



Product Liability Update

March 2015

States Take the Lead on Legislating BPA Even Where United States and European Nations Have Found BPA Safe as Currently Used

I. Introduction

In spite of an overwhelming amount of scientific evidence indicating that bisphenol A (BPA) is safe in the levels that most consumers encounter on a regular basis today, definitive pronouncements and legislation from the federal government, and recent editorials from the likes of the *Wall Street Journal* that are calling for an end to unnecessary taxpayer-funded studies of BPA (it is estimated that the National Institutes of Health has funded BPA studies to the tune of \$100 million since 1997), individual states have taken up the fight against the “plastic windmill” to double up on legislation that was not even necessary in the first place.

To those new to the “sippy cup wars,” BPA, a hardening chemical additive that is used primarily to make polycarbonate plastic and epoxy resins, has been the subject of litigation and legislation geared toward outlawing or severely limiting its use. 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.

Since 2009, the U.S. Congress has introduced different versions of the “Ban Poisonous Additives Act” in an attempt to ban **any** food container that is composed, in whole or in part, of BPA and **any** food container that can release BPA into food. While that legislation has been continually

unsuccessful, the Food and Drug Administration did subsequently ban BPA from use in baby bottles, sippy cups, and baby formula packaging in 2013 based on a petition from industry stating that BPA **was no longer used for those applications in the marketplace**

In addition to industry voluntarily abandoning the use of BPA in specific products aimed at children, government bodies such as the European Food Authority concluded in early 2015, after extensive study, that dietary and other uses of BPA (including those experienced by our youngest consumers – babies) do not pose a health risk to consumers at any age. Likewise, in December 2014, the FDA conclusively pronounced: **“BPA is safe at the current levels occurring in foods.”**

Undaunted by the repeated failure to enact BPA banning or labeling legislation and the reality of industry usage, “The BPA in Food Packaging Right to Know Act” was reintroduced in Congress last week. If passed, food manufacturers would be required to label any packaging that contained BPA. A similar bill was introduced but failed to get out of committee in 2013.

Despite existing federal legislation and government-funded studies establishing BPA’s safety, individual states continue to advance a patchwork of legislation aimed at labeling requirements and banning BPA’s use in consumer goods such as reusable beverage containers and cash register receipts. The following is a state-by-state summary of legislation that is pending or that has been enacted or defeated.

II. Proposed and Pending Legislation

STATE	LEGISLATION AND DESCRIPTION	DATE INTRODUCED
Arizona	<i>Senate Bill 1376</i> <u>Summary:</u> Bans BPA from use in child food containers such as formula packaging. (legislature adjourned without enacting)	February 4, 2014
California	An advisory panel of the California Office of Environmental Health Hazard Assessment (OEHHA) will consider the possible listing of BPA under Proposition 65. (Will be considered by the next meeting of the Development and Reproductive Toxicant Identification Committee on May 7, 2015.)	February 20, 2015
Connecticut	<i>Senate Bill 367</i> <u>Summary:</u> Requires a label for all food or drink packaging that contains BPA. (Similar legislation was introduced in 2014 as SB 316 but was not enacted.)	January 22, 2015
Delaware	<i>House Bill 109</i> <u>Summary:</u> Expands existing BPA legislation to any reusable food container or food containers directed at children. (legislature adjourned without enacting)	May 1, 2013
Hawaii	<i>Senate Bill 383</i> <u>Summary:</u> Bans BPA from child care products and toys. (legislature adjourned without enacting)	January 18, 2013
Hawaii	<i>Senate Bill 384</i> <u>Summary:</u> Bans BPA from use in beverage and food containers intended for children under the age of 3. (legislature adjourned without enacting)	January 18, 2013
Hawaii	<i>House Bill 351</i> <u>Summary:</u> Bans BPA from use in child care products or toys. (legislature adjourned without enacting)	January 22, 2013
Hawaii	<i>House Bill 396</i> <u>Summary:</u> Bans BPA from any product intended for children under 3. (legislature adjourned without enacting)	January 22, 2013
Kentucky	<i>House Bill 147</i> <u>Summary:</u> Bans BPA from children's food and beverage containers (except for metal cans). (legislature adjourned without enacting)	January 7, 2014
Maryland	<i>Senate Bill 175</i> <u>Summary:</u> Prohibits the use of BPA in cash register receipts. (Pending in the Maryland Senate Finance Committee as of February 10, 2015.)	January 30, 2015

STATE	LEGISLATION AND DESCRIPTION	DATE INTRODUCED
Massachusetts	<i>Senate Bill 400</i> <u>Summary:</u> Prohibits the use of BPA in child care products that are intended to facilitate sleep or relaxation such as pacifiers or teething devices. (legislature adjourned without enacting)	January 22, 2013
Nebraska	<i>Legislative Bill 696</i> <u>Summary:</u> Bans BPA from use in any reusable food container. (legislature adjourned without enacting)	January 8, 2014
New Jersey	<i>Assembly Concurrent Resolution 109</i> <u>Summary:</u> Urges Congress to ban BPA from use in all children's products.	February 6, 2014
New Jersey	<i>Assembly Bill 1821/Senate Bill 1401</i> <u>Summary:</u> Prohibits the use of BPA in food packaging, beverage packaging, and reusable food and beverage containers.	February 27, 2014
New Jersey	<i>Senate Bill 1925</i> <u>Summary:</u> Prohibits BPA's use in hard plastic beverage containers.	April 28, 2014
New York	<i>Assembly Bill 2997</i> <u>Summary:</u> Bans the sale of toys, liquids, foods, and beverages for children under the age of 3 in containers containing BPA.	January 20, 2015
New York	<i>Senate Bill 2763/Assembly Bill 3267</i> <u>Summary:</u> Bans BPA in thermal receipt paper.	January 22, 2015
New York	<i>Senate Bill 3276</i> <u>Summary:</u> Bans liquids, foods, and beverages in containers containing BPA with a least-toxic-alternative-replacement requirement.	January 22, 2015
New York	<i>Assembly Bill 3359</i> <u>Summary:</u> Prohibits the manufacture, distribution, and sale of certain toys and child care products containing BPA.	January 22, 2015
New York	<i>Senate Bill 2763</i> <u>Summary:</u> Bans toys, liquids, foods, and beverages for children in containers containing BPA.	January 29, 2015
North Carolina	<i>House Bill 848</i> <u>Summary:</u> Prohibits the sale of a variety of children's products containing BPA. (legislature adjourned without enacting)	April 10, 2013
Pennsylvania	<i>House Bill 377</i> <u>Summary:</u> Prohibits the use of BPA in products intended for children. (pending in Consumer Affairs committee)	January 29, 2013
Pennsylvania	<i>House Bill 951</i> <u>Summary:</u> Bans the use of BPA in food or beverage containers. (pending in Consumer Affairs committee)	March 12, 2013

STATE	LEGISLATION AND DESCRIPTION	DATE INTRODUCED
Tennessee	<i>House Bill 242/Senate Bill 698</i> <u>Summary:</u> Requires labels for food packaging containing BPA. (House Bill 242 withdrawn; legislature adjourned without enacting Senate Bill 698.)	January 30, 2013
Texas	<i>House Bill 218</i> <u>Summary:</u> Prohibits the manufacture and sale of toys, cosmetics, teething products, or feeding products containing BPA intended for use by an infant or child younger than 3 years of age. (never left committee)	February 7, 2013
Washington	<i>House Bill 2779</i> <u>Summary:</u> Prohibits the use of BPA in beverage containers or reusable food containers. (legislature adjourned without enacting)	February 7, 2014
West Virginia	<i>Senate Bill 2305</i> <u>Summary:</u> Bans BPA from any reusable food or beverage container (legislature adjourned without enacting)	January 9, 2014
Wisconsin	<i>Assembly Bill 607</i> <u>Summary:</u> Expands existing BPA legislation aimed at sippy cups to all children's containers. (legislature adjourned without enacting)	January 7, 2014

III. Enacted and Defeated Legislation

STATE	LEGISLATION AND DESCRIPTION	DATE ENACTED OR DEFEATED
California	<i>Assembly Bill 1319</i> <u>Summary:</u> Prohibits the manufacture, sale, or distribution of any bottle or cup that contains BPA at a level above 0.1 ppb if the bottle or cup is designed or intended to be filled with a liquid, food, or beverage intended primarily for consumption by children 3 years of age or younger.	October 4, 2011
Connecticut	<i>House Bill 6572/Public Act No. 09-103</i> <u>Summary:</u> Bans the manufacture, sale, and offer to sell or distribute of any infant formula or baby food that is stored in a plastic container, jar, or can that contains BPA.	June 3, 2009
Connecticut	<i>Senate Bill 210</i> <u>Summary:</u> Prohibits the use of BPA in thermal paper.	July 13, 2011
Delaware	<i>Senate Bill 70</i> <u>Summary:</u> Prohibits BPA in plastic products marketed for use by children including baby bottles, water bottles, containers for food storage, lining in metal cans for baby products, and other containers used for food or beverage storage for products consumed by children.	June 30, 2011

STATE	LEGISLATION AND DESCRIPTION	DATE ENACTED OR DEFEATED
District of Columbia	<p><i>Council Bill 521</i></p> <p><u>Summary:</u> The bill prohibits the manufacture, sale, offer for sale, or distribution in commerce of any product intended for use by children under the age of 6 that contains BPA.</p>	March 31, 2011
Illinois	<p><i>Senate Bill 2950</i></p> <p><u>Summary:</u> Prohibits manufacturers from making or wholesalers from selling food or beverage containers containing BPA intended for children under the age of 3 as of January 1, 2013. Prohibits retailers from knowingly selling food or beverage containers containing BPA intended for children under the age of 3 as of January 1, 2014. Violations can warrant fines of up to \$200 per day.</p>	August 27, 2012
Maine	<p><i>House Bill 330</i></p> <p><u>Summary:</u> Designates BPA as a “high concern chemical” and bans some uses of BPA in products such as baby bottles sold in the state.</p>	April 25, 2011
Maine	<p><i>Legislative Document 902</i></p> <p><u>Summary:</u> Bans BPA from use in reusable food containers, beverage containers, baby food packaging, and children’s toys.</p>	June 4, 2013
Maryland	<p><i>Senate Bill 213</i></p> <p><u>Summary:</u> Prohibits the manufacture, sale, or distribution of bottles or cups for children under 4 years old that contain BPA. Companies must use a “least-toxic” alternative when manufacturing such products.</p>	July 1, 2010
Maryland	<p><i>Senate Bill 151</i></p> <p><u>Summary:</u> Amends existing law to prohibit the use of BPA in infant formula cans.</p>	May 10, 2011
Massachusetts	<p><i>105 MA ADC 650.020 – Listing of Banned Hazardous Substances (2011)</i></p> <p><u>Summary:</u> Prohibits the manufacture and sale of BPA in baby bottles and sippy cups.</p>	January 7, 2011
Minnesota	<p><i>Senate Bill 247/House Bill 326</i></p> <p><u>Summary:</u> Prohibits manufacturer or wholesaler from selling any product containing BPA that can be filled with food or liquid and is intended for use by children under 3 (exemption for used children’s products). The law also prohibits retailers from selling any such products, without exception.</p>	May 8, 2009
Minnesota	<p><i>Senate Bill 379/House Bill 459</i></p> <p><u>Summary:</u> Additional BPA legislation that prohibits the sale of food containers or packaging containing BPA by manufacturers on January 1, 2014 and by retailers by January 1, 2015. The bill also prohibits similarly hazardous replacements.</p>	May 17, 2013
Nevada	<p><i>Assembly Bill 354</i></p> <p><u>Summary:</u> Prohibits the manufacture, sale, or distribution of certain bottles and cups that contain intentionally added BPA and are intended primarily for use by young children and infants.</p>	May 28, 2013

STATE	LEGISLATION AND DESCRIPTION	DATE ENACTED OR DEFEATED
New Jersey	<i>Assembly Bill 3779</i> <u>Summary</u> : Makes selling, offering for sale, or distributing a food or beverage container made with BPA a consumer fraud practice if the packaging is intended for use by young children.	February 7, 2013 (died in committee)
New York	<i>Assembly Bill 6919/Senate Bill 3296</i> <u>Summary</u> : Bans manufacture, sale, or distribution of any toy or child care product containing BPA intended for use by a child under 14.	July 30, 2010
South Dakota	<i>House Bill 1241</i> <u>Summary</u> : Requires that any food packaging that contains BPA shall display a label on the front of the package stating "This package contains bisphenol A."	February 20, 2014 (tabled)
Vermont	<i>Senate Bill 247</i> <u>Summary</u> : No person or entity shall manufacture, sell, or distribute in commerce in this state (1) any reusable food or beverage container containing BPA or (2) any infant formula or baby food stored in a plastic container or jar that contains BPA. Beginning July 1, 2014, no person or entity shall manufacture, sell, or distribute in commerce in this state any infant formula or baby food stored in a can that contains BPA. Manufacturers shall use the least toxic alternative when replacing BPA.	May 20, 2010
Washington	<i>House Bill 1180/Senate Bill 6248</i> <u>Summary</u> : No manufacturer, wholesaler, or retailer may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use any bottle, cup, or other container, except a metal can, that contains BPA if that container is designed or intended to be filled with any liquid, food, or beverage primarily for the consumption from that container by children 3 years of age or younger and is sold or distributed without containing any liquid, food, or beverage.	March 19, 2010
Wisconsin	<i>Senate Bill 271</i> <u>Summary</u> : Prohibits the use of BPA in baby bottles and sippy cups and requires such products to be labeled "BPA-free."	March 3, 2010

IV. How Can You Best Prepare?

Prevention is key in dealing with potential consumer class action or mass tort claims arising from piecemeal state legislation. Thompson Hine's Mass and Toxic Tort lawyers, in addition to helping defend consumer lawsuits, 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.

With respect to BPA or otherwise, education and prevention are essential to minimizing the risk of becoming embroiled in a "bet-the-company" case.

FOR MORE INFORMATION

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