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PRODUCT STEWARDSHIP & SUSTAINABILITY REPORT

News and Analysis for Industry Marketers and Their Legal Counsel | April 2016

Latest Challenge to E-Waste Law Rejected

By Joseph S. Kakesh

On March 31, 2016, a federal district court in Connecticut rebuffed a broad constitutional challenge to that state's "market share"-based TV recycling program. [1] *Vizio v. Klee* is the latest in a growing number of cases where courts have upheld product stewardship programs alleged to violate the U.S. Constitution.[2]

Like earlier cases, Vizio's challenge raised what are characterized as "Dormant Commerce Clause" issues. That is, Vizio alleged that the state's program had impermissible effects outside Connecticut and hampered competition. In addition, Vizio also raised Equal Protection Clause challenges. It alleged that, because its products are newer and are lighter than many older televisions it was being held responsible for recycling, Connecticut's TV recycling program required the company to recycle unfairly high volumes of TVs.[3]

Although the court ultimately rejected Vizio's arguments, they lay bare an ongoing challenge in product stewardship programs generally: how can states allocate e-waste stewardship responsibilities fairly when consumer technology changes rapidly, and when the makeup of material entering the recycling stream does not reflect the makeup of material currently offered in the marketplace? Connecticut's current-

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Terminix Pleads Guilty to Illegal Pesticide Applications

By Roger H. Miksad

On March 29, 2016, Terminix International Company LP and its U.S. Virgin Islands affiliate pleaded guilty to criminal charges that the company illegally applied the pesticide methyl bromide to numerous residential structures in violation of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The U.S. Environmental Protection Agency (EPA) initiated its investigation of Terminix after a family of four was inadvertently exposed to methyl bromide while on vacation in the U.S. Virgin Islands in March 2015. Members of that family suffered severe medical harm.

The use of methyl bromide in residential structures was canceled by EPA in 1984, and any such use in the U.S. is illegal. The charges filed

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Lead-Acid Battery Stewardship Bill Introduced in California

By David B. Weinberg

On April 6, 2016, California Assemblymembers Christina Garcia and Miguel Santiago filed amendments to AB 2153 that would require establishment of a new product stewardship organization to, among other things, "increase recycling, and substantially reduce public agency costs for the end-of-life management of lead-acid batteries." The proposal comes notwithstanding the unchallenged documentation that approximately 99 percent of the lead used in batteries is collected and recycled (and used to make new batteries). Indeed, lead batteries are recognized by the EPA as the nation's most highly recycled consumer product.

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New DOT Rule Governs Reverse Distribution

By Saskia Mooney

The U.S. Department of Transportation (DOT) on March 31, 2016, issued a final "reverse logistics" rule that applies streamlined hazardous materials shipping requirements to retailers who return retail goods to manufacturers, suppliers, and distribution facilities. The new rule applies only to highway transportation. It allows the return of cleaning materials, beauty and art supplies, fuels, expired over-the-counter drugs, and other regulated liquids and solids without full compliance with hazmat regulations, as long as specified and reduced requirements are met. The requirements address labeling, packaging, training/instructions, materials segregation, and recordkeeping and incident reporting obligations.

The new rule also allows highway return of equipment containing flammable liquids or gases (e.g., generators, ATVs, camping equipment), provided appropriate fuel isolation precautions are taken, and simplifies regulation of return shipments of lead batteries for recycling.

Unsold retail goods need to be returned for many reasons, including recalls, recycling, replacement, and obtaining manufacturer credit for overstock. Often, however, these goods are hazardous materials (or contain hazardous materials). And retailers often find the full-scale hazmat regulations unnecessarily burdensome.

Responding to an industry petition and comments on two stages of proposed rules (advanced notice and proposed), DOT concluded that it is safer and more effective to give retailers reasonable and achievable shipping requirements to follow for reverse logistics product returns. Examples of covered classes of hazardous materials include certain flammable and combustible liquids; limited quantities of compressed gases (i.e., in cylinders and aerosol cans); limited quantities of retail fireworks, ammunition, and flares; flammable

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California Proposition 26 and Product Stewardship

By Carolyn R. Schroll

California has passed product stewardship legislation for a wide variety of products including mattresses, carpets, electronics, and paint. Although several other states have product stewardship legislation, California's laws face the unique challenge of complying with "Proposition 26," a constitutional amendment that requires a two-thirds approval vote in both houses of the California Legislature for any tax. Failure to comply could leave the product stewardship programs susceptible to legal challenge.

Adopted in November 2010, Proposition 26 broadened the definition of "tax" while narrowing which charges qualify as "regulatory fees."[1] The Proposition's goal was to curb the legislature's practice of claiming that new taxes were "regulatory fees" in order to avoid the two-thirds approval requirement. Under Proposition 26, levies that "exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program" are considered taxes.

An assessment is a "regulatory fee" (and thus escapes Proposition 26's two-thirds requirement) only if those paying the fee directly benefit from the service for which the fee is collected. For example, collecting a fee at the entrance to a dump to pay for maintenance of the dump is not a tax, because only those using the dump pay the fee. In contrast, the levies created by product stewardship legislation to pay for collection and recycling look more like taxes. Although there have been no court cases yet addressing the issue, many of these levies are assessed on people and companies who do not benefit from the services the fees are funding and therefore would require bicameral two-thirds votes for enactment.

For example, under California's carpet recycling statute, a fee is assessed on new carpet sales, but is used to pay for recycling programs for old carpet. Someone replacing hardwoods with new carpet would pay the fee but would not receive

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market-share based solution for TVs may not satisfy industry challengers, but at least this court believes that it is sufficient to meet the "rational basis review" standard that has been applied to commercial enterprises for equal protection challenges. And that test appears unlikely to change.

The Connecticut E-Waste Law for Televisions

Under the Connecticut E-Waste Law[4], the number of pounds of TVs a TV manufacturer is required to recycle in a given year is calculated by reference to the manufacturer's "market share." [5] The Connecticut Department of Energy and Environmental Protection (DEEP) issued regulations stating that a manufacturer's market share is its share of the number of TV units sold nationally in a prior year.[6] For example, assume that recyclers collected 10 million pounds of covered TVs in Connecticut in 2015. Assume further that 10 million TV units were sold in the United States in 2014 and that a TV manufacturer subject to Connecticut's E-Waste Law sold 2 million, or 20 percent, of those 10 million units. In allocating recycling responsibilities in Connecticut for 2015, the TV manufacturer would be responsible for recycling 2 million pounds of TVs, or 20 percent of the total weight of TVs collected in 2015. This rule applies regardless of the total weight of TVs that were actually collected for recycling in 2015 or the total weight of TVs sold by the manufacturer – nationally or in Connecticut – in 2014.

At least with respect to TVs, Connecticut's allocation approach differs from those used in many other states. Many of those calculate the total number of *pounds* of TVs that an obligated manufacturer sells in a prior year, and allocate recycling responsibilities on the basis of the proportion of those pounds to the total number of pounds of TVs sold in the prior year.[7] For other covered electronic devices, Connecticut is similar to many other states in that it allocates recycling responsibility by reference to a manufacturer's "return share," or the share of devices that are actually returned for recycling.[8]

Vizio's Challenge to the Connecticut E-Waste Law

For Vizio, the problem with Connecticut's "market share" approach is that many of the TVs brought in for recycling are far heavier than those sold by manufacturers currently obligated to recycle them. Basing a recycling allocation on the number of units sold in a prior year (as opposed to the number of pounds sold or number of pounds actually returned for recycling), the market share approach raises the possibility that that measurement will not be a meaningful proxy for the number of pounds of recycled materials those units represent. Where, as here, there is a significant difference between the weight of products sold 10 years ago and the weight of products sold last year, there is a potential mismatch between a company's current contribution to the future e-waste problem and its current responsibility for dealing with an e-waste problem that started in the past.

This is precisely the issue faced by Vizio. The company is relatively new. It makes flat-screen TVs, and it has never sold older TVs or monitors that contain far-heavier cathode ray tubes (CRTs). In its complaint, Vizio alleged that because CRT-containing products are often as much as 10 times heavier, on a per unit basis, than its own, lighter flat-screen products, it was being subject to recycling costs far in excess of what it would be if the recycling obligation was based on actual weight of its products returned for recycling (its "return share"). Vizio argued that such a disparity discriminated against new TV manufacturers in favor of older TV manufacturers, and against all TV manufacturers in favor of manufacturers of other electronic devices covered under the act, whose recycling obligations are calculated by reference to their return shares only.[9]

In its motion to dismiss the case, DEEP argued that the market-share allocation method it uses to determine recycling responsibility is facially neutral and thus constitutional. That is, it does not single out any particular product category or manufacturer.[10] DEEP argued that the market-based mechanisms are best where products, such as TVs, have a longer useful life and because TV manufacturers more frequently enter and leave the market in comparatively short periods of time.[11] If a manufacturer of a TV is no longer in business at the time the TV is brought in for recycling, then there would be no one responsible for paying for the recycling under a "return share" model. DEEP argued further that its market-share model benefits consumers and the public because its "pay it forward" approach accounts for the likelihood that today's market participants – and today's parties responsible for recycling – may not be in the market in the future when their products reach the end of their useful life and are themselves brought in for recycling.[12]

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Terminix Pleads Guilty to Illegal Pesticide Applications *continued from page 1*

against Terminix listed 15 separate residential applications from 2012 to 2015. As part of its plea, Terminix agreed to pay a $10 million fine, and make "good faith efforts" to resolve the past and future medical expenses of the family harmed. Terminix also agreed to three years' probation, and agreed to suspend the use of methyl bromide nationwide—even for approved uses—except as required to fulfill existing government fumigation contracts. Because the charges and plea agreement were filed the same day, it is clear that Terminix and EPA had reached an agreement as to the plea deal prior to the filing.

Of the $10 million fine, $1 million is set aside to reimburse the EPA for the cost of responding to and cleaning up the March 2015 incident site, and an additional $1 million is to be paid to the National Fish and Wildlife Foundation to fund pesticide applicator training in the Virgin Islands.

EPA has separately announced that it has opened administrative proceedings against two other applicators in Puerto Rico also for alleged residential applications of methyl bromide.

Observers and industry are also waiting for the results of an EPA Office of Inspector General internal evaluation of EPA's fumigant regulations and oversight practices. That evaluation includes methyl bromide and other fumigants registered by EPA. The results of that report are anticipated to be released in the coming months, and may shed light on whether and how EPA intends to update its regulation and enforcement for these types of products.

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DEEP summed up its view of Vizio's complaint as follows: "Plaintiff's complaint . . . boils down to little more than the speculative possibility that the total weight that Plaintiff is actually charged to recycle ***over time*** will exceed the total weight of its own products that are recycled ***over time***."[13] DEEP argued that states are not required to ensure that such exact parity between these weights will result.

The Court's Decision

The district court agreed with DEEP. With respect to Vizio's equal protection claims, the court opined that the state had to provide only a "plausible policy reason" in favor of the market-based approach in order for the e-waste regulation to pass muster.[14] The court ruled that, given the different market dynamics at play for TV and other manufactures, Vizio "failed to allege the existence of any . . . factors that would tend to demonstrate that TV manufacturers and other . . . manufacturers are similarly situated for the purposes of the E-Waste Law."[15] The court also ruled that Connecticut's market-share based TV recycling program did not impose differential treatment on old and new TV manufacturers in a manner that failed rational basis review.[16] The mere fact that new TV manufacturers may be required to pay more per pound for recycling than old TV manufacturers is not enough for a successful equal protection challenge, the court ruled, where, as here, the state provided plausible reasons for doing so. Those included, the court found, to ensure that no manufacturer escapes its recycling responsibilities, and to deal with "orphan shares" of TVs, the manufacturers of which are no longer in business at the time the TVs are recycled.[17]

Looking Forward

It is too soon to tell whether Vizio will file an appeal. We will likely continue to see heavier CRT TVs and monitors make their way into recycling stream over the next several years, however, and, given the state of the TV marketplace, the burdens of recycling these products may continue to fall differentially on manufacturers who are selling lighter, more environmentally responsible products. Given the relatively easy standard states have to meet to show that such differential burdens meet important state interests, it not at all clear that future challenges to product stewardship programs on equal protection bases will be successful at the trial court level, at least when, as in Connecticut, the statutory language

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specifies a facially neutral basis for assigning responsibilities. It may take an appellate or even a Supreme Court decision to provide any indication that future cases could succeed. Given how rapidly and unexpectedly technological developments occur, today's manufacturers of lighter and nimbler electronic products may soon themselves be viewed as the burdensome behemoths that drag down future start-ups and innovators. We can only wait and see.

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[1] *Vizio v. Klee*, Ruling on Motion to Dismiss, Case No. 15-cv-00929 (D. Conn. Mar. 31, 2016), ECF No. 36.

[2] *See, e.g., Pharmaceutical Research and Mfrs. of Am., et al. v. County of Alameda*, 768 F.3d 1037 (9th Cir. 2014) (upholding Alameda County's unused pharmaceutical drug stewardship ordinance).

[3] Vizio also alleged that the method of allocating responsibility for recycling TVs unfairly burdened TV manufacturers generally. *See Vizio v. Klee*, Complaint at 25 (D. Conn. June 17, 2015), ECF No. 1. Similar equal protection challenges were raised against New York City's e-waste law, but no decision was ever rendered: that case was settled when the state passed its own superseding e-waste legislation. *See Consumer Elecs. Ass'n, et al. v. City of New York, et al.*, Complaint, Case No. 09-cv-6583 (S.D.N.Y July 24, 2009), ECF No. 1; Stipulation of Voluntary Dismissal and Settlement (June 28, 2010), ECF No. 79.

[4] Conn. Gen. Stat. §§ 22a-629 through 22a-640.

[5] Conn. Gen. Stat. § 22a-631.

[6] Conn. Agencies Regs. § 22a-638-1(g)(2).

[7] *See*, e.g., S.C. Code § 48-60-50.

[8] *See* Conn. Agencies Regs. § 22a-638-1(g)(1)(C) and (j)(3).

[9] *See Vizio v. Klee*, Complaint at 24-26; Memorandum of Law in Opposition to Motion to Dismiss at 34-35 (ECF No. 24).

[10] *Vizio v. Klee*, Motion to Dismiss at 34-35 (ECF No. 21).

[11] Motion to Dismiss at 4.

[12] *Id.* at 4-5.

[13] *Id.* at 6 (emphasis in original).

[14] Ruling on Motion to Dismiss at 35.

[15] *Id.* at 36-37.

[16] *Id.* at 37-39.

[17] *Id.* at 40.

Lead-Acid Battery Stewardship Bill Introduced in California *continued from page 1*

It is not coincidental that close to Assemblymember Santiago's legislative district includes the now-closed, highly controversial Exide Vernon secondary smelter, and Assemblymember Garcia's district is located between the former Exide smelter and Quemetco, Inc.'s surviving City of Industry smelter. Nor is it coincidental that the proposed amendments to AB 2153 would impose a "recycling charge" on battery sales to fund a $100 million Lead-Acid Battery Cleanup Fund. The fund would be available to finance cleanups of residences near smelters and other "lead-contaminated" areas of the State.

Other provisions of the bill are described in the box at the end of this article.

The sponsors' staff justifies the recycling provisions of the bill with the argument that many California auto battery retailers are not returning to consumers the "core charges" that manufacturers credit to them upon return of a used battery. When California in 1988 adopted the model legislation promoted by the Battery Council International, one of the few provisions not included in California law was a mandatory "deposit-in-lieu-of-trade" that would have required such returns. Rather than simply now incorporating that requirement in state law, however, the staff has argued that the massive supervisory structure that would be established by the proposed legislation is necessary to assure future compliance. And, of course, the bill would also divert a significant portion of the deposit money to state coffers.

The amendments to AB 2153 are to be heard by the Assembly's Environmental Safety and Toxic Materials Committee on April 12th. In light of the makeup of that committee, the bill seems likely to be reported out. Its ultimate enactment is highly uncertain, however: under California's Constitution, legislation imposing a tax must be approved by two-thirds of both the Assembly and Senate. Few, if any Republicans are likely to support the bill, and Democrats are a few votes short of a two-thirds majority in both houses. One would also hope that some Democrats will see that the recycling provisions of this bill are unnecessary, given that close to 100 percent of lead in used batteries already is recycled.

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New DOT Rule Governs Reverse Distribution *continued from page 2*

solids; oxidizers; certain poisonous materials; corrosive materials; and miscellaneous Class 9 hazardous materials except lithium batteries. All shipments must utilize limited quantity compliant packaging.

Hazardous wastes are not eligible for the reverse logistics provision. Nor are organic peroxides, self-reactive materials, spontaneously combustible materials, or materials that are dangerous when wet or poisonous by inhalation.

The rule provides more flexibility to shipments by private or dedicated carriers (i.e., shipper owned transport vehicles). For example, materials shipped by private carriers under the new reverse logistics provisions may be marked with "REVERSE LOGISTICS – HIGHWAY TRANSPORTATION ONLY – UNDER 49 CFR 173.157" in lieu of surface limited quantity marking. This marking, subject to size specifications, provides clear notice to carriers that only highway transportation is allowed.

Non-private carrier shipments (e.g., contract or common carriers) are also eligible for reverse logistics coverage, but more limitations apply. For example, materials shipped by non-private carriers must be specifically authorized for reverse logistics *and* limited quantity shipment, and must meet all the limited quantity shipment requirements (e.g., marking).

Suppliers, manufacturers, and distributors must provide retailers with clear instructions on how to properly classify, package, mark, offer, and transport all reverse logistics shipments. Employers must either provide appropriate training based on these instructions or make the instructions available to employees.

In this same rule, DOT also separately authorizes the pickup of used automotive batteries from multiple retail locations for purposes of recycling, provided those batteries are consolidated on pallets and loaded so as not to cause damage to the batteries during transportation. This new provision codifies a long-utilized special permit that DOT had granted to industry to allow fuel-efficient "milk run" battery collection shipments.

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California Proposition 26 and Product Stewardship *continued from page 2*

the benefit of recycling facilities because they do not have old carpet to recycle. Even a person purchasing new carpet is not really benefiting from the stewardship program, either. Thus, there is a substantial likelihood that a challenge to the carpet recycling statute grounded in Proposition 26 would be successful.

Proposition 26 applies retroactively to laws passed after January 1, 2010, but before November 3, 2010. The legislature had to repass those laws by a two-thirds majority by November 3, 2011, or else the laws were void. In addition, any new legislation passed after November 3, 2010, that was not approved by two-thirds of the legislature is also subject to challenge for failure to meet Proposition 26's requirements. And, of course, opponents of proposed programs can use Proposition 26 to require two-thirds approval for new product stewardship legislation.

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[1] Cal. Const. art. 13A, § 3

Key Elements of the Garcia Bill

- A new, government-supervised organization to manage lead acid battery recycling;
- Government approval of the new organization's plan to collect and recycle lead acid batteries;
- A "California Recycling Sticker" on every lead-acid battery sold in California;
- A fee of $15-$20 to be charged on the purchase of every lead acid battery sold in California;
- $1 of the fee to go to a state Lead-Acid Battery Cleanup Fund;
- $2 of the fee to go to pay for the organization;
- Consumer is refunded the fee, less $3, if a returned battery has a California sticker – no refunds without the sticker;
- 75% of any core purchase paid by a manufacturer to a retailer to be redirected to the state (not the retail collector).

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The Wiley Rein *Pocket Part to the FCPA Resource Guide*

On March 10, 2016 Wiley Rein's FCPA Group released a unique publication. In November 2012, the Department of Justice and Securities and Exchange Commission published the Resource Guide to the U.S. Foreign Corrupt Practices Act (the Guide), addressing a broad range of topics regarding the interpretation and enforcement of the FCPA. Given the paucity of judicial precedent under the FCPA, the government's pronouncements regarding the meaning of the anti-corruption law carry substantial weight. U.S. officials, however, have announced that they do not intend to update or supplement the Guide. Wiley Rein, therefore, has created a "Pocket Part" to address subsequent FCPA developments.

The 60-page Pocket Part will not summarize the factual details of every FCPA matter. Rather, it selectively addresses the key FCPA settled actions and other related developments that either underscore the central lessons of the Guide or illustrate developing trends in FCPA enforcement. The document is intended to sit on your shelf next to Guide as a resource for counsel and compliance professionals confronting challenging FCPA compliance and investigatory questions.

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