

MEMORANDUM

August 7, 2024

BY EMAIL

TO: American Recyclable Plastic Bag Alliance
FROM: Mayer Brown LLP
RE: SB 1053 & AB 2236 Analysis

Executive Summary

This memorandum contains our analysis of legal issues pertaining to compliance with and enforcement of the requirements of SB 1053 and AB 2236. If enacted, these bills would change existing law to expressly prohibit certain stores from providing, distributing, or selling “a bag” to consumers at the point of sale. However, the wording of the bills will likely lead to litigation in the courts, as those seeking to enforce and comply with the statute grapple with the ambiguous wording and lack of proper definitions provided by the drafters of the bill. While courts may look to legislative intent or other sources for guidance for how to apply the statute, conflicting approaches to interpreting the statute could lead to inconsistent enforcement across the state. We make no findings nor do we offer an opinion about the merits or goals of the bills.

I. Background

In California, existing law prohibits certain retailers as defined¹ (a store) from providing single-use carryout bags to customers, with the exception of bags used to contain unwrapped food. Current law permits stores to sell or provide reusable grocery bags, provided the reusable bags meet certain specified requirements with regard to durability, material, and labeling. Further, stores are permitted to provide reusable grocery bags made from plastic film or paper, provided those

¹ Proposed Rule, CA PUB RES § 42280(f) defines a “store” as a “retail establishment that meets any of the following requirements: (1) A full-line, self-service retail store with gross annual sales of two million dollars (\$2,000,000) or more that sells a line of dry groceries, canned goods, or nonfood items, and some perishable items; (2) Has at least 10,000 square feet of retail space that generates sales or use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5 (commencing with Section 7200) of Division 2 of the Revenue and Taxation Code) and has a pharmacy licensed pursuant to Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code; (3) Is a convenience food store, foodmart, or other entity that is engaged in the retail sale of a limited line of goods, generally including milk, bread, soda, and snack foods, and that holds a Type 20 or Type 21 license issued by the Department of Alcoholic Beverage Control; (4) Is a convenience food store, foodmart, or other entity that is engaged in the retail sale of goods intended to be consumed off the premises, and that holds a Type 20 or Type 21 license issued by the Department of Alcoholic Beverage Control.”

bags are made with a certain level of recycled material and satisfy various other requirements.² Under current law, the Attorney General, and city and county prosecutors may bring actions against producers and a store to enforce provisions of the law. Fines range from \$1000 to \$5000 per day for each violation.³ City and county prosecutors may keep any fines collected.⁴

While proponents assert that SB 1053 and AB 2236 would ban certain stores from selling or distributing reusable plastic bags, the current versions of the two bills go much farther and would ban the sale or distribution of a wide variety of bags. SB 1053 and AB 2236 contain identical language that, if enacted, would change existing law to expressly prohibit stores from providing, distributing, or selling “a bag” to a consumer at the point of sale, except as provided, with exceptions for certain precheckout bags like bags provided by pharmacies, bags to protect items from contamination, and bags to cover drycleaning.⁵ Excluding those exceptions, the only permitted type of bag to be sold at the point of sale is a recycled paper bag.⁶ We note that the bills define “point of sale” to include checkout counters, self-checkout kiosks, in-store pickup, outside delivery and home delivery.

Despite the bills’ numerous revisions, legislators have failed to provide a clear definition for what constitutes a “bag” under Section 42283, leaving the statute vague. Instead, drafters changed the language of Section 42283(a) from a ban on “single use carry out bag[s] or a reusable grocery bag” to simply “a bag.” Further, drafters intentionally struck from the code a definition for “reusable grocery bag” which may have been helpful to understanding the types of bags to which this ban is intended to apply.⁷ In another stricken section, the bills also remove the ability for a store to explicitly stock and sell reusable grocery bags of any kind, even those made from cloth or other washable textiles.⁸ We note, that these washable and reusable grocery bags made from cloth or other washable textile fibers are very popular with consumers and were a key element

² Under existing law, reusable grocery bags made from plastic film must be produced by a certified producer, and contain at least 40% postconsumer recycled material. A recycled paper bag must be made of 40% postconsumer recycled material, and stores must charge no less than \$0.10 per bag. Public Resource Code Section 42281.

³ CA PUB RES § 42285(a).

⁴ CA PUB RES § 42285(b).

⁵ Proposed Rule, CA PUB RES § 42283(a) (“Except as provided in subdivisions (b) and (c), a store shall not provide, distribute, or sell a bag at the point of sale”).

⁶ Proposed Rule, CA PUB RES § 42283(b)(1) (“A store may make available for purchase at the point of sale a recycled paper bag but shall not sell a recycled paper bag for less than ten cents (\$0.10) in order to ensure that the cost of providing a recycled paper bag is not subsidized by a consumer who does not require that bag”).

⁷ Proposed Rule, stricken section, CA PUB RES § 42280(g) (“reusable grocery bag’ means a bag that is offered for sale or distributed by a store to a customer for the purpose of carrying purchased goods”).

⁸ Proposed Rule, stricken section, CA PUB RES § 42281(a). This rule allowed a store to “stock or display for sale or distribution a reusable grocery bag at a location other than the point of sale” bags made of cloth or other washable textile.

of passage of SB 270. These drafting issues have been raised in analysis developed by legislative policy committees.⁹

By intentionally removing these definitions from the code, the legislature effectively is making it only possible for stores to “provide, distribute, or sell” recycled paper bags to customers at the point of sale.¹⁰ However, the ambiguity surrounding the definition of “bag” and what it means to “sell” a bag at a point of sale, could lead to confusion as to whether stores can provide, distribute or sell any other type of bag including washable reusable grocery bags, insulated bags for transport of hot or cold foods, and commonly purchased items like Ziploc bags, trash bags, backpacks, insulated cooler bags, etc. This could lead to significant issues for enforcement of this bill, and potentially lead to litigation, as courts grapple with how to interpret this ambiguous statute.

II. As Currently Drafted, the Statute is Too Vague to be Enforceable

Given that SB 1053 and AB 2236 would ban the sale or distribution of “a bag” at the point of sale in certain stores, with the exception of recycled paper bags, the law may be too vague to be enforceable under the due process clause of the United States Constitution.¹¹ Due process requires that criminal laws that regulate persons or entities must be written in a way that gives fair notice of the conduct that is forbidden or required.¹² Under a void-for-vagueness standard, the government is prevented from “enforcing a provision that ‘forbids or requires the doing of an act in terms so vague’ that people of ‘common intelligence must necessarily guess at its meaning and differ as to its application.’”¹³

Courts have held that statutory language is not impermissibly vague if its meaning can be fairly ascertained by reference to other sources, such as dictionary definitions, similar statutes, the common law, judicial decisions, or if the words have a common and generally accepted meaning.¹⁴

The vague wording of the statute raises several issues regarding proper notice to the affected entities and subsequent enforcement of violations. Under the current law, enforcement authority over the single-use carryout bag ban rests with the Attorney General and local officials, and is enforced under local ordinances. Proponents assert that the purpose of the legislation is to prohibit sale or distribution of reusable plastic bags at certain stores. However, given the language

⁹ 202320240SB1053_Assembly Natural Resources (1).pdf

¹⁰ Here, the point of sale is defined as “a place where purchased goods may be transferred to a customer.”

¹¹ *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment”). *See also* CA Constitution art I § 7 (“A person may not be deprived of life, liberty, or property without due process of law”).

¹² *Id.*

¹³ *Ivory Educ. Inst. v. Dep't of Fish & Wildlife*, 28 Cal. App. 5th 975, 981 (2018), as modified (Nov. 5, 2018).

¹⁴ *Id.* at 982.

of the proposed bills, it is entirely reasonable that people of “common intelligence” would “guess at its meaning and differ as to its application.”¹⁵ Thus, if a store cannot determine if they are permitted under the statute to sell other types of commonly used bags like washable grocery bags, trash bags, food storage bags, backpacks, purses, or totes it can be argued that they did not have proper notice of the prohibited conduct, and cannot be prosecuted for any violations. We note that existing state law and locally adopted ordinances governing single use carry out bags contain extensive definitions of the products that are banned or limited.

Further, the uncertainty surrounding what constitutes a violation leaves room for varying levels of enforcement across the state, and creates incentives for potential abuse by enforcement officials. For example, some local prosecutors may interpret the provision to ban the sale or distribution of a wide variety of bags while others might interpret that same statute more narrowly. The vague wording of these bills combined with the broad discretion afforded to prosecutors under the Public Resources Code could lead to widely differing enforcement actions.

III. California’s Rules of Statutory Interpretation May Lead Courts to Interpret the Statute in Conflicting Ways

In addition to challenges under the due process clause, the bills’ use of the term “bag” is likely to invite litigation over statutory interpretation. Bag producers and retailers are likely to challenge the vagueness of the language of the statute as a way to challenge the law’s constitutionality and enforceability. Under such a challenge, courts would be forced to apply the varying rules of statutory interpretation to make such a ruling.

Under the general rules of statutory interpretation, courts are typically inclined to give common sense interpretations to statutes that conform with the apparent purpose of the legislation. However, courts also assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean. Moreover, some courts adhere to the principle that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.¹

When undertaking to interpret a statute, courts will seek to (a) ascertain the intent of the legislature to effectuate the purpose of the law, and (b) give a provision a reasonable and common sense interpretation consistent with the apparent purpose, which will result in “wise policy rather than mischief or absurdity.”¹⁶

(a) Legislative Intent

¹⁵ *Ivory Educ. Inst.*, 28 Cal. App. 5th at 981.

¹⁶ *DeYoung v. San Diego* (1983) 147 C.A.3d 11, 18.

Legislative intent and guidance for interpretation can be ascertained from numerous sources, including the Counsel’s Digest included with the bill, the bill’s legislative history, and dictionaries.

The Legislative Counsel’s Digest is a helpful tool courts look to for understanding intent when interpreting an ambiguous statute.¹⁷ However, as the digest is not part of the law, it must be disregarded where the law is clear and there is no need for construction.¹⁸ As the statute in this case is ambiguous, the counsel’s digest would be a useful tool for determining the legislative intent. Unfortunately, the counsel’s digest is not any clearer than the language of the statute when it comes to the prohibition on “bags.” The digest states, “The bill would also prohibit a store from providing, distributing, or selling a bag to a consumer at the point of sale, except as provided.” No further explanation is given for the rationale for this amendment or what policy goals it hopes to achieve.

Another source of intent is legislative history. The court cautions against using legislative history as a source of interpretation, explaining that legislative histories often only represent the views of lobbyists and committee staff, rather than the legislature as a whole.¹⁹ That warning aside, there are several sources courts look to for legislative histories, such as additions and omissions from bills during the amendment process. Courts say that, as a source of legislative history, intent can be deduced from what the legislature intentionally omitted from bills.²⁰

As discussed, in the latest amendments to SB 1053 and AB 2236, the drafters intentionally struck Section 42289(g), which defined a reusable grocery bag,²¹ and replaced it with a new definition, defining a reusable grocery bag as “a bag that is provided by a store to a customer at the point of sale that meets the requirements of Section 42281.”²² Despite providing this new definition, Section 42283(a) intentionally omits the term “reusable grocery bag” and instead only uses “bag.”²³ However absurd it may be, intentionally changing the definition of reusable grocery bag, and still omitting it from the text of the bill could be seen as intent by the drafters that the law

¹⁷ *California Teachers' Assn. v. Governing Bd.* (1983) 141 C.A.3d 606, 613.

¹⁸ *Id.*

¹⁹ *J.A. Jones Constr. Co. v. Superior Ct.*, 27 Cal. App. 4th 1568, 1577 (1994) (“history represents the views of only a few of the persons, including lobbyists and committee staff people, involved in the legislative process, and the history is contaminated by documents that are aimed more at influencing the judiciary than explaining the bill to the rest of the Legislature”).

²⁰ *See Beverly v. Anderson* (1999) 76 C.A.4th 480, 485 (fact that Legislature omitted provision from final version of statute is strong evidence that it did not intend provision to be judicially grafted onto statute).

²¹ Proposed Rule, stricken section, CA PUB RES § 42280(g) (“reusable grocery bag” means a bag that is offered for sale or distributed by a store to a customer for the purpose of carrying purchased goods”).

²² Proposed Rule, CA PUB RES § 42280(d).

²³ The stricken CA PUB RES § 42283(a) reads, “a store shall not provide a single use carryout bag or a reusable grocery bag to a customer.” The replacement section reads, “except as provided in subdivisions (b) and (c), a store shall not provide, distribute, or sell a bag at the point of sale.”

is intended to apply to all bags, not only bags used for “the purpose of carrying away purchased goods.”

Finally, courts may turn to dictionaries to ascertain the ordinary, usual meaning of a word, where the statute fails to define them.²⁴ As is the case here, the proposed bills do not provide a definition for “bag.” But rather, the text gives examples of what types of bags may be provided by stores, namely only recycled paper bags and the three other exceptions.²⁵ Thus, while the statute does not provide a definition for “bag,” giving explicit examples of what type of bag is allowed may satisfy a court looking to pin down what types of bags to which the bill applies. However, the court may not be satisfied by that approach, and may turn to a dictionary for the definition, which will likely lead to wider applications than to just reusable grocery bags. For example, Webster’s dictionary defines “bag” as: a usually flexible container that may be closed for holding, storing, or carrying something. Having the court adopt this definition could potentially cause issue for retailers given the broad array of items to which the definition could apply.

(b) Common Sense Interpretation

Courts will give a provision a reasonable and common sense interpretation, rather than reach an interpretation that will provide an absurd result.²⁶ Further, courts have held that if two constructions are possible, that which leads to the more reasonable result should be adopted.²⁷ In doing so, courts must look for the context of the law, and where uncertainty exists, give consideration to consequences that will flow from a particular interpretation.²⁸

The bill’s current language and legislative history creates a conundrum for the courts. A literal interpretation of the statute, the plain wording of which prohibits the sale or distribution of all bags except for recycled paper bags, would arguably lead to an absurd result. Thus, a court looking to interpret this law to avoid unwise policy would likely look to divine legislative intent to determine how the law should apply. However, in this instance, evidence of legislative intent appears to support an interpretation that differs from the proponents’ purported intent. The legislation repeals definitions of the types of plastic bags to be regulated that provide guidance to store operators. In a major departure from current state policy, the bills do not exempt washable grocery bags made from cloth or other textiles from the definition of bags that stores are prohibited from selling, providing or distributing. The Legislative Counsel digest states that “[T]he bill would

²⁴ See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 (“When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word”).

²⁵ Proposed Rule, CA PUB RES § 42283(b)-(c).

²⁶ See *Granberry v. Islay Invs.*, 161 Cal. App. 3d 382, 388 (“The words of a statute will not be literally construed if this would cause an absurd result, or if it would fail to give effect to the manifest purposes of the statute in light of its legislative history”).

²⁷ *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688.

²⁸ *Id.*

also prohibit a store from providing, distributing, or selling a bag to a consumer at the point of sale, except as provided.” The legislation as drafted contains no findings or declarations of intent and courts may not find the proponents’ statements and press releases probative of legislative intent. All of these facts may lead a court to conclude that the legislature intended to enact a broad ban on plastic bags and to define the term “bag” in a manner that does not comport with the proponents’ intent or wishes.

While the common-sense approach may lead a court to interpret the statute narrowly, the record on legislative intent may persuade a court that the text of the bill is meant to be literal, and thus apply to all bags, even those not meant for transporting purchases. The conflict between these approaches to statutory interpretation could lead to further litigation as courts decide which approach to embrace.

Conclusion

The vague wording of the SB 1053 and AB 2236 regarding the types of bags permitted to be sold by certain stores may lead to litigation in the courts, as those seeking to enforce the statute grapple with the ambiguous wording and lack of proper definitions provided by the drafters of the bill. The current language of the bills creates a potential for unequal enforcement of the law and legal uncertainty for retailers. The Legislature may wish to consider changing the statutory language to be more precise about what types of bags are targeted by the bills, so as to give entities proper notice of prohibited conduct.

ⁱ <https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf>; See also *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).