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Prosecutors Strike Gold In Retailers' Dumpsters

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Law360, New York (April 30, 2015, 9:09 PM ET) -- In recent years, California prosecutors have accelerated enforcement actions against California retailers who are alleged to have improperly discarded seemingly benign retail items that may nevertheless classify as "hazardous waste" under federal or state law. The California Attorney General's Office and local district attorneys — who can use the proceeds from multimillion-dollar settlements to fund their internal operations — have settled with a number of big-box retailers that operate in-state facilities. These retailers include home improvement stores, pharmacies, supermarkets, warehouse stores and even a cable provider. Pursuant to these public settlements, California retailers have been forced to overhaul their hazardous waste management practices and pay the government tens of millions in civil penalties.

Now New York appears poised to follow the lead of California prosecutors by enforcing against retailers whose New York operations are suspected to violate hazardous waste control laws under the federal Resource Conservation and Recovery Act (RCRA) and/or New York's complementary laws and regulations. In January 2015, New York's Department of Environmental Conservation (DEC) announced that it will initiate an enforcement campaign against retailers with the ambitious goal of establishing hazardous waste-related compliance by all businesses in New York within the year. This move — which follows a similar enforcement action that Connecticut's Department of Energy and Environmental Protection settled with CVS Pharmacy in 2013 — suggests that state and local prosecutors across the country have begun to follow California's enforcement approach, thereby creating significant potential liability for retailers that operate in multiple states and which manage products that may classify as hazardous waste when disposed.

Everyday Retail Items May Classify as "Hazardous Waste" When Discarded

In the process of handling potentially millions of retail items during their daily operations, retailers must account for the fact that some of those items will become unsaleable for various reasons. For example, products expire, they break after falling from shelves and supply trucks, and many are returned by customers in unsaleable form. Because the nature and composition of those products will determine whether they must be classified as federal or state hazardous waste and how they must be managed, having an effective hazardous waste management program in place is critical when companies must handle these unsaleable items.

The consequences of not having an effective program in place are significant, as recent enforcement action and settlements in California illustrate. California prosecutors have been engaging in undercover "dumpster dives," that is, covert searches of retailers' trash bins after such bins leave the premises.

Prosecutors have discovered many items in those bins that may appear innocuous — such as personal cosmetics, partially full or empty aerosol cans, light bulbs, over-the-counter pharmaceuticals, batteries, and electronic toys or other devices — but in fact are considered hazardous waste under California law. In one of these cases, prosecutors argued to a California court that the number of devices found in these dumpster dives should be extrapolated based on the total number of dumpster pickups from that retailer's California facilities during a five-year period. For example, by using this methodology, if 10 hazardous items were found in one dumpster, and 5,000 dumpster pickups occurred at the retailer's facilities over five years, the prosecutors would argue that the penalties and injunctions should be based on the 50,000 extrapolated violations, rather than the 10 alleged violations that were actually found.

If prosecutors were to use this extrapolation methodology for assessing fines, the fines could quickly become enormous. This penalty calculation also can be further aggravated when prosecutors claim multiple penalties for a single item that they allege was improperly discarded. For example, a California retailer deemed to have improperly disposed of a given hazardous waste (*e.g.*, AA batteries, fluorescent bulbs, brand-name kitchen cleaners, shampoo) might be threatened with liability for, among other potential penalties:

- Civil penalties of up to $25,000[1] per day under California's HWCL (Cal. H&S § 25189(c) or (b))
- Civil penalties of up to $2,500 per violation under California's Unfair Competition Law in the amount of $2,500 per violation (Cal. Business & Professions Code §§ 17200 et seq.)
- Civil penalties of up to $2,000 per violation under California's Hazardous Materials Release Response Plans and Inventory (Cal. H&S § 25515 and 25515.5); and so on

Similarly, prosecutors may argue that a single item that they allege was improperly disposed can result in a number of different types of hazardous waste violations; such as failure to train employees, failure to characterize waste, and failure to store, manifest or transport hazardous waste. In light of the potential extrapolation of the number of violations and the multiple penalties that could apply to each violation, the potential exposure in such cases can easily reach the tens or hundreds of millions of dollars.

When faced with such massive exposure, companies may choose to settle these actions with the government on unfavorable terms, which include large fines and onerous consent judgment terms. To date, the subjects of California's enforcement actions have not chosen to defend themselves in litigation. Instead, each has settled, thereby limiting the body of useful legal precedent and developing an expectation among prosecutors that they can use dumpster investigations and extrapolation to recover large settlements without prolonged litigation to test the factual or legal theories that support these substantial penalty claims.

California Enforcement History

Recognizing the potential for significant settlements, California prosecutors have initiated investigations and enforcement actions against a large number of retailers across the state, including across a wide range of entities. On more than 20 occasions, California retailers have paid multimillion dollar settlements. For example, Target settled for $22.5 million in 2011 and Safeway for almost $9.9 million in January 2015. The largest settlements to date have come against Wal-Mart — for $27.7 million in 2010 — andAT&T, which agreed to pay $23.8 million in November 2014 for the alleged improper storage and disposal of electronic waste, along with an additional $28 million to improve the company's practices for managing batteries and electronic equipment, among other items.

RCRA and California's HWCL

California's HWCL predates its federal analog, RCRA, and is broader in scope and penalties in a number of ways. For example, while both laws define hazardous waste as waste that is toxic, corrosive, reactive or ignitable, hundreds of substances — including copper, zinc, fluorides and nickel — qualify as toxic in California, but not under RCRA. Also, California does not offer all of the regulatory exemptions for small quantity generators that are available at the federal level and in many states. This means that even those retailers who generate certain types of hazardous waste in California, even in relatively small volumes, can get caught up in the state's stringent hazardous waste regime.

Although California retailers may face heightened enforcement risks in certain respects, prosecutors in other states still have plenty of tools under RCRA and their own states' hazardous waste control laws to extract penalties from retailers whose compliance programs, the prosecutors conclude, have fallen short of the applicable requirements. Given that New York and Connecticut have begun to follow in California's footsteps, retailers across the country should brace for more to come.

Federal Enforcement

In addition to paying nearly $28 million as part of a 2010 settlement with California prosecutors, Wal-Mart has been forced to pay even larger penalties to the federal government for similar violations. In 2013, Wal-Mart pled guilty to federal hazardous waste disposal violations and paid $81.6 million in civil and criminal penalties as part of a plea agreement with the Justice Department and U.S. Environmental Protection Agency. The interrelated cases focused on violations in just two states: Missouri and (once again) California. The Wal-Mart settlement involved allegations that the company had not provided its employees with sufficient hazardous waste training. And the government claimed that certain returned products, which may qualify as hazardous waste, were shipped to return centers without required manifests or other documentation.

Wal-Mart's settlement accompanied a 2013 Notice of Data Availability by the EPA, making public the EPA's intention of "exploring ways to clarify and make [RCRA] hazardous waste regulations more

effective for managing waste generated in the retail sector."[2] In February 2014, the EPA requested input on hazardous waste management in the retail sector, seeking public comment on, among other points, "existing data on the retail industry universe[,] ... [the] amount of hazardous waste it generates, and suggestions for improving hazardous waste regulations for retail operations."[3] The fact that the federal government has begun to focus on enforcing hazardous waste laws against retailers suggests this has become an area of critical importance to the retail sector. It may also shed additional light on the timing of New York's recent announcement concerning this issue.

Planning Ahead

With New York and Connecticut following California's lead, and the EPA signaling that its action against Wal-Mart may be the beginning of a new federal enforcement trend, retailers across the United States need concrete internal procedures for identifying, handling, and properly disposing or recycling of hazardous wastes.

The good news for retailers is that they can take positive steps today to implement prospective compliance measures that will minimize the potential for liability under federal and state hazardous waste laws. Latham & Watkins LLP will be offering a series of webcasts on this subject in the coming months to help retailers prepare for these changes in state and federal enforcement, the first of which will occur on Tuesday, May 5, at 11:00 a.m. PST — registration for which can be completed here.[4]

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Endnotes

[1] All values are in US dollars.

[2] “Hazardous Waste Requirements for the Retail Sector; Clarifying and Making the Program More Effective,” Unified Agenda 2050-AG72, available athttp://federalregister.gov/r/2050-AG72.

[3] “EPA Requests Input on Hazardous Waste Management in the Retail Sector,” dated February 6, 2014, available athttp://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/794512bdefc0368f85257c77005a5481!OpenD ocument (last visited February 19, 2015).

[4] To register for the May 5 webcast, simply copy and paste this link into your internet browser: http://w.on24.com/r.htm?e=943265&s=1&k=9F43703CB63243130EEA9D9BE6F80DD8. For questions about the May 5 webcast and upcoming presentation, please contact Michele Bravo at Michele.Bravo@lw.com or at (213) 892-3054.
