THE GOLDEN STATE REPORT

California Retailers Association
April 28, 2017

Inside this Issue:

Legislative Update

AB 1576 (Levine) Gender Pricing to be Amended

AB 1576 is set to be heard in the Assembly Judiciary Committee next week on May 2. The author will be taking amendments to AB 1576 which were recommended by the Assembly Judiciary Committee last year to SB 899.

Overall, it places this provision back into the Unruh Civil Rights Act, therefore triggering private right of action for enforcement. The definition of gender specific products remains the same, which means those products a reasonable person would believe are targeted to a specific gender or placed in a location labeled for a specific gender. Substantially similar is defined as products with the same brand, functional components, or substantially same ingredients.

Price differences are allowed for gender-neutral factors or that have been set and passed down to retailers by manufacturers, wholesalers, etc.

Contrary to last year's bill, Assemblyman Levine did not include carve outs for food and new motor vehicles.

CRA is leading a broad business coalition in opposition. Although the amendments make the bill worse, the significant increase in exposure to litigation may work in our favor since private right of action on this issue is not popular with some of the committee members. CRA will keep you posted on any developments and will be pushing to defeat this in committee.

AB 514 (Salas) Pharmaceutical Medical Waste

AB 514, which exempts personal care products from the Medical Waste Management Act, unanimously passed out of Assembly Environmental Safety and Toxic Materials Committee without opposition. Committee Chairman Assemblyman Quirk told the author, Assemblyman Salas, “I really like your bill.” The bill now moves to appropriations and we project it to enjoy a smooth course through the policy process.

Alameda County Plastic Bag Ban

Alameda County's Plastic Bag Law was expanded to retail stores and **starts May 1, 2017.**

Retail stores in the County will need to charge at least 10 cents for compliant recycled content paper or reusable bags (including thick durable plastic bags). The law only applies to carryout bags, not to bags without handles that are used to protect merchandise.

continued on page 2

continued from page 1

Details on ordinance requirements and outreach materials have been mailed to all affected retail stores in Alameda County in January and March 2017. Outreach materials may be downloaded at www.ReusableBagsAC.org or contact the helpline at 510-891-6575 for additional assistance.

Bad Debt Recovery Threatened

California originally only imposed sales tax on a cash basis on a credit or installment sale. Sales tax was only remitted by retailers as money was actually collected from the consumer. Subsequently, California amended its law in order to collect the tax on an accrual basis. Accordingly, California started collecting 100% of the sales tax up front (at the time of sale) on the full amount of the consumer's expected-but-not-yet-made payments on installment or credit transactions. To ensure that sales tax was paid only on the actual collections for credit or installment sales, the Legislature enacted the bad debt sales tax refund statute to provide retailers with a refund or deduction for the portion of the sales tax that was not collected from the consumer. Over time, the consumer finance business changed and fewer and fewer retailers provided financing to consumers. Retailers increasingly began to contract with third-party finance companies to issue and administer credit to consumers. The California Board of Equalization originally interpreted the bad debt statute narrowly and took the position that only a financing retailer could recover excess sales tax paid on defaulted accounts. This narrow interpretation effectively eliminated both the retailer and the finance company from claiming the refund or deduction and rendered the bad debt statutes nearly meaningless. In 1997, the California Retailers Association sponsored and secured passage of AB 599, which expressly acknowledged the rights of either the retailer or the finance company to receive the refund or deduction. Currently, bad debt sales tax recoveries are most often taken by retailers in the form of deductions on their sales tax returns, but sometimes taken by lenders by refund.

An attempt to repeal the law in 2008, when the State was in serious deficit, was defeated through the work of CRA.

Now there is another attempt to change the law so that the State retains the excess sales tax revenue. Assemblywoman Cristina Garcia is planning to amend a bill (possibly AB 1305) to eliminate bad debt recovery and use the funds to offset the sales tax revenue loss created by eliminating the sales tax on feminine hygiene products. (Another bill would eliminate the sales tax on feminine hygiene products and pay for it by increasing alcohol taxes; see below.) Garcia notes that the Board of Equalization recently reports a surge in sales tax refunds paid recently. However, the “surge” was primarily due to two factors: (1) long delays in approving and paying refund claims as claims stacked up awaiting administration amid delays largely caused by changing audit standards, and (2) a steep increase in charge- offs at the time of the financial crisis (mainly 2008-2009). Refund claims will be down substantially going forward as the BOE catches up and gets to current years.

AB 1305 does not yet contain the bad debt recovery language, but the bill is set to be heard in the Assembly Revenue & Taxation Committee on May 8; if the author intends to amend it, we should see the amendments in print next week. CRA is already working behind the scenes opposing the proposal.

continued on page 3

continued from page 2

Alcohol Tax and Deliveries

CRA is also opposing **AB 479, Gonzalez Fletcher**, which would raise $75 million to cover the cost of eliminating the sales tax from diapers and feminine hygiene products. Supporters argue that the tax was last raised 20 years ago. True, but data shows that it took 10 years for sales to return to the same level as before the increase. Even though the bill only taxes distilled spirits, the entire alcohol industry, including wine and beer segments, is opposing it. The bill will be heard in the Assembly Revenue and Taxation Committee on May 8; if passed, it must also be heard in the Assembly Governmental Organization Committee. Because the bill requires a 2/3 vote, and with the strength of the alcohol and retail industries, the bill should have a difficult time achieving passage.

Cigarette Coupons?

Assemblyman Kevin McCarty (D-Sacramento) says he plans to sponsor legislation to prohibit cigarette coupons. This is in response to tobacco companies offering $2 coupons to offset the big cigarette tax increase recently passed on the ballot and effective this month.

New Bill regarding Food Marketing

AB 841,Weber, was amended and could impact a broad assortment of branded food items. Specifically, the bill says that a school or school district may NOT:

(1) advertise any food or beverage, or the corporate brand of the food or beverage, unless *every* food and beverage product manufactured, sold, or distributed under the corporate brand name can be served or sold on the school campus during the school day. This prohibition includes advertising on any property or facility owned or leased by the school district or school and used at any time for school-related activities, including school buildings, athletic fields, facilities, signs, scoreboards, or parking lots, or any school buses or other vehicles, equipment, vending machines, uniforms, educational material, or supplies.

(2) participate in a corporate incentive program that rewards pupils with free or discounted foods or beverages when they reach certain academic goals.

(3) participate in a corporate-sponsored program that provides funds to schools in exchange for consumer purchases of foods or beverages.

The prohibition on corporate incentive programs is also highly problematic. For example, the highly popular and successful "Box Tops for Education" program would be disallowed.

The source of the legislative language is a model statute drafted by ChangeLab Solutions, based in Oakland, CA. The American Heart Association picked it up and is the main proponent of the bill. CRA is working against the bill with a coalition of food industry entities. The bill is scheduled for hearing in the Assembly Education Committee on May 10.

continued on page 4

continued from page 3

Proposed Immigration Bill Imposes Fines on Employers Who Cooperate with Federal Immigration Requests

Assemblyman David Chiu's **AB 450**, puts employers in California in the middle between state law and federal immigration officials. The most recent version of the bill would:

- prohibit an employer from providing a federal immigration enforcement agent access to without a properly executed warrant and would prohibit an employer, or a person acting on behalf of the employer, from providing voluntary access to a federal government immigration enforcement agent to the employer's employee records without a subpoena;
- require an employer to provide an employee, and the employee's representative, a written notice of an immigration worksite enforcement action to be conducted by a federal immigration agency at the employer's worksite, unless prohibited by federal law;
- require an employer to provide to an affected employee, and to the employee's representative, a copy of the written federal immigration agency notice describing the results of an immigration worksite enforcement audit or inspection and written notice of the obligations of the employer and the affected employee arising from the action;
- require an employer to notify the California Labor Commissioner of a federal government immigration agency immigration worksite enforcement action within 24 hours of receiving notice of the action and, if the employer does not receive advance notice, to immediately notify the Labor Commission upon learning of the action, unless prohibited by federal law;
- require an employer to notify the Labor Commissioner before conducting a self-audit or inspection of specified employment eligibility verification forms, and before checking the employee work authorization documents of a current employee, unless prohibited by federal law.

Failure to meet any of the obligations would create liability for employers of $10,000 - $25,000 for each violation. The bill passed the Assembly Judiciary Committee on a party line vote and is pending in the Assembly Appropriations Committee. It creates a legal quicksand for employers; for example, how many employers would know what constitutes a "properly executed search warrant"? CRA and the business community are opposed to the bill, but we anticipate it will pass and be one of many labor sponsored-and-supported bills that reach the Governor's Desk in September.

Proposition 65: Some Good News

AB 1583 passed out of the Assembly Environmental Safety and Judiciary Committees and is pending in the Appropriations Committee. The bill provides:

1) The basis for a Proposition 65 Certificate of Merit is discoverable (subject to normal discovery limitations such as privileges).
2) If the Attorney General determines, after reviewing the Certificate of Merit and the supporting factual information filed under Proposition 65, that there is no merit to the action, the AG must serve a letter on the noticing party and the alleged violator stating there is no merit to the action.

continued on page 5

continued from page 4

3) The Attorney General must maintain a record of any letters served, and must make the information available to the public on the AG's website, including the total number of letters served annually and the names of the noticing parties and law firms.

CRA is supporting the bill.

Fresh Juices: Avoiding a Label Mandate

AB 836, Chiu is sponsored by JuiceBot, a company that produces fresh but non-pasteurized juices from a vending machine located inside retail facilities. The bill permits dispensing the juice, requiring it to be replaced every 48 hours since it is not pasteurized. A label "at point of sale" is also required. CRA sought an amendment to clarify that the label must be on the vending machine or the product itself, not at "point of sale" interpreted as the checkout location. The bill's sponsors have agreed to clarify the language to read *"Non-pasteurized juice dispensed from a vending machine shall be replaced within 48 hours and shall include a label on the vending machine that states the juice is not pasteurized. The label shall be the responsibility of the vending machine owner."* Once in print, this amendment will eliminate our concerns with this bill.

Sugar Sweetened Beverages Redux

Reintroduced from last year's legislative session, **SB 300, Monning**, prohibits distributing or selling a sugar-sweetened beverage in a sealed beverage container, or a multipack of sugar-sweetened beverages, unless the beverage container bears the following health warning: *"STATE OF CALIFORNIA SAFETY WARNING: Drinking beverages with added sugar(s) contributes to obesity, type 2 diabetes, and tooth decay."* The bill is very specific about the size of type, placement of warning and characters per linear inch on each product according to the amount of beverage contained. Vending machines, self-serve dispensers and sit-down restaurants all must provide the warning. The bill was removed by the author from the hearing calendar, since he did not have the votes for passage.

Then, last week, Assemblyman Richard Bloom amended his **AB 1003** to impose a $0.02 per ounce tax on sugar sweetened beverages. This week the bill failed to pass the Assembly Health Committee.

Dogs and Cats

AB 485, O'Donnell, would prohibit pet stores from selling dogs, cat or rabbits unless the animals were obtained from an animal control agency, shelter or rescue organization. The bill passed its first hearing in the Assembly Business & Professions Committee on a 10-1 vote, and now goes to the Appropriations Committee. Getting lots of momentum from favorable press….

continued on page 6

continued from page 5

Unsuccessful

The following two bills, both authored by Republicans, failed to pass:
AB 1174, Harper, would have established California as a "right-to-work" state. It failed in the Assembly Labor Committee.

SB 524, Vidak, would have prevented any employer who relied in good faith upon the written advice of the Division of Labor Standards Enforcement regarding how to comply with the law, from being punished through the assessment of civil and criminal penalties, fines and interest. The bill failed in the Senate Labor Committee.

Food Donations

AB 1219, Eggman, provides immunity from civil liability for food donations. CRA is supporting the bill, which passed the Assembly Judiciary Committee and Appropriations Committee with nary a dissenting vote. It now awaits a vote on the Assembly Floor.

Privacy

SB 327, Jackson: Requires manufacturers that sell connected devices, defined as "any device, sensor, or other physical object that is capable of connecting to the Internet", directly or indirectly, or to another connected device, to equip the device with "reasonable security features" appropriate to the nature of the device and the information it may collect, contain, or transmit, that protect it from unauthorized access, destruction, use, modification, or disclosure, and to design the device to indicate when it is collecting information, and to obtain consumer consent before it collects or transmits information. Also requires persons who sell or offer to sell a connected device to provide a short, plainly written notice of the connected device' s information collection functions at the point of sale; requires manufacturers to provide direct notification of security patches and updates to consumer. CRA is opposing this bill because of its vagueness.

How are "responsible security features" defined? How would retailers provide the "plainly written notice" at point of sale, for hundreds of devices? Is a private label retailer a "manufacturer", and if so, how would a retailer be able to provide "security updates" to consumers without taking purchaser contact information at every transaction? The bill is scheduled for its first hearing, in the Senate Judiciary Committee, on May 9. CRA is strongly opposed to the bill.

Food Dye Bill Amended

SB 504, Wieckowski: As introduced, the bill would have banned sale of any food containing synthetic food dyes unless it contained a specific warning label. CRA opposed this version of the bill. It has now been amended to require the Office of Environmental Health Hazard Assessment to study whether synthetic food dyes have an effect on children's behavior, and if so, what mitigation measures might be taken. While some organizations are still opposing the bill, the Legislature rarely kills bills that simply call for a study. CRA is now neutral on the bill.

continued on page 7

continued from page 6

Regulatory Report

WIC Update

At a meeting of stakeholders on April 3, the WIC Program staff answered questions about the most frequent reasons for rejected FIs (Food Instruments):
1) The amount of the FI exceeds the Maximum Allowable Departmental Rate (MADR). The MADRs are updated every 4 weeks, on Fridays.
2) The retailer accepts a food instrument from a participant *prior to* the "First Day to Use" on the food instrument, which will result in a stop payment.
3) No retailer/vendor information is on file, resulting in a "Return to Maker".

WIC's transition to electronic benefits transfer (EBT) is underway. An RFP for a systems manager will be issued this month, with selection planned for August. Advisory materials explaining the project will be sent to retailers in early 2018. A pilot project will be held in Solano County May through July of 2019, with statewide rollout tentatively scheduled for April of 2020.

All Beverage Manufacturers Required To Report

On April 10, CalRecycle issued a Notice applicable to all manufacturers of plastic beverage containers. For private label retailers, you must either report or have your private label manufacturer report on your behalf. This new requirement for reporting of virgin and postconsumer resin stems from legislation enacted last year. (Don't panic, the report is not due for 11 more months!)

On or before March 1, 2018, and annually thereafter, a manufacturer of a beverage sold in a plastic beverage container subject to the California Redemption Value shall report to CalRecycle the amount of virgin plastic and post consumer recycled plastic used by the manufacturer for plastic beverage containers for sale in the state in the previous calendar year. This requirement does not apply to refillable plastic beverage containers. The manufacturer must submit this information to the department under penalty of perjury. The department will post the information reported on its website.

Air Resources Board: Facility Emission Caps

In responding to the Air Resources Board's secret action to attach an Indirect Source Rule to the State Implementation Plan, CRA is working with the Administration and a large coalition of transportation, freight, trucking and port interests. While the terminology is confusing and the process complicated, the gist of the problem is this:

Stakeholders agreed with the Sustainable Freight Plan's goals that were approved by CARB in response to an Executive Order by Governor Brown. There is no Indirect Source Rule (ISR) in the Sustainable Freight Plan. ISRs generally include freight facility performance targets such as emission

continued on page 8

continued from page 7

caps, which are inflexible, limit investment in transportation infrastructure, decrease freight system efficiency and reduce jobs in the name of emission reductions. Without public notice, in March the Air Resources Board voted to add an addendum to the state's air quality plan (SIP) that calls for an ISR.

CRA is asking the Governor to rescind CARB's action; if so, the Governor must act within 90 days from the date of CARB's vote to approve the addendum. Thus, the deadline for the Governor to act, if he can be persuaded to do so, is June 20 (CARB adopted the addendum on March 23). Below is an article written by CRA President Bill Dombrowski and distributed to statewide press.

Public Participation is Essential in Policymaking Process
by Bill Dombrowski, President of the California Retailers Association

We've all heard the analogy comparing the legislative and regulatory process to sausage making: it's often messy, it can get sticky, but the final product comes together in the end. A driving factor that contributes to this unruliness is public engagement – a crucial component in policymaking to ensure that a collaborative exchange of ideas occurs when adopting policies that represent California's diverse landscape.

Unfortunately, the South Coast Air Quality Management District (SQMD) and the California Air Resources Board (CARB) recently chose to sidestep public input when adopting a policy that will likely reduce the amount of goods that can be moved through California's ports in an attempt to cut air emissions.

This policy, which is known as a facilities or productivity cap, was originally part of a broader plan introduced by Governor Brown and billed as an effort to bring all parties to the table to reduce emissions from freight activities, while increasing the competitiveness of California's freight system. It was this reason that stakeholders came to the table in the first place – transportation companies, distribution centers, environmentalists, academics, regulators and many others.

Yet in attempt to shutout public input, government regulators clandestinely met on March 23 and slapped a facilities cap on California's ports, failing to notify the public of its consideration. This was not an accidental oversight, but a deliberative rejection of public engagement in the governmental process.

As a result, the impacts will be significant for those whose livelihoods rely on the movement of goods through California's major ports, such as Los Angeles and Long Beach. According to the California Association of Port Authorities, port activities employ more than half-a-million people in California and generate an estimated $9 billion in state and local tax revenue annually – playing an important role in products entering and leaving the United States. According to the Port of Long Beach, the port supports 30,000 jobs (about one in five) in Long Beach, 316,000 jobs (or one in 22) in the five-county Southern California region, and 1.4 million jobs throughout the United States. It's the second busiest port in the nation, yet that may change now that regulators imposed a productivity cap – limiting the amount of goods that can be moved through our ports.

Reducing emissions to impact climate change is a laudable goal and we all have a responsibility to

continued on page 9

continued from page 8

preserve and protect our natural resources for future generations However, the development of sound public policy should not be a one-sided conversation that occurs in a vacuum, as public participation in the governmental process is what holds policymakers accountable to do better now and in the future.

CRA Annual Meeting

The time is approaching for the CRA's Annual Meeting. This is a great opportunity to reconnect with other CRA members to discuss the latest legislative and regulatory measures that impact the retail industry. We also expect to hear from a mixed line-up of elected officials and legislators who will impart their insights on the major issues our industry is facing. As customary, we will begin with a reception and dinner the night prior to the meeting. Use the link below to register on line. We look forward to seeing you all there!

Reception/Dinner: May 30, 2017 from 5:30 p.m. - 8:00 p.m.

Annual Meeting: May 31, 2017 from 8:30 a.m. - 2:30 p.m.
The Sheraton Grand Sacramento Hotel

Register to Attend the CRA Annual Meeting!

https://www.calretailers.com/cra-annual-meeting

Tidbits

- California added 19,300 jobs in March and its unemployment rate dropped to 4.9%, according to figures released April 21 by the state's Employment Development Department. That's the first time since December 2006 that the jobless rate has fallen below 5%.

- The Legislative Analyst's Office (LAO) did a brief analysis of policies of other states, to address California's redemption center closures. The largest difference in recycling center policies between other states is that beverage distributors in other states are typically responsible for paying most of the cost of recycling. Second, recyclers are paid a fixed payment, rather than one that fluctuates based on the market. And third, other programs allow more flexibility for recyclers and retailers resulting in different collection systems. Also, the LAO mentions that a reduction in recycling centers have resulted in increased retailer costs because retailers have had to accept containers themselves and pay the $100 per day fee to the state.

continued on page 10

continued from page 9

- The LAO recommends making manufacturers and distributors responsible for recycling their material by implementing a market-based system. They also recommend the Legislature make changes to the handling fee structure, adjusted based on updated cost surveys. And lastly, they recommend eliminating some of the requirements on recyclers to provide more flexibility. The LAO report is available here: http://www.lao.ca.gov/Publications/Report/3649

Guest Column

Kate Gold is a partner in Drinker Biddle & Reath's Los Angeles office and a member of the firm's Labor and Employment, Litigation and Class Action groups. Her practice includes defense of individual, collective and class actions brought by employees and consumers. The attorneys in the firm's Class Actions group have extensive experience representing retail industry clients in California and nationally.

Suit Shopping: Deceptive Pricing Class Actions Persist

Kate Gold, Kathryn Deal, Meredith Slawe, Kate Villanueva, Dan Brewer and Ashley Super - Drinker Biddle & Reath LLP

Retailers have become a frequent target of the plaintiffs' class action bar given their heightened visibility and consumer-facing activities. Deceptive pricing litigation has been on many retailers' radars for quite some time. But there has been a significant uptick in these cases over the past three years, with plaintiffs testing novel theories in a variety of cases. The reality is that in the current litigation climate, nearly all retail marketing campaigns and pricing strategies come with some degree of risk that plaintiffs and their counsel will target them as confusing, unfair and/or deceptive. Most recently on the pricing front, a number of major retailers have faced aggressive challenges to "Compare At" pricing, product discounting (alleged "perpetual sales" and undisclosed exclusions from discount offers) and shipping charges for online purchases. They have been subjected to significant exposure, reputational damage and litigation costs. Consequently, comprehensive internal legal review of advertising, marketing and pricing practices has never been more important.

Compare-At Pricing

"Compare at" pricing actions, also called "false-reference" pricing suits, generally allege that retailers mislead shoppers by including two prices on their price tags—an "original" or "retail" price (sometimes labeled as "their price" or the "advertised reference price") and a "now" discounted price (sometimes labeled as "our price")—where the merchandise was allegedly never offered for sale at the higher dollar amount. Plaintiffs allege that these prices are "fictitious" or "illusory" and drive consumers to purchase goods they otherwise would not have bought.

This wave of litigation can be traced to a 2014 letter from four members of Congress to the Federal Trade Commission requesting that the Commission launch an investigation into potentially

continued on page 11

continued from page 10

"deceptive and unfair marketing practices at outlet stores." This letter stated that "[o]utlet-specific merchandise is often of lower quality than goods sold at non-outlet retail locations. While some retailers use different brand names and labels to distinguish merchandise produced exclusively for outlets, others do not. This leaves consumers at a loss to determine the quality of outlet-store merchandise carrying brand-name labels." Letter from U.S. Senators Sheldon Whitehouse, Richard Blumenthal, Ed Markey, and Congresswoman Anna G. Eshoo to Edith Ramirez, Chairwoman, Federal Trade Commission (Jan. 30, 2014). This letter was published on a number of sites and, not surprisingly, a series of consumer class action lawsuits promptly followed. These cases have challenged outlet, factory and discount store pricing models, and many of them have been filed by serial plaintiffs. With some minor variations, the general theory behind these cases has been that shoppers are misled by retailers' pricing techniques that improperly suggest that merchandise sold in factory or outlet stores was once offered for sale at higher prices in flagship stores and then cascaded down to the outlets in a subsequent season or due to surplus inventory or merchandise flaws.

These suits fundamentally misrepresent the nature of outlet and discount store models in the current retail environment and make incorrect assumptions about consumer expectations at large. Consumers value the access that outlet and factory stores give them to high-end brands and styles and the latest trends in a "fast fashion" environment. These cases underestimate the savvy of the modern shopper, and threaten to dissuade retailers from expanding and enhancing outlet shopping options in response to increased demand. The notion that all outlet shoppers are uniformly confused as a "class" in the manner alleged in these complaints seems dubious. Given the variations in individual consumer experiences and motivations as well as an untenable damages calculation, plaintiffs in these cases should face significant impediments to class certification should they proceed to that stage.

To date, prominent retailers including Michael Kors, Neiman Marcus, Levi Strauss, The Gap, Saks, Nordstrom, and Ralph Lauren have found themselves defending these actions with mixed results. For example, Michael Kors settled its action for nearly $5 million after the plaintiff filed a second amended complaint, while Neiman Marcus was successful in defeating the claims on a motion to dismiss because the plaintiff had failed to show that merchandise of like grade and quality was not, in fact, sold by other retailers at the listed "Compare To" price. The plaintiff in that case appealed the order dismissing the action to the Ninth Circuit. Argument was held on February 17, 2017, and the parties are awaiting a ruling.

Notably, the Los Angeles City Attorney recently filed suits against four major retail chains—Kohl's, Sears, Macy's and J.C. Penney—for alleged false reference pricing. The suits claim that these retailers violated California state law by advertising "list" or "regular" prices on merchandise at which the goods were never offered. Additionally, the suits claim that J.C. Penney and Kohl's both agreed as part of separate 2015 settlements in California federal courts to stop using false reference pricing, but that they have failed to comply. The suits seek injunctive relief to bar the four retailers from using false reference pricing, in addition to civil penalties of up to $2,500 for each violation.

On the federal agency front, the FTC is scheduled to review its Guides Against Deceptive Pricing later this year, according to the agency's Regulatory Review Schedule. This revision will likely

continued on page 12

continued from page 11

offer retailers and courts guidance about how retailers can and should comply with the FTC's regulation on deceptive pricing.

Shipping Charges

In the past few months, two notable cases have been filed by the same plaintiff and his counsel relating to retail shipping charges for online purchases. *Reider v. Express, LLC*, No. 17-cv-0556 (C.D. Cal Jan. 23, 2017); *Reider v. Electrolux Home Care Products, Inc.*, No. 17-cv-0026 (C.D. Cal. Jan. 8, 2017). In these cases against Express and Electrolux, which represent the latest twist on deceptive pricing allegations, plaintiff claims that consumers have been misled by online shipping charges because they believed that these charges corresponded to the actual shipping costs incurred by the retailers.

The case against Express was voluntarily dismissed at an early stage; however, the case against Electrolux remains pending. Electrolux filed a motion to dismiss arguing, among other things, that the claims should be dismissed because the shipping costs were reasonably related to the actual shipping costs, therefore were not misleading, and that plaintiff voluntarily agreed to incur those shipping charges in connection with his purchase. The Central District of California dismissed a similar suit against Amazon at the summary judgment stage because the plaintiff had failed to demonstrate that he relied on the shipping policy in deciding to purchase from the website. *Baghdasarian v. Amazon.com, Inc.*, No. 05-cv-8060, 2009 WL 4823368 (C.D. Cal. Dec. 9, 2009), *aff'd*, 458 F. App'x 622 (9th Cir. 2011). Even if the Electrolux case avoids the same fate, it is likely to face substantial challenges at the class certification stage.

If the last few years are any indication, retailers can expect to remain primary targets of aggressive and opportunistic plaintiffs and their counsel. Retailers should take a thoughtful approach to developing their marketing and pricing strategies and ensure that terms and conditions in their online buy-flow and in stores (to the extent possible) are clear and conspicuous to consumers.

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CA Is Heading Due Left and You Are Paying For It.

Thomas Del Beccaro , CONTRIBUTOR
I try to place politics in perspective.
Opinions expressed by Forbes Contributors are their own.

The 2016 election is in the books. President Trump won the vote that counts – the Electoral College vote. California went for Hillary and its governing politicians are fighting Trump tooth and nail. Indeed, rather than adjust to the rest of the nation, California is headed due left. Below is a list of just how far Left it is headed and how you – yes, you - are paying for it.

Before we get to the list, we should note how uniquely Left California really is. Plainly stated, of all the large states in America that regularly cast their Electoral College votes for Democrats, California is by far the most lopsided to the Left.

Washington State votes Democrat each Presidential Election – but it has no income tax. That is certainly a policy of the Right not the Left. Oregon reliably votes Left as well – but it regularly lands in the top 20% of states as a place to do business.

Even New York, quite the liberal state in most people's eyes, is downright balanced compared to California. Not only is there a Conservative Party of New York that matters, the State Legislature is somewhat balanced. This year, although the Democrats dominate the New York Assembly, working with independent Democrats, according to the *New York Times*, "has allowed [Republicans] to control the chamber." Before that, after the 2010 elections, Republicans had outright control of the Senate chamber.

California is anything but balanced. For two decades now, the Democrats have owned both chambers of the legislature – now with supermajorities in the Senate and the Assembly. That means they can pass any law they want, including higher taxes, without a single Republican vote.

Finally, keep in mind that California government, from the city council level to the state level, is over $1.3 trillion in debt – and growing because of pension and medical care promises made by those governments. Oh, and don't forget that

California's highest income rate is 13.3% - 50% higher than New York's top rate – and the nation's highest poverty rate.

So how far Left is California headed? Let us count the ways:

1. Jerry Brown used to stand in the way. The Democrat members of the California legislature are so far Left that Governor Moonbeam regularly vetoed dozens upon dozens of the hundreds of laws passed each year. Yes, Jerry Brown is the adult in their legislative romper room. Previously, that has meant that Brown has vetoed such laws as universal health care and once promised no tax increases without a vote of the people.

No more. In March, Brown proposed a massive $52 billion over ten years to allegedly pay to fix roads. Keep in mind there is an existing gas tax that is dedicated to fixing roads. The Democrats in the legislature, however, took much of that money and spent it on other things. Now they want a new tax so they won't feel guilty about raiding existing transportation taxes.

1. Brown's High-Speed Rail. Jerry Brown didn't put the brakes on High Speed Rail. Voters passed and Brown has pushed a $68 billion rail boondoggle, which some think would cost double that amount to really build. Even though the voters have soured on the project after finding out more about it, Brown and the legislature continue to fund the early stages of the program, which likely never will be completed. Brown could avoid any current tax increase for roads by using high speed rail funds for roads.

2. Gavin Newsom For Governor. Whatever brakes Brown applied in the past are about to come off. Gavin Newsom is the odds-on favorite to be Governor – he of the "whether you like it out not" squeal. He famously said just that as Mayor of San Francisco when he authorized same-sex marriages despite existing state law prohibiting it. Newsom deftly knew the courts would likely back his actions and change not only California law – but law throughout the country.

But you ain't seen nothing yet. Newsom, according to the *Sacramento Bee*, "has long envisioned a universal health care model for California that includes a single-payer system." Keep in mind, that Newsom is running for Governor so he can run for President.

3. <u>Universal Health care</u>. For years, each legislative session, a universal health care bill makes its way through the legislature. This year is no different – a bill will pass. Will Governor Brown sign it? Brown may change his mind this time around if Republicans in Washington undo ObamaCare. Even if Brown says no – because the massive tax increase it requires will conflict with his other tax increase – Newsom would sign that bill in 2019.
The existing bill promises "coverage for all medical care, including inpatient, outpatient, emergency care, dental, vision, mental health and nursing home care" – all without "co-pays or insurance deductibles," according to the *Santa Cruz Sentinel*. It is downright Bernie Sanders-like.

Who will get those benefits? – well, likely everyone in the state without employer coverage. Everyone. All of which brings us to . . .

4. A Sanctuary State. Forget sanctuary cities – that is so yesterday. California Democrats in Sacramento are so intent on fighting Trump, they want to make California a Sanctuary state with benefits, such as in-state tuition for those here illegally, driver's licenses and protection from deportation, etc. Those benefits were afforded to them with, as the *LA Times* called it, "relatively little political rancor."

Of course, a Sanctuary State, would double down on California's already permissive immigration policies that make it a magnet for illegal immigration – more than any other state in the Union.

5. Crime and Less Punishment. The left has long believed that many who commit crimes are victims themselves. Others are concerned with "mass incarceration" of minorities. So many people were in California prisons that prison overcrowding led to a Federal Court takeover of the prison system. Brown "solved" the overcrowding problem by pushing laws that have led to release of prisoners and the reduction in sentences. The result? A rise in crime that is going unpunished.
6. Ammunition Control. Forget gun control. That too is so yesterday. Gavin Newsom pushed and California voters overwhelmingly supported requiring permits to buy ammunition. Look for other Blue states to do the same.
7. Driving out Farmers. Some of California's Leftist politicians believe farming harms the environment. They have made farming an increasingly more expensive enterprise, through wage and environmental regulations, to the point that they are driving farmers out of business - thereby reducing the capacity of California

to produce food. Of course, that raises the price of food across the Country. Another result of that is the increased importation of foods from Mexico and China – two places that use far more pesticides and pollute the world to a much greater degree in the process.

8. California Regulations Are Polluting The World. As I mentioned in my last article, California continually increases the costs of manufacturing to the point of driving manufacturing out of the state. It also results in increased pollution worldwide as jobs go to China and India – two places with limited environmental laws.

So, what does all of this mean to you? The answer is much more than just increased pollution and higher food prices.

First, keep in mind that California has long set the agenda in America. It remains true to a significant degree that "as California goes, so goes the nation." The legalization of gay marriage is recent proof of that. Also, don't forget that the San Francisco was ground zero for the sanctuary city movement that grips the Left and affects the whole country.

Beyond those items, California's high taxes, high poverty rate and poor job prospects have led many Californians to leave the state for other states. For those too poor to leave and those in poverty because of a lack of jobs brought on bad California policies, they are reliant on federal dollars for welfare, Medicare and the like. All combined, California has a disproportionately high number of welfare recipients – and you pay for that.

The list goes on. For years, Brown and the Democrats have refused to spend money on the upkeep of infrastructure in favor of their social justice plans. The recent storms wreaked havoc that should not have been but for deferred maintenance. Now federal dollars, your tax dollars, are paying for the repair.

All of the above is why you should care about California's current drive to the Left. It is not just a political temper tantrum – it affects your state and your wallet. In other words, the Left Coast is not just a state of mind, it has a hefty price tag as well - and YOU are paying for it ever day.

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What in the World Is Causing the Retail Meltdown of 2017?

In the middle of an economic recovery, hundreds of shops and malls are shuttering. The reasons why go far beyond Amazon.

Derek Thompson Apr 10, 2017

From rural strip-malls to Manhattan's avenues, it has been a disastrous two years for retail.

There have been nine retail bankruptcies in 2017—as many as all of 2016. J.C. Penney, RadioShack, Macy's, and Sears have each announced more than 100 store closures. Sports Authority has liquidated, and Payless has filed for bankruptcy. Last week, several apparel companies' stocks hit new multi-year lows, including Lululemon, Urban Outfitters, and American Eagle, and Ralph Lauren announced that it is closing its flagship Polo store on Fifth Avenue, one of several brands to abandon that iconic thoroughfare.

A deep recession might explain an extinction-level event for large retailers. But GDP has been growing for eight straight years, gas prices are low, unemployment is under 5 percent, and the last 18 months have been quietly excellent years for wage growth, particularly for middle- and lower-income Americans.

So, what the heck is going on? The reality is that overall retail spending continues to grow steadily, if a little meagerly. But several trends—including the rise of e-commerce, the over-supply of malls, and the surprising effects of a restaurant renaissance—have conspired to change the face of American shopping.

Here are three explanations for the recent demise of America's storefronts.

1. People are simply buying more stuff online than they used to.

The simplest explanation for the demise of brick-and-mortar shops is that Amazon is eating retail. Between 2010 and last year, Amazon's sales in North America quintupled from $16 billion to $80 billion. Sears' revenue last year was about $22 billion, so you could say Amazon has grown by three Sears in six years. Even more remarkable, according to several reports, half of all U.S. households are now Amazon Prime subscribers.

But the full story is bigger than Amazon. Online shopping has done well for a long time in media and entertainment categories, like books and music. But easy return policies have made online shopping cheap, easy, and risk-free for consumers in apparel, which is now the largest e-commerce category. The success of start-ups like Casper, Bonobos, and Warby Parker (in beds, clothes, and glasses, respectively) has forced physical-store retailers to offer similar deals and convenience online.

What's more, mobile shopping, once an agonizing experience of typing private credit-card digits in between pop-up ads, is getting easier thanks to apps and mobile wallets. Since 2010, mobile commerce has grown from 2 percent of digital spending to 20 percent.

The Growth of Mobile Shopping

Cowen Research

People used to make several trips to a store before buying an expensive item like a couch. They would go once to browse options, again to narrow down their favorites, and again to finally pull the trigger on a blue velvet love seat. On each trip, they were likely to make lots of other small purchases as they wandered around. But today many consumers can do all their prep online, which means less ambling through shopping centers and less making incidental purchases at adjacent stores ("I'm tired, let's go home … oh wait, there's a DSW right there, I need new sneakers").

There will always be a place for stores. People like surveying glitzy

showrooms and running their fingers over soft fabrics. But the rise of e-commerce not only moves individual sales online, but also builds new shopping habits, so that consumers gradually see the living room couch as a good-enough replacement for their local mall.

2. America built way too many malls.

There are about 1,200 malls in America today. In a decade, there might be about 900. That's not quite the "the death of malls." But it is decline, and it is inevitable.

The number of malls in the U.S. grew more than twice as fast as the population between 1970 and 2015, according to Cowen Research. By one measure of consumerist plentitude—shopping center "gross leasable area"—the U.S. has 40 percent more shopping space per capita than Canada, five times more the the U.K., and 10 times more than Germany. So it's no surprise that the Great Recession provided such a devastating blow: Mall visits declined 50 percent between 2010 and 2013, according to the real-estate research firm Cushman and Wakefield, and they've kept falling every year since.

Shopping Space per Person, by Country

Cowen Research

In a long and detailed paper this week on the demise of stores, Cowen Research analysts offered several reasons for the "structural decay" of malls following the Great Recession. First, they said that stagnating wages and rising health-care costs squeezed consumer spending on fun stuff, like clothes. Second, the recession permanently hurt logo-driven brands, like Hollister and Abercrombie, that thrived during the 1990s and 2000s, when coolness in high-school hallways was defined by the size of the logo emblazoned on a polo shirt. Third, as consumers became bargain-hunters, discounters, fast-fashion outlets, and club stores took market share from department stores, like Macy's and Sears.

Finally, malls are retail bundles, and when bundles unravel, the collateral damage is massive. (For example, look at pay TV, where ESPN has bled millions of subscribers in the last few years as one of its key demographics, young men, abandon the cable bundle that is

critical to ESPN's distribution.) In retail, when anchor tenants like Macy's fail, that means there are fewer Macy's stragglers to amble over to American Eagle. Some stores have "co-tenancy" clauses in malls that give them the right to break the lease and leave if an anchor tenant closes its doors. The failure of one or more department stores can ultimately shutter an entire mall.

3. Americans are shifting their spending from materialism to meals out with friends.

Even if e-commerce and overbuilt shopping space conspired to force thousands of retail store closings, why is this meltdown happening while wages for low-income workers are rising faster than any time since the 1990s?

First, although rising wages are obviously great for workers and the overall economy, they can be difficult for low-margin companies that rely on cheap labor—like retail stores. Cashiers and retail salespeople are the two largest job categories in the country, with more than 8 million workers between them, and the median income for both occupations is less than $25,000 a year. But recently, new minimum-wage laws and a tight labor market have pushed up wages for the poorest workers, squeezing retailers who are already under pressure from Amazon.

Second, clothing stores have declined as consumers shifted their spending away from clothes toward traveling and dining out. Before the Great Recession, people bought a lot of stuff, like homes, furniture, cars, and clothes, as retail grew dramatically in the 1990s. But something big has changed. Spending on clothes is down—its share of total consumer spending has declined by 20 percent this century.

What's up? Travel is booming. Hotel occupancy is booming. Domestic airlines have flown more passengers each year since 2010, and last year U.S. airlines set a record, with 823 million passengers. The rise of restaurants is even more dramatic. Since 2005, sales at "food services and drinking places" have grown twice as fast as all other retail spending. In 2016, for the first time ever, Americans spent more money in restaurants and bars than at grocery stores.

Non-Food Retail vs. Restaurants and Bars: 1992-2016

St Louis Fed

There is a social element to this, too. Many young people are driven by the experiences that will make the best social media content—whether it's a conventional beach pic or a well-lit plate of glistening avocado toast. Laugh if you want, but these sorts of questions—"what experience will reliably deliver the most popular Instagram post?"—really drive the behavior of people ages 13 and up. This is a big deal for malls, says Barbara Byrne Denham, a senior economist at Reis, a real-estate analytics firm. Department stores have failed as anchors, but better food, entertainment, and even fitness options might bring teens and families back to struggling malls, where they might wander into brick-and-mortar stores that are currently at risk of closing.

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There is no question that the most significant trend affecting brick-and-mortar stores is the relentless march of Amazon and other online retail companies. But the recent meltdown for retail brands is equally about the legacy of the Great Recession, which punished logo-driven brands, put a premium on experiences (particularly those that translate into social media moments), and unleashed a surprising golden age for restaurants.

Finally, a brief prediction. One of the mistakes people make when thinking about the future is to think that they are watching the final act of the play. Mobile shopping might be the most transformative force in retail—today. But self-driving cars could change retail as much as smartphones.

Once autonomous vehicles are cheap, safe, and plentiful, retail and logistics companies could buy up millions, seeing that cars can be stores and streets are the ultimate real estate. In fact, self-driving cars could make shopping space nearly obsolete in some areas. CVS could have hundreds of self-driving minivans stocked with merchandise roving the suburbs all day and night, ready to be summoned to somebody's home by smartphone. A new luxury-watch brand in 2025 might not spring for an Upper East Side storefront, but maybe its autonomous showroom vehicle could circle the neighborhood, waiting to be summoned to the doorstep of a tony apartment

building. Autonomous retail will create new conveniences and traffic headaches, require new regulations, and inspire new business strategies that could take even more businesses out of commercial real estate. The future of retail could be even weirder yet.