

Client Alert

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Coming Christmas 2014: California Adds Another Phthalate Chemical to Its Proposition 65 List

By Robert L. Falk and William F. Tarantino

With the 2013 holiday season behind us, the State of California's Office of Environmental Health Hazard Assessment (OEHHA) already appears to be looking forward to Christmas 2014. It has just wrapped and put a bow on next year's Christmas present for Proposition 65 "bounty hunter" plaintiffs' lawyers by adding the chemical diisononyl phthalate (DINP) to the Proposition 65 list. Under the statute, Proposition 65 warning requirements will automatically become applicable to consumer products containing DINP that are sold in California (or by the Internet to Californians) one year following the effective date of the listing, December 20, 2014.

Businesses that choose not to provide warnings for DINP-containing products sold in California after the Proposition 65 warning requirement for this chemical becomes effective just before next Christmas are likely to receive 60-Day Notice letters from the same Proposition 65 plaintiffs that have brought hundreds of cases on previously listed phthalates such as Di(2-ethylhexyl)phthalate (DEHP), butyl benzyl phthalate (BBP) and di-n-butyl phthalate (DBP) in recent years. In fact, in addition to providing the plaintiffs' lawyers with millions in attorneys' fees, settlements of those claims largely resulted in reformulation commitments that required the settling business to find substitutes for DEHP, DBP and BBP in the soft plastic and vinyl components of their products. One of the most readily available substitute phthalates is DINP.

Whether a Proposition 65 enforcement action can be brought against a company for exposure to a chemical from a product manufactured before the listing date is an unresolved issue. While the question has been raised in the recent litigation regarding fire retardants in furniture, neither the California Attorney General nor a judge has yet offered an opinion on it. Whether a company can be liable for a product that left its hands prior to the effective date of the warning requirement – one year post-listing – is similarly uncertain. Businesses that wish to avoid having to litigate these issues of first impression, or a potential "no significant risk" defense based on the amount of chemical exposure being below the warning threshold, may wish to implement a Proposition 65 warning program for products containing DINP as soon as possible.

Unlike the case with DEHP, DBP and BBP, the new Proposition 65 listing of DINP is only with respect to its effects as a carcinogen, not as a reproductive toxicant. Interests arguing against the DINP listing argued that DINP's mechanism of action was such that it would not produce cancer in humans, but OEHHA's carcinogen identification committee rejected that argument as a basis not to proceed with the listing. Parallel arguments concerning the lack of carcinogenicity in humans of DEHP were the basis of a Court of Appeal decision upholding a declaratory relief action brought by businesses in *Baxter v. Denton*, 120 Cal. App. 4th 333, 15 Cal. Rptr. 3d 430 (2004). Hence, there may be an opportunity for those businesses willing to litigate based on the science to avoid the effect of the new DINP listing here.

While the new Proposition 65 listing of DINP has potentially significant implications for many manufacturers, distributors and retailers of consumer products made of vinyl or soft and pliable plastics, for those that get on top of it early enough to deplete older inventories before the next holiday season approaches, the possibility of further reformulation by

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substituting unregulated phthalate compounds for DINP and other regulated phthalates remains potentially viable. Since implementation of the federal Consumer Product Safety Improvement Act of 2008 (CPSIA), companies making mouthable children's toys and child care articles have been required to limit DINP, along with DEHP, BBP, DBP and two additional phthalates (DIDP and DnOP) in their products to levels of 1,000 parts per million or less each – the same level that has been utilized as a reformulation standard in virtually all previous Proposition 65 settlements on phthalate-related claims.

Morrison & Foerster LLP has advised clients on Proposition 65 and represented hundreds of companies in Proposition 65 litigation and settlement negotiations since the inception of this statute in the 1980s. It continues to do so today, including with respect to phthalate-related claims. It also assists businesses on CPSIA, Green Chemistry, and other consumer claims and product liability issues. For more information or assistance in this area, please contact Robert Falk (rfalk@mofo.com) or Bill Tarantino (wtarantino@mofo.com).

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