LITIGATION MINUTE: THE LIFECYCLE OF BEAUTY PACKAGING

BEAUTY AND WELLNESS SERIES: PART THREE OF THREE

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By: Saskia P. Mooy, Katherine L. Staba

WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

For both consumers and producers, the recent seismic shifts in packaging—from materials to circularity advertising—have been hard to miss. The past few years have introduced several state laws expanding producer liability through product end of life, adding new considerations for brands, both for existing products and as new products are designed.

In a minute or less, here is what you need to know about new state extended producer responsibility (EPR) laws and the increasingly complex landscape of related product green advertising claims.

End-Of-Life New Considerations

Selection of packaging material and design has long stood at the top of beauty brands' lists of considerations for a variety of legal and commercial reasons, including price point, retail shelf appeal, brand signaling, and transportation logistics. Disposal of the product once in commerce has not historically been a focus.

New EPR laws—passed in Maine, Oregon, Colorado, and California and introduced in many more—generally require producers of packaging (any material, regardless of recyclability, that is intended for single or short-term use to hold, protect, handle, or deliver a product to the consumer) to take more responsibility for the end-of-life management of their products. This includes collection, recycling, and disposal of the products—obligations that historically fell to the government and public.

Under this shared responsibility model, qualifying producers may not sell or distribute any products that use “covered materials” (or analogous terms generally referring to all packaging materials with limited exceptions) unless the producers pay and join a not-for-profit Producer Responsibility Organization (PRO) that is selected by the state and tasked with managing the recovery of products. State laws vary, but generally:

- The “producer” designation falls to the manufacturing entity that owns or licenses the branding displayed on the product, so long as the entity does not fall below certain revenue and covered material usage thresholds;
- Producers must pay annual dues towards and participate in the PRO based on the amount and type of packaging used; and

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- Producers must make their internal records related to recycling rates, collection rates, postconsumer-recycled content rates, and other compliance materials available for inspection or, in some instances, provide annual data reports reflecting the total weight of covered material.

The draft rulemaking currently underway in each state suggests that ultimately there may be a more nuanced calculation necessary to determine the producer or producers for a single product. Colorado's third-draft rules, released in March 2024, propose a sequential list of potential producers—ranging from the producer of unfilled packaging to the importer of the product into the United States—and proposed two equally obligated producers for packaging materials used in internet transactions. Penalties for failure to participate in the PRO or suspected noncompliant producers could result in hefty administrative penalties and settlements.

State-by-state EPR laws may mark the beginning of a larger, producer-financed stewardship model. At the federal level, hearing testimony in recent months has advocated for a federal regulatory framework related to EPR, in part, to align the economic and compliance impact from disjointed state regulations.

Refreshed Green Guides and Conflicting Obligations

Alongside these new EPR laws are the much-anticipated updated Federal Trade Commission Green Guides (Green Guides). The Green Guides, last updated in 2012, provide guidelines for transparent environmental marketing, including qualification and substantiation for claims to avoid misleading consumers, likely interpretations of certain claims, and general principles applicable to environmental claims.

The current drafts have been in active comment and review since December 2022, focusing on several key questions, including whether the Green Guides overlap or conflict with other federal, state, or local laws or regulations. While not focused on packaging alone, the Green Guides nonetheless set a bar as to the use of “recyclable” terms and symbols, identifying that an unqualified claim can be made when recycling facilities are available to a substantial majority (60%) of consumers or communities where the item is sold.

The EPR state laws are also engaging in rulemaking to establish a framework to define related terms, including by identifying a set of readily recyclable materials (Colorado), material-specific recycling meanings (Maine), and locations where covered materials are considered recyclable (California, proposed regulation comment period ending 8 May 2024). Joined under this landscape is an existing patchwork on state laws that, in certain instances, require symbol usage[1], and in other instances incorporate the Green Guides by reference into state law (e.g. Rhode Island, Maine).

While we await final substantive rules for the EPR laws and guidance on conflicting state or federal laws over the next several years, brands are left uncertain of product packaging and labeling requirements, with gaps potentially resulting in incongruence. In theory, products may be labeled as recyclable on packaging not eligible to be considered recyclable for the purposes of EPR compliance in individual states.

What Are Brands to Do?

While complete and concrete guidance is still on the horizon, the release of draft rulemaking affords brands the opportunity to identify critical themes and anticipate compliance hurdles:

- Review agreements and procedures related to product and packaging supply chain and raw materials;

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- Audit all green claims currently on products, packaging, and in marketing messaging to identify substantiation and any upcoming critical timelines for reassessment (e.g., before critical marketing campaigns or packaging redesigns);
- Educate product design and manufacturing teams about upcoming regulations and potential impact to long-lead actions; and
- Assess manufacturing practices to identify any potential third parties that may qualify as “producers.”

FOOTNOTES

[1] Mich. Comp. Laws §§ 324.16102(1); 324.16104(1) (1994).

KEY CONTACTS



SASKIA P. MOOY
ASSOCIATE

PORTLAND
+1.503.226.5771
SASKIA.MOOY@KLGATES.COM



KATHERINE L. STABA
PARTNER

CHICAGO
+1.312.807.4263
KATIE.STABA@KLGATES.COM

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