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MASS &amp; TOXIC TORT UPDATE

## **Despite Science, Legislation and Litigation Regarding Use of Chemical Bisphenol A Increase**

On July 15, a panel of scientists appointed by California's governor voted unanimously *not* to add Bisphenol A (BPA) to California's Proposition 65 – the state's list of chemicals that are known to cause cancer, birth defects, or reproductive harm. Despite this ruling and the growing scientific consensus that BPA is safe, state assemblies – including in California – and the federal government continue to consider banning or already have banned the use of the chemical in certain consumer products. And as regulation and the ensuing media attention continue to increase, so does the inevitable threat of litigation.

### ***What Is BPA?***

BPA is a hardening additive that is used primarily to make polycarbonate plastic and epoxy resins. Polycarbonate plastics are used in a number of applications, including medical equipment, bicycle helmets, safety glasses, automobile bumpers, compact discs and DVDs, and, most notably, baby bottles and sippy cups. Epoxy resins are used in many coatings and other applications, including protective liners in metal cans for canned foods and beverages. Given the variety of products that may contain BPA, it is important for manufacturers to determine whether their products contain BPA and be aware of studies that are driving the current attention to its use.

### ***What Is Causing Concern?***

BPA's molecular shape mimics estrogen, the female hormone. Some studies reportedly show that BPA, at a sufficiently high dose, acts as an endocrine-disruptor in animals, including early onset of sexual maturation, altered development and tissue organization of the mammary gland and decreased sperm production in offspring. Other studies reportedly suggest that BPA may be most harmful in the stages of early development. Previous U.S. reports state that more than 90 percent of Americans have BPA trace residues in their bodies, and that trace amounts of the chemical are transferred from food and beverage containers, especially when the plastic is heated, exposed to strong dishwashing chemicals, or comes into contact with acidic substances. A recent Harvard study also reports that BPA leaches into cold beverages during normal consumption and that BPA levels in the urine of test subjects were significantly raised during regular consumption from BPA-containing products. Yet studies have consistently shown that noncarcinogenic BPA is safe at levels currently experienced by consumers.

Concern regarding the chemical surged, however, late last year. The National Toxicology Program's Center for the Evaluation of Risks to Human Reproduction issued a monograph on BPA in September 2008 stating that low-dose studies of BPA "provide limited evidence of adverse



effects on development in laboratory animals.” The monograph went on to state, though, that there is “some concern” about the effects of BPA on the brain, behavior, and prostate gland of fetuses, infants, and children at current human exposures levels. It is this statement that has led to an increase in both legislation and litigation.

### ***Legislation and Litigation***

Notwithstanding the lack of published scientific evidence establishing adverse effects upon humans, legislation banning the use of BPA recently has been introduced in both the House of Representatives and the Senate as the ***Ban Poisonous Additives Act of 2009***, currently in committee. The Act would ban ***any*** food container that is composed, in whole or in part, of BPA or any container that can release BPA into food, although under certain circumstances a waiver could be granted for the container as long as a prominent warning of the potential health effects associated with BPA is displayed on the container’s label. Also at the federal level, the Food and Drug Administration announced in June that it will reconsider its 2008 finding that BPA is safe at current exposure levels, with its review to be completed by the end of this summer or early fall. Notably, Canada banned BPA in baby bottles in 2008 and presently is considering an outright nationwide ban of BPA.

In addition, there are several states with pending legislation that would ban the use of BPA in food containers. Despite the finding of its governor’s panel, for example, legislation is still pending in California that would ban BPA from being used in baby bottles, with a vote expected this fall. Already, Minnesota and Connecticut, as well as the City of Chicago, have banned the sale of baby bottles and sippy cups containing BPA.

Consumer litigation concerning BPA also has increased, no doubt due to the pending legislation and resulting media attention. After the National Toxicology Program draft report was issued in early 2008, plaintiffs’ attorneys nationwide began filing consumer class action complaints, claiming breach of implied warranties allegedly accompanying BPA-containing products as well as violations of state consumer protection laws. The lawsuits were numerous enough to be consolidated as a Multi-District Litigation (MDL) in the Western District of Missouri, MDL-1967, in August 2008. Currently, there are more than 25 actions pending in the MDL, and filings likely will increase rapidly if more bans are enacted.

### ***How Can You Best Prepare?***

With respect to the current BPA sensitivity or otherwise, education and prevention are essential to minimizing the risk of becoming embroiled in “bet-the-company” litigation. Thompson Hine’s Mass and Toxic Tort lawyers continue to monitor the state of the science, as well as legislation regarding BPA. In addition to helping companies defend consumer lawsuits, we can help companies identify and develop practical ways to limit their exposure to consumer claims. Our lawyers advise and counsel companies on the most prudent strategies to eliminate, reduce, or manage their product liability exposure and other risks. We use our experience with product



liability claims and knowledge of potential losses and risks to implement proactive measures *before* a claim occurs.

In addition to consumer litigation defense and other risk management services, we conduct product and manufacturing audits, prepare product literature and warnings, implement plans to transfer risks contractually, counsel on insurance coverage issues, develop effective record-keeping practices, and prepare and assist companies in responding to crises and accidents.

#### **FOR MORE INFORMATION**

If you have questions or would like more information about this topic, please contact:

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