



CLASS ACTION LITIGATION



REPORT

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Class actions against makers of bisphenol-A-containing products “may represent a new wave in products liability litigation,” write attorneys Leonard Kurfirst, Brent Austin, and Anthony Hopp. While there “are several non-legal aspects of these cases that represent real departures from the past,” the authors say, “from a purely legal perspective, the BPA cases have much in common with the previous waves of toxic tort claims.” BPA plaintiffs, the authors predict, “will find themselves beset by some of the same problems that plagued plaintiffs in those cases, and defendants will have the benefit of the same strategies.”

Product Liability

An Old Whine in New Bottles? What’s New— And What Isn’t—About the Current Wave of BPA Litigation

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In the past six months, more than a dozen class actions¹ have been filed against the manufacturers of products containing Bisphenol-A (BPA), an industrial chemical used to make polycarbonate plastic and epoxy resins. Most of the lawsuits are consumer fraud claims filed by people who bought baby bottles or

¹ For list of pending class actions, See United States Judicial Panel on Multidistrict Litigation, Notice of Hearing, June 19, 2008, Schedule of Matters for Hearing Session July 31, 2008, p. 11-12, http://www.jpml.uscourts.gov/Hearing_Info/Hearing_Order7-31-08.pdf

sports bottles containing BPA. In much the same language used by people who recently purchased allegedly-defective cell phones, toys, dog food and treated wood, plaintiffs contend that the industry has long known of the supposedly hazardous nature of the products, but has kept consumers in the dark. They claim that they would not have purchased the products if they knew of the alleged risks, and now seek return of their purchase price, punitive damages, disgorgement of “wrongful profits” and statutory damages where available.

Plaintiffs’ real concern is that BPA might be harming them or their children, but there is still no solid proof that BPA causes human health effects, and certifying a personal injury class is virtually impossible in most states. Plaintiffs attempt to plead around these otherwise insurmountable obstacles by claiming consumer fraud. What plaintiffs in these and other contaminated products consumer fraud class actions fail to realize, however, is that the short-term victory of a product refund (if they ever get one) may come at the cost of waiving a future personal injury claim, should the scientific consensus ever confirm their health-risk allegations. On the other hand, if the plaintiffs’ true goal is to stop the distribution of a product they view as potentially dangerous, then the mere filing of the BPA lawsuits and the resulting publicity is a victory in itself.

The BPA cases may represent a new wave in products liability litigation. There are several non-legal aspects of these cases that represent real departures from the past. Still, from a purely legal perspective, the BPA cases have much in common with the previous waves of toxic tort claims, such as cigarettes, cell phones and treated wood. The BPA plaintiffs will find themselves beset by some of the same problems that plagued plaintiffs in those cases, and defendants will have the benefit of the same strategies.

The BPA Controversy

The appeal of polycarbonate plastic containing BPA is its unique combination of optical clarity, shatter-resistance and high heat-resistance. Its applications include eyeglass lenses, medical equipment, water bottles, digital media (e.g., CDs and DVDs), cell phones, consumer electronics, household appliances, safety shields, sports safety equipment and automobiles. Epoxy resins are used for industrial floorings, dental sealants, printed circuit boards, industrial protective coatings, automotive primers and metal can coatings (e.g., canned foods, soft drinks and baby formula).²

Studies over the past 10 years show BPA to be not only a ubiquitous chemical in the human body³, but also a possible developmental toxin in animals at low doses.⁴ Concerns have been expressed that BPA mimics the female hormone estrogen and that low dose human exposures may pose risks for early puberty, prostate effects, breast cancer and behavioral impacts, espe-

cially from early-life exposures. One of the most vocal advocates for banning BPA, Professor Frederick vom Saal of the University of Missouri, contends that while BPA can be flushed out of an adult’s body within a day, it causes stem cells in baby mice and rats to develop abnormally. These cells cannot be “reprogrammed,” which means the effects are lifelong.⁵ BPA advocates have questioned the reproducibility of Dr. vom Saal’s findings and whether mice and rat studies accurately reflect the way BPA is metabolized by humans.⁶

Recent attention has focused on potential BPA exposure from food and beverage containers, and baby bottles in particular. Disputed exposure studies have asserted that chemical migration increases at high temperatures (i.e. boiling water and microwaving) or with old, scratched bottles.⁷ Elevated levels of BPA reportedly have been found in cans of baby formula.⁸

Given these developments, the National Toxicology Program (NTP), which is part of the National Institute of Health (NIH), initiated a comprehensive review of BPA in 2007. Coincidentally, Health Canada, the Canadian government’s health department, performed its own health risk assessment during the same time. The NTP and Health Canada both came out with reports in April 2008, just days apart, that created a firestorm of media attention.

In a “draft brief” issued on April 14, 2008, the NTP acknowledged *some* concern—based upon animal studies—for neural and behavioral effects in fetuses, infants and children at current human BPA exposure levels. The NTP also expressed *some* concern that BPA exposure in these same groups might affect the prostate and mammary glands, and cause an earlier age for puberty in females.⁹ Public comment on the draft brief was invited through May 23, 2008.¹⁰

On April 18, 2008, Health Canada announced that while scientists had concluded that BPA exposure to newborns and infants is below levels that may pose a risk, “the gap between exposure and effect is not large enough.” Therefore, Health Canada proposed to designate BPA as a “dangerous substance” under Schedule 1 of the Canadian Environmental Protection Act, ban

⁵ “A Perfect Storm,” A Mahshie, Columbia Tribune, May 10, 2008, www.columbiatribune.com/2008/May/20080510Busi002.asp

⁶ See, e.g. Public Comments for NTP Draft Brief on Bisphenol, American Chemistry Council, May 23, 2008, [http://cerhr.niehs.nih.gov/chemicals/bisphenol/pubcomm/BPA\(43\)ACC23May2008_best.pdf](http://cerhr.niehs.nih.gov/chemicals/bisphenol/pubcomm/BPA(43)ACC23May2008_best.pdf); but see also Frederick S.vom Saal Comment, May 26, 2008, [http://cerhr.niehs.nih.gov/chemicals/bisphenol/pubcomm/BPA\(40\)vomsaal26May2008.pdf](http://cerhr.niehs.nih.gov/chemicals/bisphenol/pubcomm/BPA(40)vomsaal26May2008.pdf)

⁷ Compare Polycarbonate/BPA Global Group website, “Are the Myths About Polycarbonate Bottles True? New Information Supports the Safe Use of Polycarbonate Bottles”, www.bisphenol-a.org/whatsNew/20080131.html with Environmental Working Group website, “Guide to Baby-Safe Bottles & Formula”, www.ewg.org/babysafe.

⁸ *Id.*

⁹ Draft NTP Brief on Bisphenol A [CAS No. 80-05-7], April 14, 2008, http://cerhr.niehs.nih.gov/chemicals/bisphenol/BPADraftBriefVF_04_14_08.pdf

¹⁰ Following the close of Public Comments, the NTP’s Board of Scientific Counselors recommended changing the level of concern in the Draft NTP Brief on Bisphenol A from “some” to “minimal” for effects in the mammary gland and an earlier age for puberty in females. http://ntp.niehs.nih.gov/files/BSCactionsBPA_508.pdf

² Polycarbonate/BPA Global Group website, www.bisphenol-a.org/pdf/DiscoveryandUseOctober2002.pdf

³ “Exposure of the U.S. Population to Bisphenol A and 4-tertiary-Octylphenol: 2003–2004”, AM Calafat, X Ye, LY Wong, JA Reidy, and LL Needham, Environmental Health Perspectives, Vol. 116, No. 1, January 2008, p. 39-44

⁴ See, e.g., Public Comments for NTP Draft Brief on Bisphenol, Environmental Working Group, May 23, 2008, [http://cerhr.niehs.nih.gov/chemicals/bisphenol/pubcomm/BPA\(41\)EWG23May2008_best.pdf](http://cerhr.niehs.nih.gov/chemicals/bisphenol/pubcomm/BPA(41)EWG23May2008_best.pdf)

polycarbonate baby bottles and develop stringent migration targets for BPA in infant formula cans. Similar to the NTP report, public comment on the Health Canada report was invited for 60 days.¹¹

Within days, these reports generated an enormous amount of regulatory, legislative, commercial and litigation activity across the U.S. Each activity is intertwined and is summarized below.

Regulatory Actions

Depending upon its use, BPA is potentially regulated by various federal agencies, including the Consumer Product Safety Commission (CPSC), the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA) and the Food and Drug Administration (FDA).¹² CPSC spokeswoman Julie Vallese said that BPA poses the greatest health risk when in contact with food and drink and not in the types of products overseen by the CPSC. The CPSC studied rattles, teething rings, and pacifiers in 2002 and found BPA in only five of 133 plastics sampled.¹³

Presently, in the United States, most of the regulatory attention generated by BPA has been directed to the FDA. Specifically, polymers and epoxy resins that contain BPA and are used in food containers—such as baby bottles and infant formula cans - are regulated by the FDA as “food contact substances.”¹⁴ During the week of April 14, 2008, the FDA formed a task force to review the concerns expressed by the NTP and Health Canada. On June 10, 2008, the FDA issued a press release in which it offered the following conclusions:

Based on our ongoing review, we believe there is a large body of evidence that indicates that FDA-regulated products containing BPA currently on the market are safe and that exposure levels to BPA from food contact materials, including for infants and children, are below those that may cause health effects. However, we will continue to consider new research and information as they become available.¹⁵

The European Food Safety Authority (EFSA) reached a similar conclusion following a BPA risk assessment that it performed for adults, children and infants in 2006, finding that exposure to BPA is well below the Tolerable Daily Intake (TDI).¹⁶ On July 23, 2008, the

EFSA issued a press release that confirmed its earlier findings, focusing upon the limitations of the rodent studies:

The [EFSA] Panel considered the significant difference between humans and rodents, such as the fact that people metabolize and excrete BPA far more quickly than rodents. This body of evidence further limits the relevance of low-dose effects of BPA reported in some rodent studies used for human risk assessment.¹⁷

Health Canada has not been prepared to go quite as far as the EFSA and the FDA, but did make clear in a press release dated May 29, 2008 that the “precautionary approach” it took in recommending changes in products intended for newborns and infants does not apply to canned goods:

Based on the scientific evidence available to date, Health Canada does not recommend that consumers make any changes to their dietary habits as a result of the occurrence of trace levels of BPA in canned foods. Consumers should feel confident that canned foods are safe and can continue to be part of a balanced diet.¹⁸

The FDA’s evaluation process has drawn criticisms from environmental advocacy groups, trial lawyers and legislators. For example, the Chairman of the House Energy and Commerce Committee, John D. Dingell, said in April that he was concerned the FDA had based its safety rating on two studies, both funded by the chemical industry.¹⁹ Such concerns, combined with the high level of media attention devoted to the issue, resulted in the drafting of a number of legislative initiatives soon thereafter.

Legislative Activity

On April 29, 2008, two weeks after the NTP draft report was issued, legislation known as the BPA-Free Kids Act of 2008 (S.2928) was introduced by Senators Kerry, Schumer, Feinstein, Clinton, Durbin and Menendez to ban the use of BPA in products intended for children seven years old and younger. The legislation also called for the Center for Disease Control to conduct a comprehensive study of the health effects of BPA in children and adults.²⁰ The bill has been referred to the Committee on Commerce, Science and Transportation.²¹

On May 20, 2008, Senator Frank R. Lautenberg and Representatives Hilda L. Solis and Henry Waxman introduced legislation known as the Kids Safe Chemical Act (H.R. 6100). The bill seeks to ensure that all the chemicals used in baby bottles, children’s toys and other products are proven to be safe before they are put on the market. In proposing this legislation, Senator Lautenberg noted that out of the 80,000 chemicals used

¹¹ Health Canada website, April 18, 2008 News Release, http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2008/2008_59-eng.php.

¹² “Bisphenol A (BPA) in Plastics and Possible Human Health Effects,” CRS Report for Congress, Order Code RS22869, June 12, 2008, <http://www.keeptorganic.org/cms/wp-content/uploads/rs22869.pdf>

¹³ “Senators Propose Ban on Chemical in Plastics”, L Layton, Washington Post, April 30, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/29/AR2008042902551.html>

¹⁴ See, fn. 12.

¹⁵ U.S. Food and Drug Administration website, Press Release, June 10, 2008, <http://www.fda.gov/oc/opacom/hottopics/bpa.html>; see also congressional testimony of Norris Alderson, Ph.D., Associate Commissioner for Science, FDA, June 10, 2008, <http://www.fda.gov/ola/2008/BPA061008.html>

¹⁶ EFSA website, “Opinion of the Scientific Panel on Food Additives, Flavourings, Processing Aids and Materials in Contact with Food on a request from the Commission related to 2,2-BIS(4-HYDROXYPHENYL)PROPANE (Bisphenol A)”, November 29, 2006, <http://www.efsa.europa.eu/cs/BlobServer/>

Scientific_Opinion/afc_op_ej428_bpa_op_en.pdf?ssbinary=true

¹⁷ EFSA website, Press Release, July 23, 2008, http://www.efsa.europa.eu/EFSA/efsa_locale1178620753812_1211902017373.htm

¹⁸ Health Canada website, Press Release, May 29, 2008, http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2008/2008_84-eng.php

¹⁹ See, fn. 13

²⁰ Id.

²¹ Open Congress website, S.2928, <http://www.opencongress.org/bill/110-s2928/show>

to produce the products in our homes, the EPA has only required testing of 200. Under the bill, manufacturers would have the burden of providing to the EPA the data necessary for determining that a chemical is “safe.”²²

The Kids Safe Chemical Act is virtually identical to a bill that Senator Lautenberg introduced in 2005. That bill died in committee when Congress adjourned in 2006. The present bill has been referred to the Senate Committee on Environment and Public Works.²³ If passed in its current form, the bill would represent a dramatic departure in the way chemicals are regulated in the United States. The bill has similarities to the European Union’s REACH regulations, under which pre-registration of some 30,000 chemicals began on June 1, 2008.²⁴

On June 10, 2008, Congressmen Edward Markey and Raul Grijalva introduced legislation known as the Ban Poisonous Additives Act (H.R. 6228). If passed, it would amend the FDA’s authority such that food or beverage containers composed of BPA, or that could leach BPA into food or beverages, would be considered contaminated and could not be marketed.²⁵ In essence, the ban could affect many types of canned foods, such as soups, pastas, vegetables, soft drinks and infant formula, making the impact of the legislation far reaching. The bill has been referred to the House Committee on Energy and Commerce.²⁶

In addition to Congress, several states have similar bills pending, including California, New York, Connecticut, Hawaii, Maine, Maryland, Massachusetts and Pennsylvania.²⁷ Many businesses, however, have chosen to implement changes before any legislative or regulatory changes take place.

Commercial Response

Within a week of the NTP’s draft report on BPA, Toys ‘R’ Us announced that it would phase out bottles and other baby feeding products containing BPA by the end of 2008. Wal-Mart said that it would stop selling baby bottles made with BPA by early next year. Nalgene, which makes plastic water bottles popular with hikers, and Playtex, which makes a variety of baby products, also said that they would stop using BPA.²⁸ The partial list of impacted companies demonstrates how rapidly markets can be reshaped by an activist campaign that catches fire online, as recently noted by *Fortune Magazine* writer Marc Gunther.²⁹ The question that he poses is why? Gunther says one could argue that government agencies, such as the FDA, are too slow to take action,

or one could argue instead that “science can’t compete with emotion.”³⁰

From a commercial perspective, it would appear that pressure to eliminate BPA entirely from canned foods and solid food containers is not as great. On June 10, 2008, the North American Metal Packaging Alliance issued the following statement:

Metal packaging and its use of epoxy coatings have a proven record of success and have helped create the world’s safest food supply. Epoxy coatings in use today are an essential metal packaging technology that meets all regulatory criteria and critical performance requirements for the broadest variety of foods and beverages. Representative Markey’s legislation would have the effect of threatening the safety of the world’s food supply and putting at risk the ability of all nations to feed their people.³¹

A similar assessment was offered by Tupperware, which provided a list of product safety determinations made by various governmental entities. Tupperware continues to distribute food contact products that contain BPA.³²

The Scientific Evidence

Scientists seeking to ban BPA claim that it is dangerous at low doses because, even if it is quickly flushed out of the body, it can have long lasting effects. They contend that it re-programs certain genes, and that the genetic damage caused by BPA exposure can predispose laboratory animals, and by extension humans, to hormone-mediated diseases later in life. Much of this science remains very controversial.

Human exposure measurements and exposure pathways

It is difficult to deny that BPA is widespread in the environment, and that people have been exposed to it. In 2004, scientists from the Centers for Disease Control measured BPA concentrations in archived urine samples of 394 adults in the United States.³³ Ninety-five percent of the samples contained BPA at concentrations greater than 1 ug/l. The authors noted that the sample was not representative of the U.S. population.

A more recent study by the same authors looked at BPA concentrations in the urine of 2,157 adults and children older than six years of age.³⁴ Ninety-two percent of those sampled had BPA in their urine. Interestingly, the results were significantly lower for Mexican-Americans than for non-Hispanic whites and African-Americans. Females had higher concentrations than

²² Senator Frank R. Lautenberg website, Press Release, May 20, 2008, <http://lautenberg.senate.gov/newsroom/record.cfm?id=298072>

²³ Open Congress website, H.R. 6100, <http://www.opencongress.org/bill/110-h6100/show>

²⁴ See European Commission website, REACH, http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm

²⁵ See, fn. 12

²⁶ Open Congress website, H.R. 6228, <http://www.opencongress.org/bill/110-h6228/show>

²⁷ <http://www.earthshare-oregon.org/our-groups/profiles/oec/bpa>

²⁸ “More U.S. Retailers Give BPA the Boot”, L Szabo, USA Today, April 21, 2008, http://www.usatoday.com/news/health/2008-04-21-BPA-phase-out_N.htm

²⁹ “Wal-Mart: the New FDA”, M Gunther, *Fortune Magazine*, July 16, 2008, http://money.cnn.com/2008/07/15/magazines/fortune/gunther_bpa.fortune/.

³⁰ *Id.*, quoting chemist and industry lobbyist, Steve Hentges.

³¹ North American Metal Packaging Alliance website, Press Release, June 10, 2008, <http://metal-pack.org/docs/pdf/00032016.PDF>

³² Tupperware website, “Concerns Over Polycarbonate Containers”, http://order.tupperware.com/pls/htprod_www/tup_widget.show_page?fv_page_code=safety2&fv_section_name=help&fv_category_code=search&fv_item_category_code=200500

³³ Calafat, *et al.* Urinary Concentrations of Bisphenol A and 4-Nonyphenol in a Human Reference Population. *Environmental Health Perspectives*, 113:391-95 (2004).

³⁴ Calafat, *et al.* Exposure of the U.S. Population to Bisphenol A and 4-Tertiary-Octylphenol 2003-2004. *Environmental Health Perspectives*, 116: 39-45 (2008).

males, and children had higher concentrations than adults. The geometric mean value for all participants was 2.6 ug/l.

The sources of human exposure to BPA remain somewhat controversial. Plaintiffs often allege the ester bonds that hold BPA molecules together decay with time, and that BPA is released into food or liquids that contact the decayed plastic.³⁵ The support for this statement, however, appears to be weak. Several researchers have studied the potential for BPA to leach from baby bottles. They have determined that BPA leached from baby bottles on their first use, but not on subsequent uses.³⁶ Differing results have been obtained from various groups studying the effects washing, boiling and brushing on BPA leaching.³⁷ Most of the scientific papers on the subject present estimates of the potential for BPA to seep into food, as opposed to actual measurements. Several studies, however, have measured BPA in canned foods including vegetables, fish and baby formula.³⁸

Human health effects

Noticeably absent from the debate currently swirling around BPA is any mention of an epidemiology study demonstrating that BPA causes human health effects. Proponents of a ban on BPA claim that human epidemiology studies are inherently biased toward false negatives. Whether this is true or not, the studies that prop up the current BPA litigation are animal studies and *in vitro* studies of human cell cultures.³⁹ The difference between BPA studies and the animal and *in vitro* studies of other alleged environmental toxicants, however, is that the scientists who have studied BPA claim to have done so at extremely small doses, and to have discovered the biological mechanisms by which BPA could cause human endocrine disruption at analogous doses.⁴⁰

³⁵ *Brady v. Avent America*, 08 CV 4189, United States District Court for the Northern District of Illinois.

³⁶ *Vandenberg, et al.* Human Exposure to Bisphenol A. *Reproductive Toxicology*, 2007, Aug.-Sep.; 24(2):139-77.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *see e.g., Richter, et al.* Estradiol and Bisphenol A stimulate Androgen Receptor and Estrogen Receptor Gene Expression in Fetal Mouse Prostate Mesenchyme Cells, *Environmental Health Perspectives*, 115:902-08 (2007).

⁴⁰ *See, Welshons, et al.* Large Effects from Small Doses I: Mechanisms for Endocrine Disrupting Chemicals with Estrogenic Activity, *Environmental Health Perspectives*, 111:994-1006 (2003); *Vom Saal, et al.*: Large Effects from Small Doses II. The Importance of Positive Controls in Low-Dose Research on Bisphenol A, *Environmental Research* 100:50-76 (2006); *Welshons, et al.* Large Effects from Small Doses III: Endocrine Mechanisms Mediating Effects of Bisphenol A at Levels of Human Exposure, *Endocrinology*, 147(6):556-569 (2006).

Noticeably absent from the debate currently swirling around BPA is any mention of an epidemiology study demonstrating that BPA causes human health effects.

Another unique aspect of the BPA litigation is the existence of the Chapel Hill Bisphenol A Expert Panel Consensus Statement.⁴¹ Published in 2007, this paper was the summary statement of a meeting convened by the National Institute of Environmental Health Sciences (NIEHS), the National Institute of Dental and Craniofacial Research (NIDCR), and the EPA to review the potential health effects of BPA exposure.⁴² The panel stated that its concerns included the potential relationship between BPA exposure and “abnormal penile/urethra development in males, early sexual maturation in females, an increase in neuro-behavioral problems such as attention deficit hyperactivity disorder (ADHD) and autism, an increase in childhood and adult obesity and type 2 diabetes, a regional decrease in sperm count, and an increase in hormonally mediated cancers, such as prostate and breast cancers.”⁴³ In other words, the panel attempted to link BPA to every hot button public health issue in the United States today, as well as some lesser-known health issues.

The panel separated into five sub-panels organized around specific topics.⁴⁴ Beginning several months before the November 2006 meeting, the sub-panels communicated and reviewed the available literature in their respective areas.⁴⁵ They then met for three days to “interact with each other and to integrate information from different disciplines concerning low dose effects of BPA after each panel of experts had prepared a report in its specific area.”⁴⁶ Based on the information the experts had assembled prior to the meeting and their discussions during the meeting, the panel announced a list of conclusions with greater or lesser degrees of confidence. The panel was confident that:

- Human exposure to BPA is widespread, but variable.
- The current published metabolic studies in rats show adverse effects at levels that are analogous to the levels encountered by humans.

⁴¹ Chapel Hill Bisphenol A Expert Panel Consensus Statement: Integration of Mechanisms, effects in animals and potential to Impact Human Health at Current Levels of Exposure, *Reproductive Toxicology* 24:131-138 (2007).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

- Sensitivity to endocrine disruptors such as BPA varies with life stage. There are specific windows of human development where people are more susceptible to the effects of BPA.
- BPA alters the epigenetic programming of genes in experimental animals resulting in adverse effects years after exposure. Specifically, prenatal or neonatal exposure to BPA results in organizational changes in the prostate, breast, testis, mammary glands, body size, brain structure and chemistry and behavior of laboratory animals.
- Adult exposure studies cannot be presumed to predict the results of exposure during development.⁴⁷

Critically, the panel cautioned that the best available information on human exposures to BPA is based on assumptions, and that the known sources of BPA exposure “do not appear sufficient to explain levels measured in human tissues and fluids.”⁴⁸

As mentioned, in April 2008 the National Toxicology Program of the NIEHS released its draft brief on BPA.⁴⁹ Based on its review of the evidence, the NTP concluded that BPA could “possibly” affect human development or reproduction:

Recognizing the lack of data on the effects of bisphenol A in humans and despite limitations in the evidence for “low” dose effects in laboratory animals . . . the possibility that bisphenol A may affect human development cannot be dismissed.

It is this statement that touched off the recent wave of litigation. Interestingly, after peer review, the NTP’s Board of Scientific Counselors accepted the following conclusions on June 11, 2008:

- The scientific evidence cited in the draft NTP Brief on Bisphenol A supports the NTP conclusion of *some* concern for neural and behavioral effects of bisphenol A in fetuses, infants, and children at current human exposures.
- The scientific evidence cited in the draft NTP Brief on Bisphenol A supports the NTP conclusion of *some* concern for bisphenol A exposure in fetuses, infants, and children at current human exposures based on effects in the prostate gland.
- The scientific evidence cited in the draft NTP Brief on Bisphenol A supports the NTP conclusion of *negligible* concern that exposure of pregnant women to bisphenol A will result in fetal or neonatal mortality, birth defects or reduced birth weight and growth in their offspring.
- The scientific evidence cited in the draft NTP Brief on Bisphenol A supports the NTP conclusion of *negligible* concern that exposure to bisphenol A causes reproductive effects in non-occupationally exposed adults.
- The scientific evidence cited in the draft NTP Brief on Bisphenol A supports the NTP conclusion of *minimal* concern for workers exposed to higher levels of bisphenol A in occupational settings.
- The scientific evidence cited in the draft NTP Brief on Bisphenol A supports the conclusion of *minimal* concern for bisphenol A exposure in fetuses, infants, and children at current human exposures based on effects in the mammary gland.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Draft NTP Brief on Bisphenol A, April 14, 2008.

- The scientific evidence cited in the draft NTP Brief on Bisphenol A supports the conclusion of *minimal* concern for bisphenol A exposure in fetuses, infants, and children at current human exposures based on an earlier age for puberty in females.

The NTP’s level of concern regarding BPA, therefore, ranges between “negligible” and “some.”

Despite being guided by the Precautionary Principle,⁵⁰ the Europeans are even less concerned. On July 23, 2008, the European Food Safety Authority (EFSA) issued a statement declaring that BPA containing products, including baby bottles, are safe for infants and toddlers, which is consistent with the FDA position quoted earlier.

There is considerable evidence supporting the EFSA’s and the FDA’s position. Dozens of articles have been published or otherwise released which found no reproductive or other endocrine-mediated effects in animals and cell cultures exposed to BPA.⁵¹ Critics attack most of these studies as having been funded by the plastics industry, but even the positive studies have not resulted in a solid consensus that BPA causes endocrine-mediated effects in humans at environmentally relevant levels.

Litigation.

Less than 10 days after the NTP released its draft report in April, class actions were being filed. At the time this article was written, more than 15 different class actions had been filed in federal courts within the states of Arkansas, California, Connecticut, Illinois, Kansas, Missouri, Ohio and Washington, and this number is sure to increase.⁵² At least two other class actions are pending in California and Illinois state courts.⁵³ Most of the cases share the following elements:

- The defendants are manufacturers and distributors of BPA-containing items that come into contact with food or beverages, particularly baby feeding systems.
- The plaintiffs purport to represent all consumers of the products on a statewide or nationwide basis.

⁵⁰ There are various formulations of the precautionary principle, but it can be summed up as: “better safe than sorry.” The idea is that if the consequences of an action are severe or irreversible, the absence of full scientific certainty should not be used to prevent the avoidance of harms, whether through action or inaction. It essentially shifts the burden to the proponent of an action or a product to prove that it is safe, rather than leaving the burden on government or the public to prove that it is unsafe. Critics claim that it sets up impossible barriers to innovation, because no one can prove a negative (i.e., nothing is completely safe. Every substance is toxic at some dose). The latest iteration of the precautionary principle in the U.S. can be traced to the Wingspread Conference of 1998. The Precautionary Principle underlies much of the chemical safety regulation in the EU, including the REACH regulations.

⁵¹ See e.g., Tyl, et al. Two-Generation Reproductive Toxicity Study of Dietary Bisphenol A in CD-1 (Swiss) mice. *Toxicological sciences* 104(2) 362-384 (2008).

⁵² See United States Judicial Panel on Multidistrict Litigation, Notice of Hearing, June 19, 2008, Schedule of Matters for Hearing Session July 31, 2008, p. 11-12, http://www.jpml.uscourts.gov/Hearing_Info/Hearing_Order7-31-08.pdf

⁵³ Koch, et. al. v. Avent America, Inc, et. al., Circuit Court of Cook County, Illinois, Chancery Division, 08 CH 18438, May 2008; Ganjei, et. al. v. Ralph’s, et. al., Superior Court of California, City and County of Los Angeles, March 2007.

- The complaints contain references to human exposure studies and animal experiments which the plaintiffs claim were known to the industry, but hidden from the public.
- The plaintiffs do not claim personal injuries, but rather various forms of consumer fraud and common law negligence based on the defendant's alleged failure to warn.
- Plaintiffs seek return of their purchase price.
- The complaints seek injunctive relief and punitive damages.

The United States Judicial Panel on Multidistrict Litigation The United States Judicial Panel on Multidistrict Litigation has been asked to consolidate and transfer the federal class actions to a single court for pretrial purposes, and while such relief appears likely, no ruling has yet been made on this request.⁵⁴

Class Action Strategies

Pleadings

Traditionally, product liability and personal injury claims have been deemed unsuitable for class treatment. Indeed, since the *Dalkon Shield* decision in 1982, progressively fewer such cases have been granted class certification in federal courts.

As courts and commentators have often observed, class certification can have an enormous impact on the litigation risks of a case—often elevating the profile and exposure of weak claims well beyond their individual merit. Traditionally, product liability and personal injury claims have been deemed unsuitable for class treatment. Indeed, since the *Dalkon Shield* decision in 1982, progressively fewer such cases have been granted class certification in federal courts.⁵⁵ No one set of operative facts establishes liability in such cases: “No single proximate cause applies equally to each potential class member and each defendant.”⁵⁶

⁵⁴ See, fn. 52.

⁵⁵ See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002); *Castano v. American Tobacco Co.*, 84 F.3d 734, 742 (5th Cir. 1996); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 424-25 (E.D. La. 1997); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 372-73 (E.D. La. 1997); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1081-82 (6th Cir. 1996); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 450 (E.D. Pa. 2000); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 221 (E.D. Pa. 2000); *Kaczmarek v. International Bus. Machines Corp.*, 186 F.R.D. 307, 311 (S.D.N.Y. 1999); *In re Stucco Litig.*, 175 F.R.D. 210, 214 (E.D.N.C. 1997); *In re Ford Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 344 (D.N.J. 1997); *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613, 618-19 (S.D. Ohio 1996); see also *Amchem*, 521 U.S. at 624.

⁵⁶ *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 628 (3d Cir. 1996), aff'd sub nom. *Amchem Prods Inc. v. Windsor*, 521

The recent BPA class actions, however, reflect theories of liability designed artfully to plead around this problem. The premise begins with allegations that there is some sort of latent danger or increased health risk, or that the nature of the product itself is dangerous or given to socially undesirable uses. Personal injury or property damages, which would appear to logically flow from the allegations, are simply disavowed. Rather, very narrow forms of “economic damages” are sought—typically the return of purchase price, disgorgement of profits, or the creation of public information funds. Causes of action typically include breach of implied warranty, statutory consumer fraud, breach of contract, civil conspiracy, and unjust enrichment. A variety of products have been challenged, most notably with tobacco, but also pharmaceuticals, wireless phones, and pressure treated wood.⁵⁷ Variants on the theme have included other unmanifested defect claims without a personal injury component, such as computers and tires.

In *Price v. Philip Morris, Inc.*, for example, plaintiffs in Madison County, Illinois, challenged the marketing of “light” cigarettes under the Illinois Consumer Fraud and Deceptive Business Practices Act, claiming they were falsely promoted as being less hazardous than regular cigarettes. A statewide class of Illinois smokers was certified. Following a bench trial, the court entered a judgment for plaintiffs of \$10.1 billion—\$7.1 billion in compensatory damages, and \$3 billion in punitives. The damages were so large that Philip Morris argued that posting the appeal bond would force it into bankruptcy.⁵⁸ The case was eventually overturned on appeal.

Obviously then, these kinds of theories can present a sizeable exposure despite the limited relief actually sought. The claims normally stem from scientific research that, at best, is preliminary, incomplete, or subject to significant academic disagreement. Indeed, such cases normally not only disavow personal injury relief, but also reveal that few if any people actually believe they have been harmed by anything. If numerous people were claiming actual harm, there would be a track record of individual injury litigation. Ironically, the absence of that individual litigation often is proffered as justification for class treatment. But the substantive basis of the claim is strange: the plaintiff claims a great public danger, while at once disavowing relief for the alleged manifestation of that danger—an injury—and, indeed, even trying to avoid the burden of showing that anyone ever really suffered an injury.

Defense Strategies

The defendant is put in a difficult position on several fronts. First, it is forced to defend itself against murky claims of an alleged health risk. Statistically, one can attach a positive number to any putative “risk,” from tak-

U.S. 591 (1997), quoting *In re Northern Dist. Of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982).

⁵⁷ See, e.g., *Ardoin v. Stine Lumber*, No. 02 CV 2502 (W.D. La. Mar. 17, 2004); *In re Wireless Telephone Radio Frequency Admissions Prod. Liab. Litig.*, 2003 WL 758710 (D. Md. March 5, 2003); *Jacobs v. Osmose, Inc.*, 213 F.R.D. 607 (S.D. Fla. 2003); *Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315 (5th Cir. 2002); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61 (S.D.N.Y. 2002).

⁵⁸ 341 Ill. App. 3d 941 (5th Dist. 2003).

ing a bath, to crossing the street, to eating a peanut butter sandwich. But defending a case in those statistical terms is to talk in the abstractions that plaintiffs wish to use and, along the way, the defendant may appear to concede that the purported defect really might be addressed on a common, class-wide basis. The allegations frequently draw media attention. “Dangerous” products—particularly ones that supposedly are dangerous to children – are sensational, while the actual safety of a challenged product is not. Further, cases can arise in multiple jurisdictions, magnifying expenses and offering a lottery where repeated class motions, regardless of their strength, increase the odds of one day producing a certification.

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The merits of these theories, both substantively and from a class certification perspective, are highly dubious. First, rejecting personal injuries in favor of a vague “health risk” claim does more to camouflage the individual issues that defeat class certification than to eliminate them. Issues of exposure and dose, for example, are inherent in any health risk assessment and are necessarily individualized. Substances like BPA also have many sources, rendering issues of causation, among others, necessarily individualized. Product identification raises further plaintiff-specific issues that cannot be avoided and, in most circumstances, rule out class certification. And, since these types of claims typically involve allegations of concealment—as the theory goes, no one would have purchased the product if they had “known the truth”—individual issues of class member knowledge, assumption of risk, and potential disclosures provided by non-parties all weigh strongly against class certification.⁵⁹

To defend these kinds of cases, it is normally critical to marshal as full an evidentiary record as possible prior to the court ruling on class certification. Experts are almost always needed on risk assessment and toxicology; on the constituent of concern, its multiple sources, and its fate and transport; and on product variations. Testimony from the named plaintiffs, and possibly absent class members and other nonparties, may also be helpful.⁶⁰

Claim-splitting

Further, claim-splitting is the hallmark of this kind of case, and that has a significant impact on conflicts of in-

terest and whether the named plaintiff can be an adequate class representative. Absent class members are bound by *res judicata* to a class action judgment, just the same as the named plaintiffs.⁶¹ *Res judicata* bars a party from raising in a subsequent proceeding any claim they could have raised in the prior one, if it arose from the same operative facts or same transaction or occurrence. Claim-splitting, in other words, is generally prohibited, and it risks the loss of unraised, “split out” claims—such as an absent class member’s personal injury claim in an “economic loss only” class action.⁶²

Many courts have found putative class representatives to be disqualified for this reason.⁶³ As one early decision from the Southern District of New York described it, plaintiffs’ “effort to improve the possibility of demonstrating commonality” by claim-splitting was “essentially cosmetic,” because the tactic was used “at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.”⁶⁴ The court went on to add, “the sacrifice by a putative class representative of the rights of absent class members implicates due

⁶¹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

⁶² RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-25; *Ramsey v. Busch*, 19 F. Supp. 2d 73, 83-84 (W.D.N.Y. 1998) (“New York law follows a transactional approach to *res judicata* . . .”); *Avenue Plaza, L.L.C. v. Falgoust*, 676 So. 2d 1077, 1079 (La. 1996) (“*Res judicata* bars relitigation of a subject matter arising from the same transaction or occurrence of a previous suit.”); *Hayes v. Solomon*, 597 F.2d 958, 982 (5th Cir. 1982) (doctrine of *res judicata* “operates to prevent the splitting of a single cause of action”).

⁶³ See, e.g., *Ardoin*, No. 02 CV 2502, slip op. at 14 (Treated wood – “The doctrine of *res judicata* would forever bar the personal injury claims of those who allege that they are injured by treated wood, subjecting them, instead, to the limited damages allowed under the present cause of action.”); *Thompson v. American Tobacco Co., Inc.*, 189 F.R.D. 544, 551 (D. Minn. 1999) (Cigarettes – “[T]he possible prejudice to class members is simply too great for this Court to conclude that the named Plaintiffs’ interests are aligned with those of the class.”); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 368 (E.D. La. 1997) (SUVs – “[T]he named plaintiffs cannot by any stretch of the imagination be considered adequate representatives of the class” where they claimed lost value and cost of repair but not personal injury, property or other consequential damages); *Millett v. Atlantic Richfield Co.*, No. CV-98-555, 2000 Me. Super. LEXIS 39, *33-34 (Me. Sup. Ct. March 2, 2000) (MTBE – Class representatives’ attempts to exclude personal injury claims jeopardized class members’ ability to bring such claims later, thereby rendering named plaintiffs inadequate); *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 897 (N.Y. 1999) (Cigarettes – Affirming lower court’s decision to decertify class because, *inter alia*, the named plaintiffs’ limitation of claims made them inadequate class representatives).

Courts in commercial cases, or product defect cases with no personal injury component, have likewise denied certification because of what they concluded was improper splitting of damages relief. See *Western States Wholesale, Inc. v. Synthetic Indus., Inc.*, 206 F.R.D. 271, 277 (C.D. Cal. 2002) (“A class representative is not an adequate representative when the class representative abandons particular remedies to the detriment of the class.”); *Henry Schein, Inc. v. Stromboe*, No. 00-1162, 2002 Tex. LEXIS 178, *55 (Tex. Oct. 31, 2002) (“[I]t is not clear that . . . the willingness of the five named plaintiffs to forego consequential damages is typical of the other 20,000 class members.”).

⁶⁴ *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982).

⁵⁹ See, e.g., *Ardoin*, No. 02 CV 2502, slip op. at 15 (treated wood statewide class denied certification); *Jacobs*, 213 F.R.D. 607 (nationwide treated wood class denied certification); *Rivera*, 283 F.3d 315 (class of painkiller medication users denied certification); *Rezulin*, 210 F.R.D. 61 (class of Rezulin users denied certification).

⁶⁰ See *Jacobs*, 213 F.R.D. 607.

process considerations.”⁶⁵ The court also expressed concern that claim-splitting should be prevented because it can “result in vexatious litigation for the defendant and an undue clogging of the dockets of the court.”⁶⁶

One tactic plaintiffs occasionally employ to escape some of these problems is to seek issue certification or bifurcation under Fed. R. Civ. P. 16(c)(13), 23(c)(4)(A) or 42(b).

One tactic plaintiffs occasionally employ to escape some of these problems is to seek issue certification or bifurcation under Fed. R. Civ. P. 16(c)(13), 23(c)(4)(A) or 42(b). While these are accepted tools in the Federal Rules, they are problematic in the class context for several reasons. First, a class trial of just a single issue – particularly something as hazy as increased health risk – often is little more than asking a jury to offer an advisory opinion that does not really advance the litigation process of bringing actual claims to an actual judgment.

As the Second Circuit expressed it in the *Agent Orange* litigation,

[t]he relevant question, therefore, is not whether Agent Orange has the capacity to cause harm, the generic causation issue, but whether it *did* cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs (e.g. state of health, lifestyle) and the nature of their exposure to Agent Orange. Although generic causation and individual circumstances concerning each plaintiff and his or her exposure to Agent Orange thus appear to be inextricably intertwined, the class action would have allowed generic causation to be determined without regard to those characteristics and the individual’s exposure.⁶⁷

Stated another way, “[w]hether a substance poses a health risk in the abstract is simply not grounds for class certification under Rule 23(b)(3).”⁶⁸

A second reason is that staging a litigation into issues does nothing to solve the *res judicata* risks described above, because the court presiding over the class trial is essentially powerless to actually determine the *res judicata* effects of its orders. That decision is reserved for a subsequent court, in an unknown forum, at an unknown point in the future. As one court put it, “because only subsequent courts will determine the *res judicata*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *In re “Agent Orange” Prods. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987).

⁶⁸ *Hurd v. Monsanto*, 164 F.R.D. 234, 240 (S.D. Ind. 1995) (citing “*Agent Orange*,” 818 F.2d at 165); see also *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 96 (W.D. Mo. 1997) (“Liability will not turn on whether cigarettes are generally capable of causing disease: Liability will depend upon whether cigarettes caused a particular plaintiff’s disease”).

effect of any judgment, this Court could not ensure that its order would preserve the rights of absent class members to bring personal injury or property damage claims. . . .”⁶⁹

Third, the overlap in factual issues between the putatively “common” issue of whether there is a health risk with true personal injury claims will be substantial. Trying to “carve at the joint” between the common and the individual factual issues may not be possible, potentially running afoul of the Reexamination Clause of the Seventh Amendment. The Clause “entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues.”⁷⁰

In the class action context, the Clause has received its most comprehensive analysis in the Seventh Circuit’s *Rhone-Poulenc* and Fifth Circuit’s *Castano* decisions.⁷¹ In the former case, the Seventh Circuit rejected a bifurcated trial plan as violating the Reexamination Clause, because it afforded a second jury an opportunity to reexamine the issue of the defendant’s negligence when deliberating on the overlapping question of comparative fault. That was “inconsistent with the principle that the findings of one jury are not to be reexamined by a second or third or nth jury.”⁷² For bifurcation or polyfurfurcation to work, the court held, issues have to be clearly severable, or “carve[d] at the joint.”⁷³ In *Castano*, the Fifth Circuit likewise rejected a class trial plan that bifurcated negligence and comparative fault, finding that the “Constitution allows bifurcation of issues that are so separable that the second jury will not be called upon to reconsider findings of fact by the first.”⁷⁴

Defendant Classes

An unusual aspect of at least two of the BPA cases is the request to certify defendant classes. Such classes are unusual. They are normally found in the context of disputes between associations, co-ops, or trade unions and their membership over the terms of commonly-held contacts, such as collective bargaining agreements. They also may appear in securities litigation, patent infringement cases, and actions against local officials that challenge state statutes. Such classes are rare outside these contexts – indeed, they are rare even within them – and are limited to the resolution of issues perfectly common to all class members.

When litigation involves unique defenses among defendant class members, due process requires that class treatment be denied. Courts thus conduct a closer scrutiny of Rule 23’s prerequisites to proposed defendant classes. That need for close scrutiny is particularly pro-

⁶⁹ *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 340 (S.D.N.Y. 2002); see also *Thompson*, 189 F.R.D. at 550 (“even if the Court permits the reservation of issues in this case, whether a subsequent court would honor such a reservation is, at best, undeterminable at this time”).

⁷⁰ *Castano*, 84 F.3d at 750.

The full text of the Seventh Amendment provides as follows: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. Amend. VII.

⁷¹ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Castano v. American Tobacco Co.*, 84 F.3d 734.

⁷² 51 F.3d at 1303.

⁷³ *Id.*

⁷⁴ 84 F.3d at 750.

nounced if the proposed class is under Rule 23(b)(2), for injunctive relief only, as these afford no opt-out rights. (If it were a Rule 23(b)(3) defendant class, the effort would be pointless, as all class members undoubtedly would opt out. Thus, most proposed defendant classes will be non-opt-out Rule 23(b)(2) classes.) At the end of the day, however, a defendant class will not be certified unless each named plaintiff has a colorable claim against each defendant class member.⁷⁵ That effectively precludes a plaintiff class simultaneously seeking certification of a defendant class.⁷⁶

On top of all these procedural and due process issues, the substantive merit of the “no injury” or “economic loss” class action is dubious. The claim is eschewed, deliberately forsaking valuable rights—if the risk allegations are to be believed – solely in favor of obtaining a class certification with uncertain, if any, benefit to the named plaintiff. That plaintiff, of course, is free to pick his own theories, but there are problems with that. First, it is doubtful that an uninjured plaintiff really has standing to sue.⁷⁷ The plaintiff presumably will respond with the claim that the product has a defect that renders it unusable, and thus the plaintiff is entitled to his money back. But the product is, in fact, doing what it was sold to do, and thus does not fit into the UCC’s conception of merchantability.⁷⁸ Many courts, going back to the earliest suits against the tobacco industry, have thus rejected dangerous product claims brought under the merchantability standard.⁷⁹ Such claims instead sound in tort. On the tort side, however, the supposed defect has not manifested – again, the product does what it was sold to do – and many courts have likewise held that unmanifested defects do not give rise to viable tort claims.⁸⁰

⁷⁵ *In re Gap Stores Securities Litigation*, 79 F.R.D. 283 (N.D. Cal. 1978).

⁷⁶ *See In re Gap Stores Securities Litigation*, 79 F.R.D. 283 (N.D. Cal. 1978). See also: *Haas v. Pittsburgh Nat’l Bank*, 526 F.2d 1083, 1095-96 (3d Cir. 1975); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 462 (9th Cir. 1973); *Clark v. McDonald’s Corp.*, 213 F.R.D. 198, 221-27 (D.N.J. 003); *Thillens, Inc. v. Cmty. Currency Exch. Ass’n of Ill.*, 97 F.R.D. 668, 673-76 (N.D. Ill. 1983).

⁷⁷ *See, e.g., Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315 (5th Cir. 2002).

⁷⁸ *See*, U.C.C. § 2-314(2).

⁷⁹ *See, e.g., Arkansas Carpenters’ Health & Welfare Fund v. Phillip Morris, Inc.*, 75 F. Supp. 2d 936, 945 (E.D. Ark. 1999) (“[P]laintiff’s claim that a typical cigarette, like all cigarettes, is ‘generally defective’ . . . cannot state a claim for breach of implied warranty of merchantability.”); *Semowich v. R.J. Reynolds Tobacco Co.*, No. 86 CV 118, 1988 WL 123930, at *3 (N.D.N.Y. Nov. 15, 1988) (“That defendant’s cigarettes are carcinogenic and are therefore not fit for human consumption, does not, however, give rise to a cause of action [for breach of the warranty of merchantability]. That harmful characteristic is shared by all cigarettes. . . .”); *Green v. American Tobacco Co.*, 409 F.2d 1166, 1166 (5th Cir. 1969) (en banc) (overruling panel and adopting dissent at 391 F.2d at 106; affirming judgment for cigarette manufacturer on implied warranty theory because there was no proof that products were adulterated; “[W]e have a product (cigarettes) that is in no way defective. They are exactly like all others of the particular brand and virtually the same as all other brands on the market.”).

⁸⁰ As the Seventh Circuit put it in *Bridgeston/Firestone*, “no injury, no tort, is an ingredient of every state’s law. *In re Bridgeston/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002). Courts, in fact, frequently reject un-

Learning From The BPA Litigation

What’s new about the BPA litigation? A few things. First, the scientific evidence focuses on genetic effects at low doses. The claim is that BPA can “turn on” or “turn off” genes in animals exposed prenatally or as newborns, and that these genetic injuries manifest as diseases later in life. The list of potential endocrine-mediated health effects allegedly caused by BPA exposure is also unique. If the anti-BPA forces are correct, and it turns out that low dose, prenatal or neonatal exposure to BPA causes everything from childhood obesity and diabetes to ADHD, this wave of litigation may be just the first of many.

Another novel aspect of the BPA litigation is the speed with which it crisscrossed the nation. The NTP made its statement in mid April 2008. By the end of May, over a dozen lawsuits had been filed and multiple anti-BPA bills were pending in Washington and several states. In this regard, the BPA litigation is much like the lead-containing toys and tainted dog food litigation of 2007. Each series of claims spread like wildfire after an initial government announcement or product recall. In this age of instant viral communication, social networking and mass produced, widely distributed consumer products, this type of rapidly-proliferating consumer litigation appears to represent a new paradigm.

The marketplace and the legislature may be more important battlegrounds than the courts when it comes to allegedly defective products.

For companies that make and sell BPA and BPA-containing products, the impact of the consumer response to these cases may be more significant than the outcome of the litigation. It is hard to deny that the market for BPA and BPA-containing products has been seriously impacted by the current controversy. While this type of impact is not unique to the BPA cases, this litigation serves to confirm that the world has changed for manufacturers and distributors. The marketplace and the legislature may be more important battlegrounds than the courts when it comes to allegedly defective products.

What’s not new? Everything else. The alleged human health effects of BPA exposure remain uncertain and may never be proven. The plaintiffs understand that their claims may lack scientific merit, and so craft their lawsuits as consumer fraud cases. But dressing up a speculative personal injury action as a commercial case is almost never a good idea for the individual plaintiffs or the putative class members. Courts often see through such complaints, and deny certification because issues of causation and damages are highly individualized. Interestingly, the individual plaintiffs may be worse off if they obtain certification than if they lose it. They may be limited to a single cause of action, and so may be giving up a potential personal injury claim in order to get back a few dollars on a consumer product they could have easily lived without.

manifested defect claims, or claims that a product is “likely to cause” damage. *Id.* (citing cases).

Only time will tell if the BPA litigation turns out differently from the waves of product liability litigation that have gone before. So far, however, there does not

appear to be anything so unique about the BPA cases that would lead to different results.