 619 F. Supp. 3d at 409. *See also* Colpitts v. Blue Diamond Growers, 527 F. Supp. 3d 562, 576–77 (S.D.N.Y. 2021).

318 HOCEVAR, *supra* note 25, at 4. *See supra* note 223 and accompanying text.

319 *See, e.g.*, Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2006 (2001) (discussing how successful multistage cases brought by attorneys general against major cigarette manufactures drew positive national attention to the role of attorneys general).

plastics at the federal level, and in addition to still nascent regulatory efforts at the state level,[320] attorney general litigation is a powerful tool for pressuring plastic producers to alter their business practices in environmentally beneficial ways—or agree to regulations that compel them to do so.

With a viable section 350 claim, the Attorney General could extract binding commitments from plastic producers to adopt more truthful and environmentally friendly recycling practices.[321] As illustrated by the settlements in *Smith*, *Downing*, and *Last Beach CleanUp v. TerraCycle*, a settlement agreement could include plastic producer commitments to relabel their products with appropriate qualifications, redesign aspects of their products, end certain practices like incineration, or agree to increased oversight and monitoring.[322] Those types of changes could lead to increased recycling of plastic products and fewer instances of improper and environmentally harmful disposal on their own. In addition, more accurate recyclability representations would contribute to reduced plastic waste if consumers choose not to purchase products that disclose their inability to be recycled. While not all consumers would change their purchasing habits, research indicates that environmental claims and representations that a product is "recyclable" are salient and important to many consumers.[323] At scale, shifts in consumer

320 *See supra* note 14 and accompanying text.

321 *See, e.g.*, Complaint ¶ 95(B), Downing v. Keurig Green Mountain, Inc., No. 1:20-cv-11673, 2021 WL 2403811 (D. Mass. June 11, 2021) (asking the court for preliminary and permanent injunctions enjoining Keurig from representing in any way to the public that its coffee pods were recyclable); *Greenpeace* Complaint, *supra* note 82, ¶ 84(B) (asking the court to order that defendants "conduct a corrective advertising and information campaign advising consumers that the Products do not have the characteristics, uses, benefits, and qualities Defendants have claimed"). *See also* People *ex rel.* Schneiderman v. Greenberg, 27 N.Y.3d 490, 497 (N.Y. 2016) (first quoting People v. Lexington Sixty-First Assocs., 346 N.E.2d 307, 313 (N.Y. 1976); and then quoting Sec. & Exch. Comm'n v. Mgmt. Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975)) (stating that the Attorney General's action for injunction under the Martin Act and Executive Law were "authorized by remedial legislation" and that the "standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief").

322 *See, e.g.*, *supra* notes 205–08 and accompanying text.

323 *See supra* notes 8–9 and accompanying text (discussing evidence of consumer awareness of sustainability and environmental claims, including recyclability representations, on products).

purchasing behavior could make clear to plastic producers that they should eliminate or redesign certain types of plastic products—or invest more heavily in alternatives to plastics. For example, if consumer demand significantly falls, the products that plastic producers first reduce or eliminate may be single-use plastic products, which some New York jurisdictions already ban or tax.[324] That change would certainly benefit the environment.

Moreover, investigation and litigation by the Attorney General puts pressure on the plastics industry that's separate from the outcome of the case. Applying the Attorney General's broad investigatory powers[325] to this issue of recyclability representations, where there is a clear case against certain plastic producers, may lead the Attorney General's office to information (particularly confidential information) that could tee up later litigation. Future cases, including those based on public nuisance or products liability claims, could implicate a wider swath of plastics industry players and would involve proving plastic producer awareness of the environmental impacts of their actions.[326] Evidence of the plastics industry's knowing manipulation of the public—which likely exists based on previous reporting[327]—could support increased legal sanctions,[328] possible settlements, or regulatory agreements. In fact, California Attorney General Rob Bonta announced on April 28, 2022 that his office is investigating the fossil fuel and petrochemical industries

[324] For example, New York State's and New York City's bans on polystyrene containers and "packing peanuts" and Suffolk County's plastic container tax. *See DEC Reminds New Yorkers: Statewide Ban on Polystyrene Foam Containers and Loose Fill Starts Jan. 1*, N.Y. DEP'T OF ENV'T CONSERVATION (Dec. 29, 2021), https://www.dec.ny.gov/press/124479.html; Soc'y of Plastic Indus. v. Cnty. of Suffolk, 573 N.E.2d 1034 (N.Y. Sup. Ct. 1991) (dismissing challenge to tax on standing grounds).

[325] *See supra* note 212 and accompanying text.

[326] *See, e.g.*, *Earth Island* Complaint, *supra* note 88, ¶¶ 161–226 (suing a large group of plastic producers based on a combination of claims: consumer protection statutory violations, public nuisance, negligence and strict products liability); *id.* ¶ 188 (asserting as part of plaintiff's failure to warn claim that defendants "knew or should have known," based on information available to them, that plastic products, "whether used as intended or misused in a foreseeable manner, inevitably cause[]" environmental harms).

[327] *See supra* note 6 and accompanying text.

[328] *See, e.g.*, N.Y. GEN. BUS. LAW §§ 349(h), 350-e(3) (Consol. 2023) (authorizing treble damages when defendant commits an intentional violation).

"for their role in causing and exacerbating a global plastic pollution crisis."[329] Attorney General Bonta's office has so far issued a subpoena to Exxon seeking information related to Exxon's role in deceiving the public about the recyclability of its plastic products (among other plastics-related activities) and sent a letter to manufacturers of reusable grocery bags in California requesting that they substantiate their recycling claims.[330]

In addition, at least two state attorneys general are pursuing analogous claims. First, Connecticut Attorney General William Tong filed a lawsuit in June 2022 against Reynolds Consumer Products and alleged that Reynold's sales of Hefty brand "Recycling" trash bags in the state violated the Connecticut Unfair Trade Practices Act.[331] Specifically, Attorney General Tong's office argued that Reynolds' sales of Hefty "Recycling" bags, which feature prominent labels and symbols of their recyclability, were and are likely to materially mislead reasonable consumers into believing that the bags are recyclable in Connecticut; in fact, the "Recycling"

[329] *Attorney General Bonta Announces Investigation into Fossil Fuel and Petrochemical Industries for Role in Causing Global Plastics Pollution Crisis*, STATE OF CAL. DEP'T OF JUST. (Apr. 28, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-investigation-fossil-fuel-and-petrochemical.

[330] *See id*. ("The investigation will target companies that have caused and exacerbated the global plastics pollution crisis, their role in perpetuating myths around recycling, and the extent to which this deception is still ongoing."); *Attorney General Bonta Demands Manufacturers of Plastic Bags Substantiate Recyclability Claims*, STATE OF CAL. DEP'T OF JUST. (Nov. 2, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-demands-manufacturers-plastic-bags-substantiate.

[331] *See Reynolds* Complaint, *supra* note 97, ¶¶ 20–29 (also alleging that such conduct contravened Connecticut's official state policy encouraging consumer recycling, violated the FTC's Green Guides, and was knowing and willful). Attorney General Tong filed the case on behalf of Michelle H. Seagull, the Commissioner of Connecticut's Department of Consumer Protection. *See id*. A California consumer recently filed a similar case concerning the Glad Product Company's "recycling" bags on behalf of a purported nationwide class. *See* Class Action Complaint, Peterson v. Glad Prods. Co., No. 3:23-cv-00491 (N.D. Cal. Feb. 2, 2023) (asserting various state law claims: unfair competition, false advertising, breach of warranty, intentional and negligent misrepresentation, and unjust enrichment). Magistrate Judge Hixson recently denied the defendants' motion to dismiss the case because he determined, contrary to defendants' arguments, that Peterson alleged facts sufficient to demonstrate his standing to seek injunctive relief. Peterson v. Glad Prods. Co., No. 23-cv-00491, 2023 WL 4600404, at *1, *3–5 (N.D. Cal. July 17, 2023).

bags are not processed into new plastic products at state MRFs and all the otherwise recyclable products disposed within the Hefty bags are diverted to landfills and incinerators.[332] Importantly, Connecticut's case alleges that Reynold's Hefty bag representations also violate *both* Connecticut's state agency regulations defining "recycle" and the FTC's Green Guides, as the state law provides that the FTC's interpretations of the FTCA guide the construction of the state's unfair trade practices.[333] Judge Farley of the Harford Judicial District Superior Court recently denied Reynold's motion to strike the State's complaint in its entirety for failure to state a claim. Viewing the State's allegations in the light most favorable to their legal sufficiency, Judge Farley found that the facts expressly and impliedly alleged in the complaint about the defendant's bags supported each of the State's six causes of action.[334] The parties are now engaged in discovery.[335]

Second, Minnesota Attorney General Keith Ellison filed, in June 2023, a case against both Reynolds and Walmart premised on misrepresentations similar to those that Connecticut is litigating.[336] Minnesota's case relates to Reynolds' Hefty-branded "Recycling"

[332] *See Reynolds* Complaint, *supra* note 97, ¶¶ 14–15, 21–24. As stated in the complaint, the Hefty "Recycling" trash bags are made from low-density polyethylene ("LDPE"), or LDPE #4, and Greenpeace determined in *Circular Claims Fall Flat* that only four percent of all U.S. MRFs accept LDPE #4 and that items made from LDPE #4 cannot be labeled as "recyclable" per the FTC Green Guides. *See id*. ¶ 15; HOCEVAR, *supra* note 25, at 12. *See also* Table 3 (presenting Greenpeace's 2022 estimates of post-consumer recycling or reprocessing rates by plastic type).

[333] *See Reynolds* Complaint, *supra* note 97, ¶¶ 21–29; CONN. AGENCIES REGS. § 22a-241b-1(16) (2023) (defining "Recycle"); 16 C.F.R. § 260.12(a) (2023) ("Recyclable Claims"); CONN. GEN. STAT. ANN. § 42-110b(a)–(b) (West 2023) ("No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . It is the intent of the legislature that in construing [this prohibition], the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission . . . to Section 5(a)(1) of the Federal Trade Commission Act.").

[334] *See* Order on Motion to Strike at 7, State v. Reynolds Consumer Prods., Inc., No. X03-CV-22-6156769-S (Conn. Super. Ct. July 5, 2023).

[335] *See* Order Regarding: 08/03/2023 Scheduling Order, State v. Reynolds Consumer Prods., No. X03-CV-22-6156769-S (Conn. Super. Ct. Aug. 3, 2023) (approving the parties' joint Scheduling Order, submitted by the State, and listing the deadline to exchange responses to discovery requests as December 15, 2023).

[336] *See* Complaint, Minnesota v. Reynolds Consumer Prods., No. 62-CV-23-3104 (Minn. Dist. Ct., Ramsey Cnty. June 6, 2023).

trash bags, just like in Connecticut's case, and to Walmart's Great Value-branded "Recycling" drawstring bags.[337] Minnesota alleges that the labels on the packaging of the bags, as well as on each defendant's website, falsely advertise the bags as recyclable when they are not recyclable in Minnesota.[338] Specifically, Minnesota relies on four statutory causes of action under state law: (1) the Prevention of Consumer Fraud Act, (2) the Deceptive Trade Practices Act, (3) the False Statement in Advertising Act, and (4) the state's prohibition on deceptive environmental marketing claims.[339] Minnesota's allegations mirror Connecticut's on the fact that recycling facilities, when they receive otherwise recyclable plastic products in the defendants' "Recycling" bags, incinerate or landfill those products.[340] And Minnesota also alleges that the defendants' bags present safety hazards for the employees who operate sorting equipment used at recycling facilities.[341] Notably, Minnesota seeks, among other relief, for the defendants to fund a corrective advertising campaign in the state "relating to the issue of recyclable materials, administered and controlled by an independent third party."[342] The parties are currently engaged in mediation and have a hearing in 2024 on the defendants' motion to dismiss the State's claims.[343]

By aligning with Connecticut, California, and Minnesota, the New York Attorney General could ratchet up the pressure on the

337 *See id.* ¶¶ 12, 13–22 (discussing Hefty bags); *id.* ¶¶ 25–31 (discussing Great Value bags).

338 *See id.* ¶¶ 34–37.

339 *See* MINN. STAT. ANN. § 325F.69(1) (West 2023) (PCFA); MINN. STAT. ANN. § 325D.44(1) (West 2023) (DTPA); MINN. STAT. ANN. § 325F.67 (West 2023) (FSAA); MINN. STAT. ANN. § 325E.41(1)(a) (West 2023) (state's prohibition on deceptive environmental marketing claims); Complaint, *supra* note 336, ¶¶ 45–77; *supra* Part I.D (discussing states' statutes that reference the Green Guides as a "standard," which includes Minnesota's Environmental Marketing Claims statute).

340 *See* Complaint, *supra* note 336, ¶¶ 37–38.

341 *See id.* ¶¶ 41–43.

342 *Id.* ¶ 80.

343 *See* Joint Motion for Stay of Discovery and Deadlines at 1, Minnesota v. Reynolds Consumer Prods., No. 62-CV-23-3104 (Minn. Dist. Ct., Ramsey Cnty. Sept. 21, 2023); Defendants Reynolds Consumer Products, Inc. and Reynolds Consumer Products, LLC's Second Amended Notice of Motion and Motion to Dismiss at 1, Minnesota v. Reynolds Consumer Prods., No. 62-CV-23-3104 (Minn. Dist. Ct., Ramsey Cnty. Oct. 18, 2023).

plastics industry to change how it advertises plastic products and to limit the production of plastic products that producers know are not functionally recyclable—particularly if the New York Attorney General can bring a claim against multiple distributors or retailers.[344] Coalition action on recyclability representations would be consistent with a history of attorneys general coordinating to police environmental marketing claims, including the use of "recyclable" and "recycled content" in product advertising.[345] There is already a burgeoning coalition action around the FTC's ongoing review of the Green Guides,[346] and the New York Attorney General (and her counterparts in other states) should build on this momentum.

Finally, high-profile litigation on the issues of recyclability and plastic producer responsibility could raise public awareness and push state or federal regulators to act on beneficial new legislation or regulation. For example, the New York legislature has considered multiple bills that would include "extended producer responsibility" provisions.[347] All of the proposed bills would require plastic

[344] *See, e.g.*, Lynch, *supra* note 319, at 2009 (reviewing how successful multistage coalition suits by attorneys general can "effectively impose[] the settlement terms on the defendant on a national basis [because] [i]f a corporation is forced to change its activities in several states, it is likely to do so in every state in which it operates").

[345] *See, e.g.*, CAL. ATT'Y GEN. ET AL., THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING 17–19, 41–42 (1990), https://p2infohouse.org/ref/24/23677.pdf (flagging the rise in recyclability claims on products and making recommendations for producer standards and guidelines that define when a product can be labeled as recyclable). A coalition of states, including New York, also previously settled with the American Plastics Council over deceptive advertising claims related to the availability of recycling to consumers in December 1995; under that settlement the Council did not admit wrongdoing but agreed to back up future claims with reliable evidence and provide consumers with more information about local recycling. *See* 1996 MASS. ATT'Y GEN. REP. 300, https://archives.lib.state.ma.us/handle/2452/43686 (reviewing settlement agreement between APC and eleven states).

[346] *See supra* Part I.D (discussing the FTC's Green Guides review and comments from state attorneys general).

[347] *See* Marissa Heffernan, *New York Lawmakers Consider Three Packaging EPR Bills*, PLASTICS RECYCLING UPDATE (Mar. 13, 2023), https://resource-recycling.com/plastics/2023/03/14/new-york-lawmakers-consider-three-packaging-epr-bills/. *See also Senate Bill S1064*, N.Y. STATE SENATE, https://www.nysenate.gov/legislation/bills/2023/s1064 (last visited Jan. 9, 2024); *Senate Bill S4246A*, N.Y. STATE SENATE, https://www.nysenate.gov/node/12014101 (last visited Jan. 9, 2024); Choi-

producers to financially support the proper recycling of plastic products and create regular producer plans that comply with minimum targets for product recovery and recycling.[348] The Attorney General's action in this sphere could positively impact the chance of passing similar or expanded legislation in the future. Moreover, in its recent workshop, the FTC raised the possibility of issuing a rule under section 5 of the FTCA that could specify which "recyclable" claims are misleading to consumers[349]—effectively translating the guidance in the Green Guides into federal regulations. Expanded legal action by state attorneys general against the plastics industry would provide strong evidence of widespread and serious consumer deception on which the FTC could draw to justify future regulatory interventions.

CONCLUSION

The New York Attorney General, with her broad investigatory powers and authority under GBL sections 349 and 350, could assemble a persuasive case against certain plastic producers for falsely advertising the recyclability of their products. New market dynamics have exacerbated dysfunction in the U.S. recycling system and rendered many types of plastic products functionally not "recyclable." Relying on guidelines from the FTC about what constitutes "materially misleading" recyclability representations, the Attorney General can persuasively argue that plastic producers are deceiving reasonable consumers *now* about a fact material to their purchasing decision. This type of litigation, which aims to root out deceptive business practices, aligns with the Attorney General's core function as the state's chief legal officer and protector of consumers' rights.

Schagrin & Tabuchi, *supra* note 1 (reviewing extended producer responsibility laws across the United States, such as those passed recently in Maine and Oregon).

348 *See* Marissa Heffernan, *supra* note 347.

349 *See Talking Trash at the FTC Recycled Claims and the Green Guides*, *supra* note 79, at 3:56:55 to 4:03:59 (including questions from the FTC's staff to the panel: do "we need a rule when it comes to recycling," "should any portion of the recycling guide be picked up" as a rule, and "what would the rule say?"). If the Green Guides were formal regulations instead of FTC guidance, plastics industry defendants would likely have a stronger case that their compliance with the Guides provides a complete defense under New York's GBL. *See supra* Part III.B.2.c (arguing the Green Guides do not currently provide a complete defense because they are only agency guidance).

Moreover, bringing state law claims in this area, even if limited to addressing recyclability representations, would not only benefit state residents but also encourage other states to begin coordinated or complementary litigation. The New York Attorney General could thus lead the field of state attorneys general in challenging the plastics industry to change its practices or accept new regulatory constraints on production and disposal—all of which would lead to environmental and public health benefits. In the future, each wayward plastic cup just might make it from the blue recycling bin to its new life in a recycled plastic product.