

Automated Speaker ([00:00](#)):

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Nikki Dobay ([00:14](#)):

Maddie, thank you so much for joining me again.

Madeline Orlando ([00:17](#)):

Yeah, thanks for having me back. Third time's the charm.

Nikki Dobay ([00:20](#)):

All right.

Madeline Orlando ([00:20](#)):

Maybe this one will actually be good.

Nikki Dobay ([00:22](#)):

Okay. They're all good.

([00:29](#)):

Hello, and welcome to Getting Salty, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in the Sacramento, California and Portland, Oregon offices. I am very pleased today to be welcoming back, it's becoming a regular thing, Madeline Orlando, who is in our Sacramento office. So we are talking about extender producer responsibility laws, as Maddie and I have been talking about them in the past, EPRs. And Maddie, you're here to give us a litigation update. So catch us up. What has been going on since you last joined the podcast?

Madeline Orlando ([01:09](#)):

Yeah, well, we have a juicy one today, I think. Last time I was on, I believe we were at the inception of this case and some of the litigation murmurs throughout the country of how are we going to challenge the EPR laws? Industry has been very confused on how to meaningfully implement these programs. And too, also just has become when we now have seven states that have EPR packaging programs in place, it has really become a challenge to meaningfully work with these laws and try and comply with them. And so over the last year, we've seen a handful of cases pop up across three states. We have Oregon, Colorado, and California. And we had our first case go to trial in Oregon, Oregon District Court, and we have our decision.

([02:01](#)):

And I have to say, I don't think it's what a lot of people were expecting. I think industry was probably pretty bullish on this case. And I can run through the major points of what the plaintiffs were arguing and then how the court ended up on the ruling. And too, EPR is a framework that has been around for a while in many different product categories, but it's not really something that we've seen litigated heavily. There was one case years ago in Connecticut federal court that challenged an EPR program there. I want to say it was regarding consumer electronics. And that case didn't really go anywhere. And

the court ultimately sided with the state and said that, "This is a state program. The states really have authority to implement these programs and develop these policy initiatives in their state borders."

[\(02:54\)](#):

And so some of the constitutional issues didn't really go far there, but that's really all that we've seen. So when we've talked about challenging these packaging EPR laws, it really was kind of uncharted territory for a lot of these cases. So we have the first case in Oregon that was filed last year by the National Association of Wholesaler Distributors challenging Oregon's EPR program. And Oregon was the state that first started their program. So they had the earliest implementation dates. What we saw was really a challenge to just the broad constitutional brushes of this program. So first, interstate commerce, what is the burden that this has on companies that are operating across the United States?

[\(03:46\)](#):

How is this burdening out of state businesses, maybe of a company that sells something into Oregon but has no other presence there? What are these programs doing to those types of companies? They're imposing these costs on national supply chains. Companies from outside of Oregon are paying for updates to the Oregon waste management infrastructure that they'll never see and never have any involvement with. So that was a big part of it. Other main portions of the complaint were first about delegating the authority to oversee the program to a private entity, which is Circular Action Alliance, the producer responsibility organization that handles day-to-day implementation. They handle the reporting and the fee obligations. Are we delegating rulemaking authority to this private organization that producers have no say in these activities? What are the issues there?

[\(04:44\)](#):

And then finally, the biggest one being obviously with these programs we're reporting and paying fees. Producers have no involvement in how the fees are set. CAA and the state independently went through that process and then just told producers, "This is how much you owe us," with no other ability to comment or partake in that process.

Nikki Dobay [\(05:08\)](#):

Is that last claim a due process claim really that they don't really have any visibility into that?

Madeline Orlando [\(05:14\)](#):

Yeah, so it's kind of wrapped up in a broader due process argument.

Nikki Dobay [\(05:18\)](#):

Got it. You alluded, but we're kind of holding the ball here, that industry is pretty bullish. So what did the court have to say about our commerce clause and due process clause and delegation authority challenges?

Madeline Orlando [\(05:32\)](#):

Yeah. Well, I'll read you the first line of the court's findings here because I think that that speaks to their overall approach to this. The decision starts off with a quote from the National Pork Producers Council, US Supreme Court case from a few years ago. And it says, "Companies that choose to sell products in various states must normally comply with the laws of those various states." So I think that tells us what we need to know.

[\(06:01\)](#):

The court found that the law was constitutional and that the state is really able to go forward with this program, that they're not the due process or interstate commerce concerns that the plaintiffs brought up and really relied on some central themes. One of them being that EPR is a legitimate environmental policy and that the state is the party that's dealing with these waste management issues and is the party that has to make these environmental policy decisions. And so it's within their purview to enact these types of programs, to charge fees, to require companies to be involved in that because they're the ones really left with the burden of a failing waste management infrastructure in the state.

(06:55):

So it was an interesting part of the opinion that I wasn't expecting were really the focus on the policy aspects here. Obviously the court addressed some of the other constitutional challenges, found that there really was no discrimination from an interstate commerce perspective. And that's an argument that I think after that pork producer's case a couple years ago probably wasn't going to be as successful. I think the one that was really surprising to me was the real lack of recognition of the delegation issues.

Nikki Dobay (07:36):

Well, just going back to the discrimination for a minute, did the court recognize or seem to appreciate the burdens that these laws, because you and I have talked all about burdens numerous times, and I'm quite familiar with the pork producers, the National Pork Producers case, and that was a pretty big blow to the pike balancing tests that we often see in other state and local tax discrimination analysis. But it sounds like the court didn't really give too much credence to that because of their conclusion that they had kind of a rational basis for these policies.

Madeline Orlando (08:19):

Yeah. The court really didn't buy that argument and it really almost framed it in the way of, "This is the cost of doing business nationally," that there are going to be these states that have their own individual requirements. And while you may not like that or agree with it, that the states are allowed to have these programs.

Nikki Dobay (08:44):

Yeah. All right. I'm just going to sigh there, but okay.

Madeline Orlando (08:47):

Yeah.

Nikki Dobay (08:47):

Because you spend a lot of time helping clients in this area try to comply. And so I know you have a very strong understanding and appreciation of the burdens, but-

Madeline Orlando (09:00):

Yes. And too, part of the court's finding was that just because the law might affect businesses out of state doesn't inherently make it unconstitutional, which I think really echoes that Pork Producers Supreme Court decision.

Nikki Dobay (09:18):

That's a tough case to get by in some of these issues.

Madeline Orlando ([09:24](#)):

Yeah. And I think there was always the recognition when this challenge was filed that that was going to be a really hard argument for plaintiffs to be successful on. And two, that we have seven other states that have passed these laws. And so what is the impact if we're saying these programs are unconstitutional because they regulate companies outside of the state borders? Well, we have seven other states that are also doing it and we have companies that are doing business all over the United States that then also have to comply with the seven others. Having this be a national, in some sense, policy with all these states doing it, I think also undercuts some of that argument that just one state is overly proportionate in terms of the burden.

Nikki Dobay ([10:10](#)):

And I think, and I'm going to try to thread the needle from the discrimination burdens issue to the delegation issue, which I know you're going to discuss more, but in the state and local tax context, the burdens we often are citing are the cost of actually filing the tax returns and getting the money to the state. So those types of burdens. But because of the DCA, this entity that these seven states have delegated the collection authority to, having one place to remit to in some ways lessens that burden. So this delegation argument in some ways kind of cuts against the burdens argument. But what did the court have to say about delegation? So what was so surprising there?

Madeline Orlando ([11:04](#)):

Yeah, so the whole argument and one of the biggest issues with these packaging EPR laws since their inception is that the state agencies themselves, while they may be overseeing the programs, are not the ones actually interfacing with companies, are not the ones actually running the reporting platform, the fee paying structures. And so the question is really, have they delegated authority, rulemaking authority without following proper procedures to this private organization? The court ultimately concluded that no, they've not done so in an unconstitutional manner and that actually the Department of Environmental Quality, the state agency in Oregon, does have sufficient authority and oversight over CAA's actions.

([12:00](#)):

Certain things they pointed out were that DEQ ultimately approves the program plans that CAA drafts and prepares, which really outlines all of the details for compliance. They review the fee structures that CAA promotes. DEQ can reject all of this if they want. They can require revisions, they can make certain requests, and ultimately they retain enforcement authority. So if there's a company that's out of compliance with the law, DEQ is the party that's enforcing that, not CAA.

([12:37](#)):

And that was something that I think the court really found pivotal to this argument is the buck really stops with DEQ even if they're not the boots on the ground party for day-to-day compliance activities. And ultimately too, DEQ can revoke CAA's approval for being the producer responsibility organization. They can appoint another party. So all of that I think really weighed in favor of the court's mind that DEQ does have sufficient authority over this law and over the implementation such that they've not delegated all of this to CAA without any oversight or any other though.

Nikki Dobay ([13:20](#)):

So if a company gets their assessment, their fee, and they disagree, do they have the right to challenge that with DEQ or is that all... Because my understanding was there was an arbitration clause and it was all... The companies are kind of stuck with what this organization tells them they're supposed to pay.

Madeline Orlando ([13:44](#)):

You are right about that. That's something that we haven't gone through yet really, but producers when they join CAA, which they're required to do, have to sign... Yeah, which is one of the issues.

Nikki Dobay ([14:00](#)):

Yep, yep. One of the many.

Madeline Orlando ([14:03](#)):

They have to sign contracts with CAA, one of saying that they are complying with the state law, that they're going to go through these exercises. And one of the provisions, as you mentioned, was a mandatory arbitration clause. So it's possible that the company does want to challenge the fees that they've been issued, and under that contract, it's questionable how that challenge would go about. And we have seen issues in terms of disagreements when there's been reporting problems, like if the company's over-reported and they got an invoice for that, how is that all being handled?

([14:36](#)):

Part of the problem is we don't really have the benefit of historical data to rely on because largely going through all this for the first time as a CAA. And so we've seen some issues with how the policy has been followed or what are the standards for these different problems. And I think that all points back to some of the questions and concerns raised by the plaintiffs in this case.

Nikki Dobay ([15:01](#)):

And kind of going back to this being a facial challenge raised by an association, I think what we see this decision doing is saying, "Facially this is constitutional," but I could imagine a situation in which there's a specific company whose facts, whose individual facts as applied could raise issues related to the delegation of the state's authority and due process issues, maybe even commerce clause issues. But it seems like the court really facially, this thing is okay. It doesn't violate any provisions at this point.

Madeline Orlando ([15:43](#)):

Yeah, and I think that's our takeaway right now is that I don't want to say this case was premature because the law was passed in, I want to say 2021, and we've had some time to where this is... We've had a lot of lead up to this and these questions have been raised for a long time and we were just waiting for someone to pull the trigger on that. But I think this would be maybe a different case if years down the line we have all of the fees that have been paid, you can tally all of that up and you can really show the economic impact and structural impact because part of these laws really is to change packaging, to change the supply chain, what materials are we using, and to make longer lasting impacts on the business itself and not just have them pay into this compliance program.

([16:36](#)):

So I think you're totally right in this idea of facial versus an as applied challenge. And we have seen some individual companies challenge that. So there is another case in Oregon District Court right now filed by an individual company that is a packaging manufacturer. And I think that there are some different issues there versus if you had a coalition of consumer brands or this plaintiff group, which was really more of a

distributors. So it really depends on where you're coming at it in the supply chain. I think we could have some different outcomes.

Nikki Dobay ([17:09](#)):

But this case isn't over, is it?

Madeline Orlando ([17:11](#)):

No. We've got more. They just want us to keep doing more podcasts, so it's really good for us.

Nikki Dobay ([17:17](#)):

Yay, great. Great.

Madeline Orlando ([17:18](#)):

Yeah. So the plaintiffs did appeal the decision to the Ninth Circuit, and so we'll see what happens in the Ninth Circuit. And it's not just the impact on this specific state, this specific plaintiffs, but now that we're at the Ninth Circuit level, obviously that encompasses California as well. And any decision the Ninth Circuit level would impact the cases going on in California as well, could impact longer term plans for the California program. This really, bumping this up to the Ninth Circuit, almost really broadens the scope here of what we could see in terms of longer lasting effects from a decision.

Nikki Dobay ([18:04](#)):

Okay. And then you also mentioned there were cases pending in some of the other states.

Madeline Orlando ([18:10](#)):

Yeah. So we have two cases pending in Colorado, one in federal court and one in Colorado state court. The one in federal court was actually filed by the same plaintiffs as this Oregon case, so NAW also involved in one of the California cases as well. So they have been leading the charge, then sticking their heads up first for everyone else to see what happens. And they're largely following the same playbook in the Colorado case and to some extent in the California case. But I will say the California case is a little bit different because they are not the only plaintiffs there. They are joined by 17 state attorneys general from largely Republican states that really have seen this as their opportunity to cut down California environmental policy generally. That one has some different political undertones there. And by politicizing it, we might see a different outcome in that case. I'm not sure. That's also really at the inception that was just filed this summer.

Nikki Dobay ([19:17](#)):

Okay.

Madeline Orlando ([19:17](#)):

But there's more to come here on these trial court level decisions and to see if we can get some of these other cases going to trial.

Nikki Dobay ([19:27](#)):

Yeah, and it'll be interesting. The California case sounds particularly fascinating and politically, yes, there's a lot going on there. But the Colorado case in particular, the federal case, as we were chatting

before the podcast, Colorado's in a different circuit. If that case, assuming that case is going to be appealed to that circuit, then would we have a circuit split? And my sense is whoever loses at the Ninth Circuit and the 10th Circuit in Colorado, there will be petitions to the US Supreme Court on these.

Madeline Orlando ([20:04](#)):

I wouldn't be surprised. We could be riding the wave all the way-

Nikki Dobay ([20:07](#)):

Oh, yeah. It's going to be a while.

Madeline Orlando ([20:09](#)):

All the way up there.

Nikki Dobay ([20:10](#)):

Yeah. Yeah.

Madeline Orlando ([20:11](#)):

They'll give lawyers the opportunity at a good time. They'll find a way.

Nikki Dobay ([20:15](#)):

Right. There's nothing like going to the Supreme Court to dig into a real cool issue. And in the meantime, these seven states currently are chugging along. Are all of the states now implemented? Are all the laws implemented and going forward or are there still states that are kind of rolling their programs out of the seven?

Madeline Orlando ([20:36](#)):

We still have a few states that are coming online. So Maryland, Minnesota, Washington, and Maine are still kind of in the early operational phases.

Nikki Dobay ([20:47](#)):

I see. Okay.

Madeline Orlando ([20:48](#)):

So we'll have some time before we have all seven states that have full scale programs where you're reporting seven times, paying seven times. And in the meantime, we have some other states like New York that has desperately tried to pass this program and can't seem to get it through. They had another round at it this last legislative cycle. And then a few other states, I wouldn't be surprised if we see Illinois.

Nikki Dobay ([21:18](#)):

Illinois is doing so many crazy things. Why wouldn't we do this?

Madeline Orlando ([21:22](#)):

Yeah, Illinois become, when we look at consumer products issues and some of the other required disclosures and things, they have inserted themselves into that conversation with California and Washington and Minnesota and some of these other states. So I wouldn't be surprised if Illinois... I believe some other states too, like Massachusetts had studies that they were looking into to do an assessment of what the program impact would be. Usually that's the first step before then they try to push for a full scale program. So I would expect, I know we've now said this the last two years, that we've expected more states to come online. I wouldn't be surprised if New York takes another run at it next year, and then we have some other states like Illinois or maybe even Hawaii is also one that has looked at it.

Nikki Dobay ([22:10](#)):

Okay.

Madeline Orlando ([22:11](#)):

So we'll see what we come up with in 2027.

Nikki Dobay ([22:15](#)):

Yeah. And just kind of thinking about the state's fiscal situations, they're going to need more money in 2027. I would assume the 17 states that are involved in the California litigation aren't on your list of concerns, but-

Madeline Orlando ([22:34](#)):

A lot of those other coastal states and progressive states.

Nikki Dobay ([22:39](#)):

I'm sure we'll be keeping you up at night during the legislative sessions next year.

Madeline Orlando ([22:44](#)):

Yeah. And the one last thing I would talk about just for future developments is there is a little bit of a push on the federal side to have a consolidated federal program. We've also seen that come up in other related spaces for recycling and other environmental claims where we have a patchwork of state laws and recently, really pushed by industry groups where we do want one federal standard so that compliance is much easier. On the EPR federal program, it's gotten maybe a little more traction than folks would think it would just given the current administration and current political waves in environmental policy. I still would be really shocked if that actually makes it through and makes any real run at it. I don't think we would see a federal EPR program really anytime soon.

Nikki Dobay ([23:47](#)):

Because that would just make sense. So we don't want to do that.

Madeline Orlando ([23:50](#)):

Of course. No, no. Why would you?

Nikki Dobay ([23:53](#)):

Yeah, that was a joke. Well, Maddie, thank you so much for catching us up on this. Before we get to the fun surprise non-tax question or surprise non-EPR question in your case, any final thoughts on this? Ninth Circuit, I'm sure we don't expect an opinion until well into next year, but what's the next kind of opinion that you're expecting to see?

Madeline Orlando ([24:18](#)):

So we have some pending motions for preliminary injunction and other federal court cases. So we're really tracking those now, especially in the California case to see what happens. With that also being very political, it's an election year in California. There's a lot behind the scenes on that aspect of it. But if there was a preliminary injunction granted, I mean, it would really have a huge effect on the state and the life cycle of that law. So really looking for those next. And then in the meantime, CAA is just the train that keeps on moving.

Nikki Dobay ([24:59](#)):

Okay.

Madeline Orlando ([25:00](#)):

They're running these programs, they're collecting fees.

Nikki Dobay ([25:03](#)):

They're out of business.

Madeline Orlando ([25:06](#)):

They're doing it. They're moving forward unless explicitly told otherwise, I would think.

Nikki Dobay ([25:11](#)):

Well, all right. Well, we'll have to catch up in a few months when I'm sure there'll be new stuff. So it's an always evolving area. And it is... I'll actually be speaking at a conference later this month, and we've got this... In our slide deck, we're doing taxes versus fees. So we've kind of thrown this in because every now and then the tax folks, they're always like, "No, that's a fee. I don't have to deal with it." And they try to give it to someone else.

Madeline Orlando ([25:38](#)):

It's a hot potato.

Nikki Dobay ([25:39](#)):

It's a hot potato for sure. But can't let you go without the surprise non-tax question. So we were also talking about the change of seasons, which isn't apparently happening in Sacramento. It hasn't gotten the memo that it's fall. But as seasons change, do you, in your family life, do you embrace different kind of meals? In the summer, in our household, there's a lot of grilling or salad nicoise and things like that, lots of fresh tomatoes, whenever we can get those. But my husband, who is the cook, so I just reap the benefits of that, he's now moving into his stews and braised meats, and that's where the recipes are going. So do you all have a shift in your menu as you move into the fall weather?

Madeline Orlando ([26:29](#)):

We do. And I have to say I'm also not the cook in my household, so whatever my husband's-

Nikki Dobay ([26:33](#)):

There's nothing wrong with that.

Madeline Orlando ([26:35](#)):

... wants to make that day, I eat it gladly or else I'm not cooking anything. But growing up and my family's Italian, my grandmother's from Northern Italy, and so they had a ravioli recipe that we always made at Thanksgiving and at Christmas. So when we start to get into the holidays, all I can think about are Grandma Boitano's homemade raviolis. So that's my big... As soon as it's not a hundred degrees in Sacramento, I'm thinking about some raviolis.

Nikki Dobay ([27:08](#)):

Ravioli.

Madeline Orlando ([27:09](#)):

Yeah.

Nikki Dobay ([27:10](#)):

I love that. Just in that vein, do you eat a lot of other pastas? I mean, I cannot get enough pasta in my life, but it's so good.

Madeline Orlando ([27:21](#)):

Oh, yeah. I had lasagna last night for dinner. It's like water, pasta, the centrals that we need for life and survival, pasta's one of them for me.

Nikki Dobay ([27:30](#)):

Yeah. Yeah. I think I'm with you. We eat a lot of potatoes. My husband's Norwegian, so we eat a lot of potatoes too, but potatoes and pasta, they're both pretty darn good in my book.

Madeline Orlando ([27:42](#)):

Well, my husband's family is actually also Norwegian, so they have the Norwegian pancakes on Christmas, so that's something I look forward to.

Nikki Dobay ([27:49](#)):

Yes. Those are super yummy. Yeah. Well, now we're both hungry, so we should go.

Madeline Orlando ([27:53](#)):

I know.

Nikki Dobay ([27:53](#)):

We should go have lunch. But Maddie, thank you so much for catching us up on this topic. It's definitely evolving, and I believe it will continue. We're on the path, I think, to petitions to the Supreme Court and years of challenges and everything that comes with that. So thanks again.

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Madeline Orlando ([28:12](#)):

All good news for us.

Nikki Dobay ([28:14](#)):

Right. Right. And thank you to the listeners for joining us for this episode of Getting Salty. We'll be back in a few weeks with more to come.