



Legal Issues in the New York City E-Waste Lawsuit

What is producer takeback?

Producer Responsibility (also called “Producer Takeback”) is a product and waste management system in which manufacturers – not the consumer or government – take responsibility for the environmentally safe management of their product when it is no longer useful or discarded. Nineteen states have passed takeback bills for electronics.

Who is being sued and for what?

The lawsuit seeks to prevent the City of New York from implementing their new e-waste recycling law on the grounds that the law is unconstitutional. The law was passed in 2008, manufacturer recycling plans were due to the City in late July of 2009, and the lawsuit was filed just before that deadline. The Natural Resources Defense Council (NRDC) has filed to become a party to the case, defending the law for which it advocated.

Why does the lawsuit challenge the City’s takeback law as unconstitutional?

The lawsuit charges that it was unconstitutional for New York City (and, by extension, any local government or state) to pass such a takeback law. They allege that the following elements of the New York City law – common to all takeback laws – are unconstitutional:

1) Dormant Commerce Clause violation

- *Argument:* The law controls activities outside of city’s borders (i.e., extraterritorially) by mandating collection, handling and recycling of e-waste even for manufacturers who lack facilities to do so in the city; by so requiring, the law discriminates against out-of-city manufacturers.
- *Potential broader applicability:* This would apply to any state law, because no state has all manufacturers and all handling facilities located within it.
- *Defense:* There is nothing on the face of the law that discriminates against out-of-state manufacturers, nor is there any intent to do. Moreover, there is, in fact, no discriminatory effect. Even assuming there were any NYC-based manufacturers, they would not enjoy any measurable benefit in terms of the costs of collecting, handling and processing e-waste. Finally, any incidental burden would be outweighed by the public benefit of removing these toxic materials from the waste stream (and ultimately landfills and incinerators), thereby reducing exposure to sanitation workers and the public at large.

2) Equal Protection violation

- *Argument:* The law treats manufacturers of covered electronic equipment (i.e., computers, TVs and printers) differently than manufacturers of other kinds of products with similar toxic components (e.g., appliances of mercury containing equipment).

- *Potential broader applicability:* This would be true of every state e-waste law, all of which cover only certain electronic products (usually computers and TVs).
- *Defense:* Governments have extremely broad discretion to decide how to regulate, so long as there is a rational basis for their approach. And governments are allowed to regulate progressively, i.e., beginning with some targeted products and then adding others over time. There are numerous examples of the government regulating some but not every item that contains similar constituents.

3) Substantive Due Process violation

- *Argument 1:* The law obliges manufacturers to bear the financial burdens alone (i.e., no role for retailers, consumers, government).
- *Potential broader applicability:* All state e-waste laws impose the full financial burden on manufacturers.
- *Argument 2:* The law is retroactive because it imposes liability on manufacturers for past transactions, i.e., by requiring them to take back equipment that was sold prior to the enactment of the law.
- *Potential broader applicability:* This would be true of any takeback law.
- *Defense:* Governments have extremely broad discretion to decide how to regulate, so long as there is a rational basis for their approach. Obliging manufacturers to bear the costs alone is precisely the approach embodied by producer responsibility – i.e., shifting the burden off of cash-strapped municipalities and taxpayers – with the goal being that if manufacturers are compelled to internalize the full end-of-life costs of their products, they will design smarter (more easily and cheaply recycled) products. Moreover, it is clear that manufacturers will, in fact, pass along at least some of the costs to consumers (instead of taxpayers), an intended outcome of this policy.

4) Regulatory Takings

- *Argument:* The law imposes an unforeseen and substantial burden on manufacturers by requiring them to alone bear the costs of accepting for return equipment even if they no longer manufacture it and even though they cannot control the actions of consumers.
- *Potential broader applicability:* The first part of the argument is true of any takeback law that applies to past manufacturers, and the latter part would be true of any takeback law.
- *Defense:* The industry has not identified exactly what they think is being taken from them by the government, but given the legitimate public benefits that the law would confer, there is no compensable taking.

5) Contracts Clause

- *Argument:* The law substantially impairs and changes the contracts for sale of goods between manufacturers and purchasers by requiring manufacturers to take them back after they are sold and “title transfers” to the consumer.
- *Potential broader applicability:* This would be true of any take-back law.
- *Defense:* The industry never explains the terms of any “implicit” contract with consumers that is being impaired. But even were there such terms, the law is again

extremely deferential to government regulation, upholding any law that has a legitimate public purpose.

The manufacturers say they are happily complying with the e-waste laws in other states and are only suing here because the New York City law is so much more burdensome than any other law. Is this true?

No. The manufacturers' real issue on this point is with the regulations *implementing* the New York City law, not the law itself. More specifically, their complaint is with one element of the regulations that is not found in the law itself: the law does not require that manufacturers provide an option for direct collection of heavier e-waste items (weighing over 15 pounds). But even though this is the issue they focus on the most, their lawsuit is broadly drafted so as to attack the underlying law. Moreover, as shown above, although industry claims that the New York City law is grossly more burdensome than the other state laws (because of the direct collection requirement contained in the *regulations*), it is in fact similar to many existing takeback laws in other states.

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