

Coca-Cola Beats '100% Recyclable' Dasani Suit, For Now

By Craig Clough

Law360 (November 21, 2022, 4:06 PM EST) -- A California federal judge on Friday granted Coca-Cola Co.'s bid to dismiss a consolidated suit from the Sierra Club and some consumers accusing its Dasani brand and other beverage companies of falsely marketing their water bottles as "100% recyclable," finding that the complaint fails the "common sense" test.

U.S. District Judge James Donato said in an order dismissing the case with leave to amend that no reasonable consumer would understand the phrase "100% recyclable" that is printed on the defendants' bottles to mean it is a guarantee the product will be recycled, but rather that it can be recycled. The fact that not all the water bottles end up being recycled is not grounds for the suit, the judge wrote.

The question of consumer deception is generally "unsuitable" for a motion to dismiss, the judge said before citing the Northern District of California's 2020 ruling in *Cannara v. Nemeth* and other opinions while stating the plaintiffs "still have the initial burden of pleading 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged' as informed by 'judicial experience and common sense.'"

The judge added, "The [consolidated amended complaint] stumbles on this threshold requirement."

The Sierra Club and a group of consumers filed their suits in June 2021 against Coke, Niagara Bottling LLC and the North American successor to Nestle, BlueTriton Brands Inc. The plaintiffs said the companies have for years sold the public on the "myth" that every plastic bottle put into a recycling bin is being reused and recycled in an environmentally friendly cycle, even though much of the products end up in landfills or incinerated.

The claims against the defendants include violations of California's Environmental Marketing Claims Act and the California Consumers Legal Remedies Act, as well as unfair business practices, false marketing and fraud. The plaintiffs also said the claims violate California public policy and Federal Trade Commission Green Guides.

To bolster their claims of the bottles being environmentally sustainable, the companies have engaged in a marketing campaign to tell consumers they want "Every Bottle Back" and that the bottles are "100% Recyclable," the Sierra Club and proposed consumer class said. But those claims are made despite the fact that some components of the bottles are not recyclable, the Sierra Club and consumers said, and municipal recycling systems lack the capacity to actually come anywhere close to handling America's bottle recycling demands.

In seeking to dismiss the suits, Coca-Cola argued among other things in September 2021 that they fail due to their interpretation of the term "recyclable." Coca-Cola said reasonable consumers would not share the same interpretation as the Sierra Club and the proposed class, which construed the label as a guarantee that the water bottles would be reused for a new item.

Judge Donato in March ordered that the suits be consolidated.

In dismissing the suits, Judge Donato's Friday order quoted the plaintiffs' own complaint and held that no reasonable consumer "would understand '100% recyclable' to mean that the entire product will always be recycled or that the product is 'part of a circular plastics economy in which all bottles are recycled into new bottles to be used again.'"

The judge also said the "allegation that defendants advertised recyclable bottles as part of a 'circular plastics economy' does not plausibly establish that a reasonable consumer would interpret 'recyclable' in the exaggerated manner that plaintiffs suggest."

The judge also said the plaintiffs' theory is in conflict with The Green Guides published by the Federal Trade Commission, because the guidelines establish if a product can be recycled under current programs, and not if the product is actually recycled.

The order allows for the complaint to be amended, but the judge said it would "likely" be the plaintiffs' last chance to do so.

Coca-Cola, the Sierra Club and counsel for the parties did not immediately respond to requests for comment.

The Sierra Club and the proposed class are represented by Marie A. McCrary and Seth Adam Safier of Gutride Safier LLP.

Coca-Cola is represented by Gary T. Lafayette and Brian H. Chun of Lafayette & Kumagai LLP and Steven A. Zalesin and Jane Metcalf of Patterson Belknap Webb & Tyler LLP.

The case is David Swartz et al. v. The Coca-Cola Company et al., case number 3:21-cv-04643, in the U.S. District Court for the Northern District of California.

--Additional reporting by Clark Mindock. Editing by Ellen Johnson.