

MASS & TOXIC TORT UPDATE**BPA: How Little Is Too Much? *Consumer Reports* Joins the Debate**

A December 2009 *Consumer Reports* article reported that its testing of a number of name-brand canned food products found that many contained unacceptable levels of Bisphenol A (BPA), compared to the maximum daily exposure levels that its scientists advocate. *Consumer Reports* also asserted that its tests revealed that some food manufacturers were allegedly mis-marketing their products as “BPA free” because, according to its testing, the products actually contained some level of BPA.

Citing animal studies purportedly showing that low levels of BPA may inhibit infant and young child development or might increase the risk of certain cancers, the *Consumer Reports* article continues the recent challenges to the use of BPA raised by various consumer groups, that argue that the Food and Drug Administration’s (FDA) mandated limits on BPA levels in food products are too high. Nevertheless, despite the recent publicity and the FDA’s regulation of BPA, a causal connection between low-level ingestion of BPA and adverse effects on humans has not been established.

With all the publicity surrounding the topic of BPA levels in food products, a public debate has emerged that food product and packaging manufacturers cannot ignore. In fact, citing recent concerns about BPA levels in food, the FDA has undertaken a reevaluation of its regulations and testing requirements for BPA, which date back to the 1980s. Recent indications from the FDA are that new regulations, initially slated to be released at the end of November, are forthcoming.

WHAT IS BPA AND WHY IS IT IN FOOD?

BPA is a component used in manufacturing some plastics. Previously, its use in certain water bottles and plastic baby products was publicized as a potential health concern. The *Consumer Reports* article, however, highlights its presence in the lining of cans used for food products.

Internal plastic coatings in metal cans help preserve food and allow for a longer shelf life. The components of these coatings, such as BPA, can transfer from the liner to the food and be ingested by consumers. As a result, these coatings can become food additives through this transfer process, thereby giving the FDA authority to regulate them.

WHY IS BPA’S SAFETY BEING QUESTIONED?

The structure of the BPA molecule resembles that of the hormone estrogen. The FDA and the food industry collaborated to develop limits for BPA using established safety testing methods for hormones based on typically expected active concentrations. More recently, new theories of how



some estrogen-like molecules interact with the human body have led some scientists to investigate whether even lower levels of substances such as BPA might have an effect on the body. Much of this research has centered around estrogen's role in fetus and infant development and the incidence of some cancers.

In 2008, the FDA assembled a group of scientists to evaluate the scientific literature on BPA and to suggest revisions to current standards. The panel advised the FDA that the current standards were sufficient, but it suggested that more research was needed. An FDA science advisory subcommittee, however, criticized this recommendation for excluding a number of smaller studies from its analysis. This subcommittee also advised the FDA to consider requiring more studies regarding the safety of BPA at lower levels. The FDA is currently evaluating its regulations.

POTENTIAL LIABILITY

There is no question that the food and food packaging industries will face a continuously evolving and complex safety, regulatory and liability landscape related to BPA. As the potential health effects of low-level exposure to BPA continue to be investigated, companies using it in their products should keep abreast of the literature and developing regulatory structure when considering its safe use.

From a liability standpoint, regardless of what the FDA decides concerning altering its regulations, companies using BPA in their food packaging must continue to appropriately test those products to ensure that BPA levels are within the limits allowed under current FDA regulations. If excessive levels are found, such as was allegedly the case in the *Consumer Reports* article, companies should take decisive corrective action to determine and alleviate fugitive sources of the alleged excessive levels of this substance. Failure to do so could result in liability claims for alleged injuries caused by BPA, breach of warranty and failure-to-warn claims, and consumer class action claims for medical monitoring. In addition, a company might face regulatory action for mislabeling their products or for failure to comply with good manufacturing practices.

PREVENTIVE MEASURES

BPA is still considered by the FDA to be an acceptable and safe product for use in food packaging. However, despite the lack of proven scientific evidence to support adverse health effects in low doses, critics of its use are gaining traction. As a result, in addition to monitoring the changing landscape on BPA, in the short term, companies should consider privately testing their products to confirm that BPA levels fall within the range that is acceptable under the current FDA regulations, and that products labeled "BPA free" truly are. In addition, as part of a long-range or contingency plan, companies should investigate alternatives to BPA for their packaging requirements should the use of such a product become necessary in the future.



FOR MORE INFORMATION

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