

# Product Liability Newsletter

Winter 2009

The Product Liability Initiative is comprised of six major American law firms. Our central purpose is to serve as an international legal resource for clients defending against product liability and mass tort litigation.

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## NEW REGULATIONS FOR CONSUMER PRODUCTS SOLD IN THE U.S.

by: *Eric W. Junginger*  
*Senior Counsel, Hanson Bridgett, LLP*

Since its formation in 1972, the U.S. Consumer Product Safety Commission ("CPSC") has been charged with protecting the public from unreasonable risks of serious injury or death from thousands of types of consumer products sold in the U.S. (e.g., toys, cribs, power tools, household chemicals). In response to the high number of product recalls in the past few years, the President of the United States signed into law the Consumer Product Safety Improvement Act ("CPSIA") in August 2008. In short, the CPSIA contains several new regulations for manufacturers and importers of children's products, apparel and footwear, packaging, and hazardous substances sold in the U.S. It also authorizes the CPSC to create searchable product databases, and enables the CPSC to impose heightened penalties either for the sale of products that violate the new standards or when a company fails to comply with CPSC reporting guidelines.

**Children's Products:** Specifically, the CPSIA requires that all children's products (defined as a consumer product designed or intended primarily for children 12

years of age or younger) be tested by an independent company and certified before the product can be imported or distributed. This testing and certification will ensure that levels of lead and phthalates are within CPSC acceptable levels and that all children's products comply with other CPSC regulations. Certain products can be exempted if compliance is not technologically feasible or if the product does not result in the absorption

**The CPSIA contains several new regulations for manufacturers and importers of children's products, apparel and footwear, packaging, and hazardous substances sold in the U.S.**

of the chemical into the human body. Further, the CPSIA requires that certain children's products include customer registration cards and permanent markings of production dates and batch numbers, in addition to requiring that warnings be

displayed immediately adjacent to any advertisements for the children's product.

**Searchable Database:** The CPSIA is intended to streamline the release of information deemed important for public health and safety. As such, the CPSC intends to make product information more accessible to the public by establishing a searchable database on the Internet of all reports of deaths / injuries caused by consumer products, which will include the name of the product and manufacturer's name. Although manufacturers will be able to review the incident reports before they are posted online, the manufacturer can only object to its publication if it is inaccurate or contains confidential / trade secret information.

**Penalties and Collaboration With State Government:** Additionally, the CPSIA increases the ability to monitor and punish noncompliance with CPSC laws. First, it gives state attorneys general power to sue companies for CPSC statutory violations so long as the CPSC receives at least 30-days notice of any such lawsuit. Second, it increases the CPSC's budget so that it can hire additional staff to potentially inspect shipping ports and overseas factories. Third, it increases civil penalties for violations of CPSC standards and for failing to report to the CPSC any product defect that could cause serious bodily harm from a maximum of \$8,000 per violation to \$100,000 per violation, as well as increasing the maximum allowable penalty for a series of violations from \$1,825,000 to \$15,000,000.

**Product Recalls:** The CPSIA also increases the CPSC's authority in regard to product recalls as it can now require that manufacturers: (1) include other languages and information on recall notices, (2) amend their corrective action plan for product defects, or (3) offer a replacement, refund or repair of the recalled product.

In future newsletters, this column will explore more details of the CPSIA, as several of its provisions are due to be enacted over the course of the next year. In the meantime, should you have any questions or concerns about the new regulations or how the CPSIA may affect your business, please contact us. ■



## EVENTS: WHERE WE WILL BE IN 2009

### DRI 2009 Product Liability Conference

DRI, the national organization of defense trial lawyers and corporate counsel, is holding a product liability conference in San Diego, California on 14-17 April 2009.

Globalaw Product Liability Initiative Coordinator and Partner of Hanson Bridgett LLP Merton Howard will be presenting on 17 April.

The discussion will include a review of the 2008 federal legislation, the Consumer Product Safety Improvement Act of 2008 and its impact on various state laws and proposed legislation regarding children's products.

For more information contact Merton Howard  
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[www.dri.org](http://www.dri.org)

### Nanotech Conference & Expo 2009

This is the world's largest and most anticipated annual nanotechnology conference and expo. Nanotech 2009 brings together over 5,000 technology and business leaders and experts from academia, government, startups and Fortune 1,000 companies.

The 12th annual conference will take place at the George R. Brown Convention Center in Houston, Texas from 3-7 May 2009.

Globalaw member firm Jackson Walker L.L.P. is a platinum sponsor of the event and will be exhibiting at Nanotech 2009.

For more information contact Lisa Powell  
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[www.nsti.org/Nanotech2009/](http://www.nsti.org/Nanotech2009/)

# CALIFORNIA GREEN CHEMISTRY PROGRAM

by: *Arthur B. Cook*  
*partner, Hill Farrer & Burrill LLP*  
and *Amy E. Furness*  
*partner, Carlton Fields PA*

On September 29, 2008, Governor Arnold Schwarzenegger signed into law the first-in-the-nation Green Chemistry Program. [AB 1879 (Feuer) and SB 509 (Simitian).] The purpose of this program is to make products sold in California "benign by design." Constituent chemicals that are dangerous to human health or the environment are eliminated at the design stage by the manufacturer. Maine and Washington state are considering similar laws designed to reduce harmful chemicals. California's program, however, is similar to the Registration, Evaluation, Authorization and Restriction of Chemicals Program (REACH) adopted by the European Union in June 2007. Under that program, manufacturers, distributors and retailers manufacturing or importing one metric ton or more of a chemical in the EU must register the chemical with the European Chemicals Agency. The program gives the EU the power to evaluate and authorize or restrict the import or use of that chemical. Under REACH, chemicals that have not been registered can not be legally sold in the EU. No program similar to REACH existed in the United States until California's state laws were passed.

REACH created a category of chemical described as "Substances of Very High Concern" (SVHC). REACH required that the European Chemicals Agency be notified of the presence of SVHCs in articles to be sold in the EU. Articles containing certain SVHCs deemed particularly dangerous to human health or the environment (known as Annex XIV

substances) are subject to pre-authorization before sale in the EU. Applicants are required to demonstrate that no safer alternative can be substituted for the SVHC, and the European Chemicals Agency can deny authorization and, therefore, deny permission to sell the article in the EU. REACH has been criticized on grounds that it will add considerable research, development and testing burdens on industry and erect obstacles to free international trade. Nevertheless, in a clear reference to REACH, California's newly enacted laws expressly encourage the Department of Toxic Substances Control ("DTSC") to "reference and use, to the maximum extent feasible, available information from other nations, governments, and authoritative bodies that have undertaken similar chemical prioritization processes..." Criticism over this requirement has focused on the fact that while REACH requires the industry to provide the chemical data, California's laws burden the DTSC with this responsibility.

California's legislation applies to "chemicals or chemical ingredients in consumer products that may be considered as being a chemical of concern..." "Consumer Product" is defined in SB 509 as "a product or part of the product that is used, brought (sic), or leased for use by any person for any purposes." There are seven categories of exempt products, largely those already heavily regulated such as pharmaceuticals, food and pesticides.

It is little exaggeration to say that the California legislature granted almost total discretion to DTSC to develop regulations to carry out the broad and vague legislative requirements. DTSC is "to limit

exposure or to reduce the level of hazard posed by a chemical of concern." The law specifically enables DTSC to adopt regulations empowering it to take actions including:

- requiring additional information;
  - requiring labeling;
  - controlling access or limiting exposure;
  - managing the product at the end of its useful life;
  - restricting the use of the chemical of concern in the consumer product;
  - prohibiting the use of the chemical of concern in the consumer product;
- "or any other outcome the department determines accomplishes the requirements of this article."

**The purpose of this program is to make products sold in California "benign by design."**

By July 2009, DTSC is required to empanel a Green Ribbon Science Panel to provide expert advice on scientific matters and chemical policy recommendations. This panel is to adopt regulations by January 1, 2011 that establish a process for identifying and prioritizing chemicals of concern in "consumer products." What these regulations will look like is uncertain but, California's program will probably incorporate much of what the European Chemicals Agency has developed in REACH.

The impact of the regulations adopted under the California Green Chemistry Program, AB 1879 and SB 509, are



expected to have far reaching implications. Manufacturers, distributors and retailers who trade to, through, or from California and who have not yet addressed compliance with the EU's REACH program should study the potential implications of California adopting parallel or similar regulations.

It is anticipated that there will be a new online Toxics Information Clearinghouse for businesses and consumers searching for information about this program. California's two new laws are intended to end some of the less effective chemical bans and instead eliminate many hazardous chemicals right at the design stage. ■

For more information about the California Green Chemistry Program, please contact the authors Arthur B. Cook at 213 621 0822 or Amy Furness at 305 539 7253.



## The Product Liability Initiative

Members of the Product Liability Initiative are veteran trial lawyers with a wide variety of backgrounds. We serve as trial counsel in high profile, multi-jurisdictional matters and regularly counsel clients on product liability issues both in the United States and around the world. Each of our members is familiar with product liability defenses and their skills include pre-trial preparation, electronic discovery, and expert witness development. We share a thorough understanding of product liability law and its application across diverse industries.

Members of this initiative are familiar with design, engineering, distribution, marketing, labeling, advertising, and consumer usage. We have extensive experience defending and managing mass tort litigation as well as class actions. We have expertise in medical issues that involve epidemiology, statistics and toxicology. We also use our knowledge of relevant federal

agencies such as the Consumer Product Safety Commission to review our client's product warnings and warranties.

Our lawyers frequently advise manufacturers, distributors, and retailers. This is done at the local, state, national and international level with our attorneys serving as national, regional or convergence counsel.

Representative industries of our members' clients include: alcohol, asbestos, automotive, aviation, chemical, electronics, engines, firearms, medical devices, pharmaceuticals, power equipment, recreational products, security systems, sporting goods, and tobacco.

Our members regularly publish articles and hold leadership positions in several defense organizations including the Product Liability Advisory Council and the Defense Research Institute.

# ABOUT THE AUTHORS



## *Arthur B. Cook*

Arthur B. Cook specializes in business litigation. Mr. Cook's areas of particular expertise include toxic torts, hazardous waste including Federal Superfund litigation, construction disputes, unfair competition and commercial transactions. Mr. Cook is experienced in proceedings in state and federal courts and before administrative agencies.



## *Amy E. Furness*

Amy E. Furness is a trial lawyer who represents a diverse clientele including both domestic and foreign corporations. Her practice focuses primarily on commercial, environmental, and product liability litigation. Ms. Furness has served as national coordinating counsel as well as regional counsel on a variety of complex civil matters throughout the United States. She has also served as in-house counsel with the environmental claims division of a national insurance company.



## *Eric W. Junginger*

Eric W. Junginger's practice involves products liability, complex civil litigation, toxic tort cases, judgment enforcement, and regulatory affairs. His experience involves all aspects of litigation, appeal, and alternative dispute resolution. Eric has handled products liability cases involving durable medical equipment, satellites, airplane parachutes, asbestos, benzene, silica, air mattresses, electrical motors, construction equipment, consumer goods, sports equipment, contract disputes, as well as premises liability cases.

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