

## Patchwork of Plastic Bag Ordinances Presents Compliance Challenges for Retailers

by Julia A. Miller, Sheryl E. Stein and Mark E. Elliott

*In the past few years, municipalities and counties in several states have adopted and implemented various ordinances banning the distribution of single-use plastic bags by retailers. What began as regulation generally targeted at supermarkets and pharmacies has evolved, in some jurisdictions, into regulation encompassing all retailers, large and small. These ordinances have been adopted primarily at the city or county level, resulting in a patchwork of regulations that are often subtly or significantly inconsistent. This inconsistency presents compliance challenges for retailers with stores in multiple affected jurisdictions.*

The cities and counties that have chosen to regulate the distribution of single-use plastic bags have done so for a variety of reasons, including landfill diversion, reduction of litter, and reducing environmental impact to land, waterways, and marine life. California state law (AB 2449)<sup>1</sup> prohibits municipalities from allowing supermarkets and pharmacies to charge a fee for plastic bags. To circumvent the state law prohibition on fees, in 2007, San Francisco became the first city in the nation to pass an ordinance banning the distribution of plastic shopping bags outright.<sup>2</sup> San Francisco's effort was directed at supermarkets and pharmacies, and required those stores to distribute only recyclable paper bags, compostable bags, or reusable bags.<sup>3</sup>

Other California municipalities followed suit, often duplicating the San Francisco regulation, but even more frequently modifying the ordinances they adopted. For example, some ordinances require specific fees to be charged for paper bags, and others impose record-keeping requirements. Some of these ordinances were challenged in court.<sup>4</sup>

<sup>1</sup> California Public Resources Code, Division 30, Part 3, Chapter 5.1, section 42250, *et seq.*

<sup>2</sup> Ordinance No. 81-07, San Francisco Environmental Code Chapter 17, sections 1701 – 1709.

<sup>3</sup> San Francisco Environmental Code Chapter 17, section 1703.

<sup>4</sup> See, e.g., *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155 (Cal. 2011).

Recent litigation against these ordinances has not proven successful. The City of Manhattan Beach passed an ordinance in July 2008 that banned the distribution of plastic bags at the point-of-sale for all retail establishments. The ordinance was challenged by a coalition of plastic bag makers and distributors that contended an environmental impact report (EIR) was required under the California Environmental Quality Act (CEQA) before the city imposed a plastic bag ban.<sup>5</sup> An EIR serves to inform governmental agencies and the public of a project's environmental impacts, and proposes mitigations and alternatives which may reduce or avoid the environmental impact associated with a project.<sup>6</sup> CEQA requires public agencies pursuing or approving a project to prepare EIRs unless the project does not result in a significant effect on the environment.<sup>7</sup> The trial court and appellate court ruled that the City of Manhattan Beach would need to prepare an EIR before implementing the ban on plastic bags, but the California Supreme Court disagreed that a full-blown EIR was necessary where the City properly determined that the ordinance would have no significant environmental effect.<sup>8</sup> However, the Court left the door open for additional challenges, suggesting that bans by larger municipalities may be subject to more extensive environmental review requirements.<sup>9</sup>

The California Supreme Court's decision vindicated municipalities that already had plastic bag ordinances on the books, and opened the door to municipalities considering adoption of similar laws. Twenty municipalities in California already have adopted bans,<sup>10</sup> and at least forty-five other California municipalities have engaged in formal and informal discussion of regulations. And California is not unique. Cities and counties in Alaska, Arizona, Colorado, Connecticut, Hawaii, Maryland, New York, North Carolina, Oregon, Texas, Washington and the District of Columbia have adopted various forms of plastic bag regulations.

Not only do the geographic compliance obligations present a challenge to retailers with stores in one or more affected jurisdictions, but the ordinances are also inconsistent in their requirements. Some bans are directed only at supermarkets and pharmacies of a certain size, where others encompass all retailers, or retailers selling both food and non-food items. Additionally, the ordinances often have differing requirements for the design, composition and labeling of recyclable paper bags and reusable bags, and require differing fees to be charged for the sale of the bags. Reporting requirements, penalties, and enforcement can also vary depending on the jurisdiction.

While not a daily occurrence, new ordinances are adopted with significant frequency. As the rate of adoption and implementation of these bans increases, the difficulty of implementation will also increase. Retailers must be aware of their obligations in each jurisdiction in which they operate, and the changing regulatory landscape must consistently be monitored to ensure continued compliance. Some retailers may handle the patchwork regulation by choosing to fulfill the most stringent requirements, but even that approach may be a challenge as the regulations continue to grow and evolve. A possible resolution is the effort by certain groups to implement a California statewide single-use bag ban in 2012. California Assemblywoman Julia Brownley first introduced legislation (AB 1998) in 2010, intended to ban the distribution of single-use plastic bags in California, but the bill was not passed. Assemblywoman Brownley has stated her intention to renew her fight for a statewide single-use bag ban in 2012 by amending AB 298, a bill now pending in the Senate.<sup>11</sup> If this effort is successful, it will likely define the requirements for all of California.



<sup>5</sup> See *id.*.

<sup>6</sup> See *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 75 (Cal. 1974); *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 565 (Cal. 1990).

<sup>7</sup> See *Save the Plastic Bag Coalition*, 52 Cal.4th at 171; California Public Resources Code § 21000 et seq.

<sup>8</sup> *Save the Plastic Bag Coalition*, 52 Cal.4th at 160.

<sup>9</sup> See *id.* at 174.

<sup>10</sup> Alameda County, Calabasas, Fairfax, Long Beach, Los Angeles County, Malibu, Marin County, Millbrae, Monterey, Palo Alto, Pasadena, San Francisco, San Jose, Santa Clara County, Santa Monica, Sunnyvale and San Luis Obispo County.

<sup>11</sup> <http://asmnc.org/members/a41/>

If you have questions, please contact the Pillsbury attorney with whom you regularly work or the authors:

Mark E. Elliott **(bio)**  
Los Angeles  
+1.213.488.7511  
mark.elliott@pillsburylaw.com

Sheryl E. Stein **(bio)**  
Los Angeles  
+1.213.488.7194  
sheryl.stein@pillsburylaw.com

Julia A. Miller **(bio)**  
Los Angeles  
+1.213.488.7324  
julia.miller@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.  
© 2012 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.