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California Recycling: Keeping Up With the Chasing Arrows



Introductions



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SB 343 (2021) Overview



"Truth in Labeling for Recyclable Materials"

A product or packaging that

- displays a *chasing arrows symbol*, or
- *any other symbol or statement* indicating the product or packaging is recyclable, or otherwise directing the consumer to recycle the product or packaging,

is ***deemed to be a deceptive or misleading claim unless***.

(1) the product or packaging is ***considered recyclable*** in the state

and

(2) is of a material type and form that ***routinely becomes feedstock*** used in the production of new products or packaging.

Public Resources Code §42355.51(b)(1)

SB 343 (2021) Overview (cont.)

What materials are “considered recyclable”?

CalRecycle “Material Characterization Study”:

- Assess material types and forms that are collected, sorted, sold, or transferred by solid waste facilities.
- Study to be published by **January 1, 2024**, and updated in 2027 and every five years thereafter.
- **18 month safe harbor period** following publication.



Public Resources Code §42355.51(d)

SB 343 (2021) Overview (cont.)

What materials are “considered recyclable”?

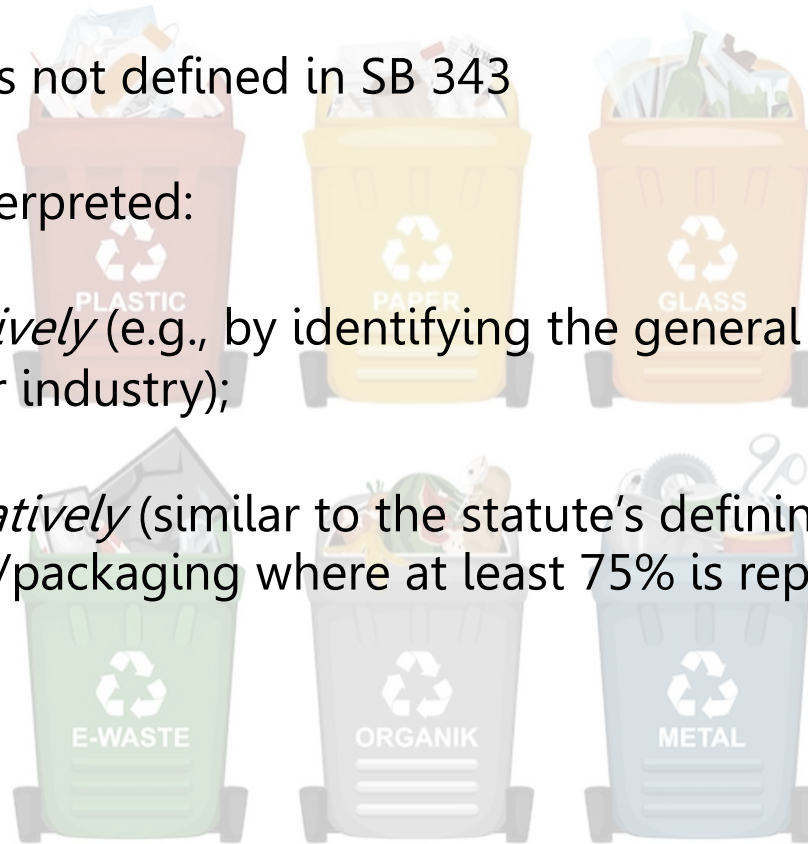
- (1) Material Characterization Study shows material is collected by recycling programs for jurisdictions encompassing at least 60% of the State's population and sorted into defined streams for recycling by transfer/processing facilities serving at least 60% of the State's recycling programs, *OR*
- (2) At least 75% of the product/packaging sorted and aggregated in the state is reprocessed into new products or packaging, *OR*
- (3) Non-curbside collection program recovers at least 60% (75% after 2030) of the product/packaging in the program and the material has sufficient commercial value to be marketed for recycling and transported at the end of its useful life to a facility to be sorted/aggregated by material type and form.

Public Resources Code §42355.51(b) & (d)

SB 343 (2021) Overview (cont.)

What materials “routinely become feedstock”?

- "Routinely" is not defined in SB 343
- Could be interpreted:
 - *Qualitatively* (e.g., by identifying the general practice in a particular industry);
 - *Quantitatively* (similar to the statute's defining as “recyclable” products/packaging where at least 75% is reprocessed)



SB 54 (2022) Overview

The Plastic Pollution Prevention and Packaging Producer Responsibility Act (Pub. Res. Code § 41821.5)

- Adopts “extended producer responsibility model”
- Imposes fees and regulatory obligations on manufacturers, retailers, or wholesalers of single-use packaging and food service ware.
 - Single-use packaging: material that is routinely recycled, disposed of, or discarded after its contents have been used or unpackaged
 - Food service ware: plastic-coated paper or paperboard, paper or paperboard with plastic intentionally added during the manufacturing process, and other single-use plastic service ware

SB 54 (2022) Manufacturer Requirements

- Reduce the weight of the plastic component source for covered materials by 25%
- Ensure portion of single-use plastic packaging is recycled, reused, or composted:
 - 30% by January 1, 2028
 - 40% by January 1, 2030
 - 65% by January 1, 2032
- Join a producer responsibility organization (PRO) by January 1, 2024.
 - Develop plan for expanding recycling infrastructure
 - Creation of \$5 billion fund to mitigate harms from plastic pollution



Addressing Compliance and Litigation Risks of New Recycling Laws

(1) High Level Risk Assessment

- *Likelihood of current business practices being held non-compliant*
 - Objective analysis – what would a court decide?
- *Likelihood of enforcement / litigation*
 - Subjective analysis
 - ✓ PUBLIC: Viewpoint of implementing agency (CalRecycle) and California Attorney General
 - ✓ PRIVATE: Viewpoint of environmental/consumer protection NGOs and California plaintiff's bar

Addressing Compliance and Litigation Risks of New Recycling Laws (cont.)

(2) Response Action Assessment

COMPARATIVE ANALYSIS

Reformulation / relabeling and/or

*Regulatory agency engagement
(rulemaking, policies, interpretations) and/or*

Legislative fix

KEY FACTORS

Company vs. industry effort

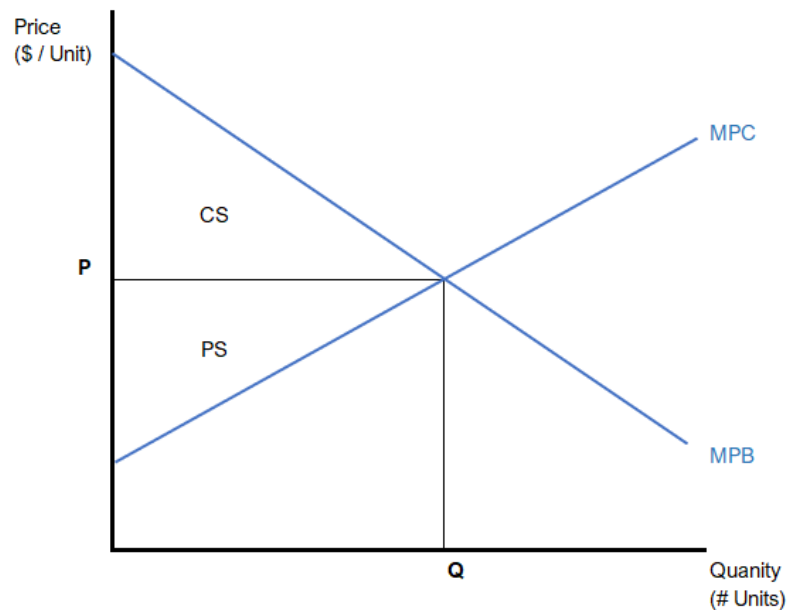
Public relations / Corporate image

Financial impact

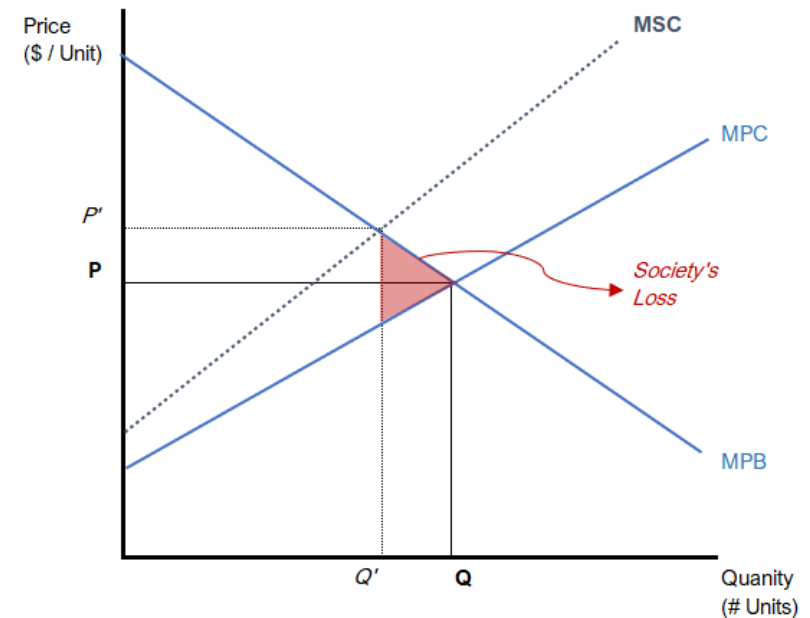
Probability of success

Economics of SB 54 and EPR Legislation

Market for plastic resin without considering environmental impact...

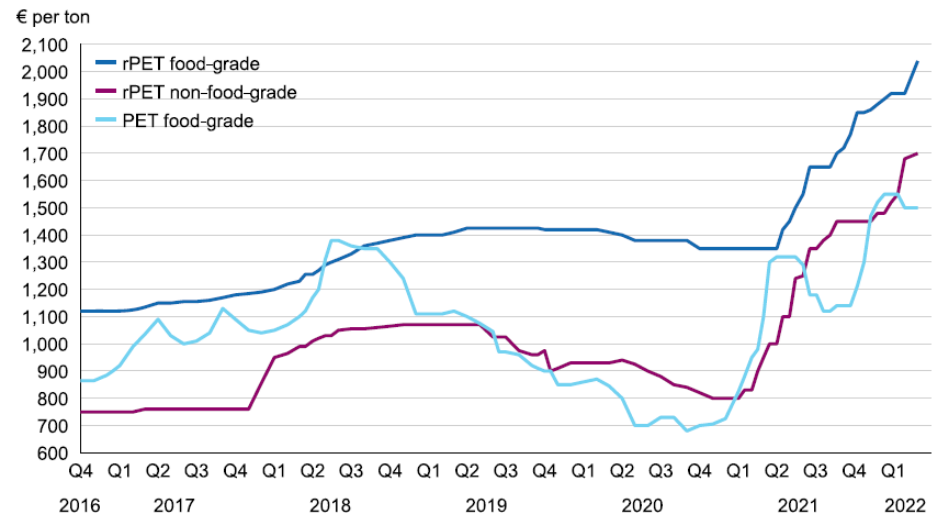


Market failure results when the good's price doesn't reflect its ***social cost***



Social Benefits of Plastics Reduction or Recycled Content Mandates Are Not Without Social Costs

- Primary plastics manufacturers face product reformulation costs, reporting costs, and recycling funding obligations (totaling \$500B over 10 years from all primary producers)
- Secondary manufacturers face supplier switching costs and higher input prices
- The degree of market power manufacturers can exercise will determine the extent of price transmission along the value chain and to households
- Unintended consequences that may arise:
 - Induce plastic recycling demand that exceeds economic capacity and future raises recycled feedstock prices
 - New Environmental Justice concerns as recycling capacity must expand to meet new demand
 - Regrettable substitution
 - Diminished consumer welfare from inferior products



Kahlert, Sebastian, Catharina R. Bening, "Why pledges alone will not get plastics recycled: Comparing recycle production and anticipated demand", *Resources, Conservation & Recycling* 181 (2022) 106279

California Attorney General Plastics Investigation

- In April 2022, California AG announced an investigation into the fossil fuel and petrochemical industries for their role in the global plastics pollution crisis.
 - Response to industry's promotion of oil-based plastic products and campaign to deceive public into believing that recycling could solve the plastics problem.
 - Cited less than 9% of plastics being recycled and plastic pollution costing the state half a billion dollars each year to clean up and prevent.
 - Issued subpoena to Exxon Mobile
- In Nov. 2022, investigation expanded to plastic bag manufacturers



California & Environmental Marketing Claims ("EMCA) (Bus. & Prof. Code §§ 17580 & 17580.5)

- Covers advertising and labeling claims that a consumer good is not harmful to, or is beneficial to, the natural environment, including claims covered by FTC's Green Guide.
- Manufacturer/distributor "shall" maintain written documentation on:
 - The reasons why the person believes the representation to be true.
 - Any significant adverse environmental impacts associated with the consumer good
 - Any measures that are taken by the person to reduce the environmental impacts directly associated with the consumer good.
 - Conformance with Green Guide standards for certain terms, such as "recycled" and "recyclable."
 - Compliance with Green Guide is a complete defense.
- Specific, narrow environmental claims are easier to defend than general claims.

Consumer Litigation Trends – Plastic Claims

Recycling Limitations:

- *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 842 (N.D. Cal. 2019) (alleged “recyclable” label on Keurig K-cups is false and misleading).
- *The Last Beach Cleanup v. TerraCycle Inc.*, Case No. 21-cv-06086 (N.D. Cal.) (sponsored recycling program)

100% Recyclable:

- *Swartz v. The Coca-Cola Co.*, 2022 WL 17881771 (N.D. Cal.) (100% recyclable label on water bottles)
- *Duchimaza v. Niagra Bottling, LLC*, 2022 WL 3139898 (SDNY) (plastic water bottles – caps and labels “minor, incidental component”)
- *Curtis v. 7-Eleven*, 2022 WL 4182384 (N.D. Ill.) (plastic service ware)



Consumer Litigation Trends – Plastic Claims (cont.)

Standing:

- *Greenpeace Inc. v. Walmart Inc.*, Case No. 21-754 (N.D. Cal.) (substantiation of recycling claims)
- *Hanscom v. Reynolds Consumer Products Inc.*, 4:21-cv-03434 (N.D. Cal) (“recycling” label claim on trash bags)



Environmental Issues Regarding Plastics

- Plastics are found in most marine habitats on Earth
- Microplastics are moving through the marine food chain
- The United States recycles only about 9 percent of its plastic trash – and little demand for recycled plastic
- Environmental justice
 - April 2021: United Nations Environment Programme (UNEP) published a report entitled: Neglected – Environmental Justice Impacts of Marine Litter and Plastic Pollution
- Sources
 - <https://www.doi.gov/ocl/marine-debris-impacts#:~:text=The%20National%20Oceanic%20and%20Atmospheric,deepest%20parts%20of%20our%20ocean>
 - <https://nap.nationalacademies.org/catalog/26132/reckoning-with-the-us-role-in-global-ocean-plastic-waste>
 - <https://wedocs.unep.org/bitstream/handle/20.500.11822/35417/EJIPP.pdf>

Microplastics

- Microplastics are “[s]olid polymeric materials to which chemical additives or other substances may have been added” and which have “at least three dimensions that range from 1 nm to 5 mm in size. Polymers that are derived in nature that have not been chemically modified (other than by hydrolysis) are excluded.”
 - https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2020/rs2020_0021.pdf
- Primary and secondary microplastics



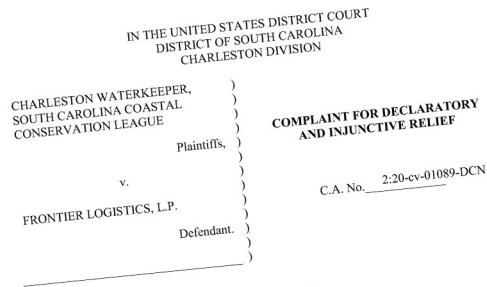
Environmental Litigation Trends

- *Earth Island Institute v. Crystal Geyser Water Co. et al.*
 - ... in the footsteps of big tobacco
 - Causes of action
 - CLRA
 - Public nuisance
 - Express warranty
 - Design defect and failure to warn
 - Negligence
 - Motion to quash recently denied
- Clean Water Act and RCRA litigation – nurdles
 - *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp. Tex.*, No. 20-40575 (5th Cir. Apr. 30, 2021)
 - *Waterkeeper v. Frontier Logistics, L.P.*, No. 2:20-cv-1089-DCN (D.S.C. Dec. 14, 2020) (citizen suit)



Closeup of nurdles found on a beach. Photo credit: Jace Tunnell,
Director of the Mission Aransas National Estuarine Research Reserve

Potential Environmental Claims Relating to Plastics



- CWA, RCRA
- Nuisance and negligence
- Environmental justice litigation

COMPLAINT

Plaintiffs Charleston Waterkeeper ("Waterkeeper") and South Carolina Coastal Conservation League ("Conservation League") (collectively, "Plaintiffs"), by and through their counsel, hereby allege:

NATURE OF THE CASE

1. This is a civil suit brought against Defendant Frontier Logistics, L.P. ("Frontier"), under the citizen suit enforcement provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.* ("Resources Conservation and Recovery Act" or "RCRA"), and the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act" or "CWA"). Plaintiffs seek declaratory and injunctive relief, civil penalties, attorneys' fees, and other relief the Court deems appropriate to remedy Frontier's violations of federal law from its packaging and distribution facility at Union Pier Terminal Building 322 in Charleston County, South Carolina ("Facility").
2. At the Facility, Frontier handles—and releases into the environment—small pre-production plastic pellets known as "nurdles." As detailed more fully below, the Waterkeeper

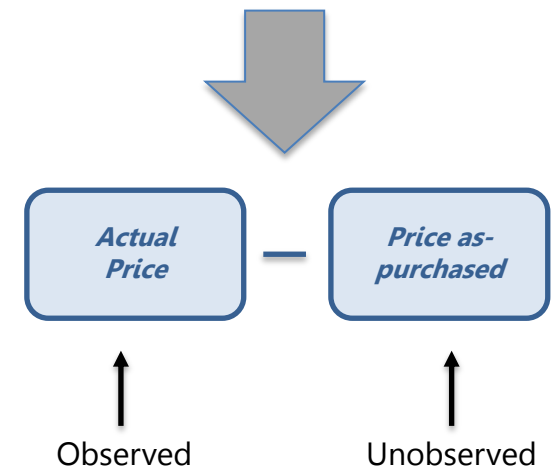
Damages Valuation in Product Labeling Class Actions

- Measure of damages is the lost value to consumers due to the alleged misrepresentation
- Courts have held the proper measure of damages is the “price premium” paid due to the misrepresentation
- Damages methods must isolate and quantify the classwide harm using common evidence
 - Does the method align with the allegations and facts?
 - Can class member expenditures be obtained from common evidence?
 - Can “but-for” expenditures be obtained and account for consumer preferences and available alternatives?

Price Premium Defined

“the difference between the **market price actually paid** by consumers and the **true market price** that reflects the impact of the unlawful, unfair, or fraudulent business practices”

(Werdebaugh v. Blue Diamond Growers, 2014 BL 146743).



Damages Methods Advanced by Plaintiffs Experts

"Full refund"

→ Cannot account for value obtained

Unjust enrichment (i.e.,
"benefit of the bargain")

→ Cannot account for consumer preferences or market conditions

Price comparison

→ Cannot account for consumer preferences or market conditions

Regression analysis

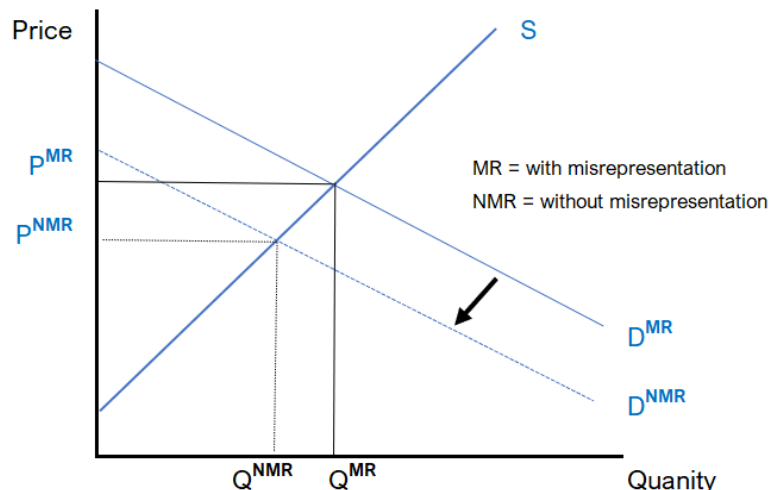
→ Uses actual market data on consumers "revealed preferences"

- **Hedonic prices**
- Before-and-after

Market simulation using
survey data

→ Uses hypothetical market data on consumers' "stated preferences"

- Contingent valuation
- **Conjoint analysis**



Challenges for Estimating Classwide Market Price Premiums

Regression Models

- Requires substitute products lacking only the misrepresented feature
- Requires information on many other product attributes influencing price and purchasing
- Requires data for the relevant time periods, market segments, and consumer groups
- Vulnerable to statistical flaws that can bias estimated market price premiums

Conjoint Analysis

- Overcoming faults and bias in Conjoint (a.k.a., choice) Studies
 - Failure to characterize claims
 - Failure to allow “do not purchase”
 - Failure to include other important product attributes (as with regression)
 - May fail to characterize real-world buying experiences leading to unbelievable results
- Average willingness-to-pay for the contested attribute is not the same as a market price premium
 - Reflects preferences of the marginal buyer, which may over/understate the average buyer
 - Requires accounting for market supply factors including costs and competition



For Further Questions



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