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Your client is in flames, the structure is in flames, now what?

BRINGING A PRODUCTS-LIABILITY ACTION BASED ON HAZARDOUS SUBSTANCE/ MATERIALS LAWS

He was in his thirties and had just recently married the love of his life. They were about to start their newly-wed lives together, and then tragedy struck. The client heated up an aerosol can with a heat gun, which led to an explosion that gave him third-degree burns over 80% of his body. He had to undergo several skin-grafts, which left permanent scarring to almost every part of his body.

During a round-table discussion at my then-firm, the first objective was to explain why someone would expose an aerosol can to heat, and then to frame the complaint in a factually correct manner so it would withstand demurrer along with any possible summary-judgment motions. After thorough legal research, I finally homed in on an argument to support our facts and defeat any projected motions for summary judgment: hazardous substance/ materials.

What is hazardous substance/ materials?

The definition of hazardous substance/materials depends on whether you are bringing your suit in federal or state court.

Under federal law, "hazardous substance" means: 1) any substance or mixture of substances which a) is toxic, b) is corrosive, c) is an irritant, d) is a strong sensitizer, e) is flammable or combustible, or f) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children. (15 U.S.C. § 1261(f)(1)(A).); 2) any substance which the Commission by regulation finds, pursuant to the provisions of section 1262(a) meeting the requirements of subparagraph (1)(A) of § 1261(f) (15 U.S.C. § 1261(f)(1)(B).); 3) any radioactive substance, if the Commission determines by regulation that the substance is sufficiently hazardous to require labeling in order to protect the public health (15 U.S.C. § 1261(f)(1)(C).); 4) any toy or other article intended for use by children which the Commission determines presents an electrical, mechanical, or thermal hazard (15 U.S.C. § 1261(f)(1)(D)); and 5) any solder which has a lead content in excess of .2 percent (15 U.S.C. § 1261(f)(1)(E).).

Despite this extensive list of "hazardous substances," there are exceptions to the rule, which include amongst other things, pesticides, special nuclear material, tobacco, or certain fuels. (15 U.S.C. § 1261(f)(2)-(3).)

If you are suing in California, under Health & Safety Code section 25501, subdivision (n)(2): "hazardous material" means a material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment, which includes: 1) A substance or product for which the manufacturer or producer is required to prepare a material safety data sheet pursuant to the Hazardous Substances Information and Training Act; 2) A substance listed as a radioactive material in Appendix B of Part 30 (commencing with Section 30.1) of Title 10 of the Code of Federal Regulations, as maintained and updated by the Nuclear Regulatory Commission; 3) A substance listed pursuant to Title 49 of the Code of Federal Regulations; 4) A substance listed in Section 339 of Title 8 of the California Code of Regulations; 5) A material listed as a hazardous waste, as defined by Sections 25115, 25117, and 25316.

There is a hazardous substance/ material; so what?

As in any product-liability case, a defendant who is in the direct chain of distribution and placed the product into the stream of commerce can be held liable for a hazardous substance/material that caused bodily injuries. However, in addition to the normal causes of action for manufacturing defect, design defect, failure to warn, etc., defendants can also be held liable for failing to provide the required special packaging and instructions for hazardous substance/ material under both federal and state law.

Defendants who produce, manufacture, and/or distribute products with hazardous substances/materials have a duty to provide labeling and/ or handling instructions as required by the Consumer Product Safety Act ("CPSA"), Federal Hazardous Substances Act ("FHSA"), and/or California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Prop 65"). This also expands to include defendants who only supplied a component part if the component itself allegedly causes injury when used in the manner intended by the product supplier. (*Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 503.)

Manufacturers of hazardous substances/materials are also mandated to periodically submit "Material Safety

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Data Sheets" ("MSDS"), which are normally published online so you can send it to your experts for review. You can also search various databases such as www.osha.gov or www.msdsonline.com for MSDS that companies have posted over the years. If the sold product does not conform with the data that is posted, that's additional evidence of product liability against the defendants.

As an added bonus, under Title 15 United States Code section 2072, you are entitled to attorneys' fees for a defendant's violation of the Consumer Product Safety Act; however, there is no state law equivalent for attorneys' fees in California.

Material Safety Data Sheets (MSDS)

MSDS – Material Safety Data Sheets, also known as Safety Data Sheets ("SDS"), are mandated by federal (29 U.S.C. § 651 et seq.; see 42 U.S.C. § 11021 et seq.) and state law under the Hazardous Communication Standard (29 C.F.R. § 1910.1200(g)). Manufacturers, distributors, or importers are mandated to provide MSDS/SDS for each hazardous chemical they use to communicate with downstream users of any potential hazards.

Any entity that is required to prepare MSDS for a hazardous chemical under Title 29 United States Code section 651 have to submit the MSDS to: 1) the appropriate local emergency planning committee, 2) the state emergency response commission, and 3) the fire department that is within the facility's jurisdiction. (42 U.S.C. § 11021(a)(1)(A)-(C).) Furthermore, a local emergency planning committee upon request by any person, shall make such MSDS available even if the local emergency planning committee has to request it from the facility owner or operator itself.

Pursuant to a published guideline by the Department of Industrial Relations Cal/OSHA's Consultation Service Research and Education Unit, MSDS preparers are required to update the MSDS within three months of learning new hazard data and/or ways to protect against the hazards, while chemical manufacturers and importers of hazardous substances are required to provide MSDS with each initial shipment and whenever they are updated. Distributors on the other hand, are required to provide MSDS and MSDS updates to all purchasers of hazardous substances.

Per the United States Department of Labor website, SDS must be published in the English language and must include information such as the properties of each chemical; the physical, health, and environmental health hazards; protective measures; and safety precautions for handling, storing, and transporting the chemical. In an employment setting, OSHA further requires that SDS preparers provide specific minimum information as detailed in Appendix D of 29 Code of Federal Regulations part 1910.1200. SDS are also required to be presented in a consistent user-friendly format that contains 16 sections. The first eight sections contain general information about the chemical, its composition, handling practices, and emergency control/first-aid measures amongst other details. Sections nine through 11 and section 16 contain technical and scientific data including stability and reactivity information as well as toxicological information and exposure control information of the chemical. The remaining sections contain ecological information, disposal considerations, transport information, and regulatory information for the specific chemical.

What packaging/instructions are required?

Under FHSA (15 U.S.C. § 1261 et seq.) the label on the immediate package of a hazardous product *must* contain all of the following information:

- The name and business address of the manufacturer, packer, distributor, or seller;
- The common or usual or chemical name of each hazardous ingredient;
- The signal word "Danger" for products that are corrosive, extremely flammable, or highly toxic;
- The signal word "Caution" or "Warning" for all other hazardous products;
- An affirmative statement of the principal hazard or hazards that the product presents, for example, "Flammable," "Harmful if Swallowed," "Causes Burns," "Vapor Harmful," etc.;
- Precautionary statements telling users what they must do or what actions they must avoid to protect themselves;
- Where it is appropriate, instructions for first aid treatment to perform in the event that the product injures someone;
- The word "Poison" for a product that is highly toxic, in addition to the signal word "Danger";
- If a product requires special care in handling or storage, instructions for consumers to follow to protect themselves; and
- The statement "Keep out of the reach of children." If a hazardous product such as a plant does not have a package, it still must have a hang tag that contains the required precautionary information. That information must also be printed in any literature that accompanies the product and that contains instructions for use.

Furthermore, FHSA requires that all of the safety information about hazardous products must be located prominently on the label and must be in conspicuous and legible type in contrast by typography, layout or color with the other printed information on the label. (See 16 C.F.R. 1500.121; see also 16 C.F.R. 1500.122-.134 for regulations related to condensing information on the label, how to label products with multiple hazards, deception use of disclaimers, and other related regulations.)

Under CPSA – Title 15 United States Code section 2063(a)(1), every manufacturer of a product: "(A) shall certify, based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission;

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and (B) shall specify each such rule, ban, standard, or regulation applicable to the product." Both CPSA and FHSA (15 U.S.C. §§ 1261(p)(1), 1278, 1278a) have more stringent standards for labeling when it comes to children's products that would require a deeper dive by the handling attorney.

Prop 65 – Health & Safety Code section 25249.5 et seq. (see also, 27 C.C.R. § 25600 et seq.) requires businesses that sell hazardous products in the state of California to provide "clear and reasonable" warnings about significant exposures to chemicals that cause cancer, birth defects or other reproductive harm before knowingly and intentionally exposing anyone to such hazardous chemicals. This requirement includes: a minimum six-point type font; an exclamation point in black outlined by a yellow triangle and the word "WARNING" printed in bold and capital letters; the internet address for Proposition 65 warnings' website, www.P65Warnings.ca.gov, and the full name of a listed chemical amongst other requirements. Prop 65 also mandates the State to publish and update its list of chemicals that are known to cause cancer, birth defects, and other reproductive harm annually. This list now contains over 900 chemicals since it was first published in 1987. (https://oehha.ca.gov/proposition-65/proposition-65-list.)

These are just some of the guidelines and requirements needed for hazardous substance/material packaging. If you are handling a products-liability case that involves a hazardous substance, you should do a deeper dive into the various statutes for the exceptions and the exceptions to the exceptions.

How do you plead hazardous substance/material?

There are many ways that you can incorporate the above statutes into your product- liability lawsuit. In my particular case, one of the theories I used was that, when tested, the aerosol can heated and combusted below the listed flash point in its MSDS. The manufacturers/distributors knew or should have known that many consumers of the product heated the product before use, and in fact there were multiple tutorials posted on websites on how to heat the product. More importantly, in one of the manufacturer's MSDS, the testing agency reported that the product could explode when the product is heated over a certain temperature, even if the can itself was empty! This important handling instruction, however, was not part of the product's packaging and was never relayed to the end-user, our client.

I had alleged the existing label which said "Keep away from heat sources, open flames, and sparks" was insufficient to warn ordinary consumers of the product's dangerous propensities. The lawsuit was brought against the manufacturer of the can, the supplier of the substance inside the can, the company who was in charge of printing the labeling, the retailer, and the component part manufacturer for the nozzle and cap. The complaint has since survived a motion to strike (punitive damages), removal, and motion to dismiss. It is now back in state court and ongoing. Defendants have since filed multiple cross-complaints and continues to argue on jurisdictional issues as to the various cross-complaints, but plaintiffs' original complaint still stands.

In sum, if you have a case that potentially involves a hazardous substance/material: check the labeling of the product to make sure it conforms with federal and state laws, go to the MSDS database websites, download the data for the product, and reach out to an expert who can conduct the proper testing to determine whether the product meets the reported criteria.

Ms. Katrina N. Yu is currently the lead trial attorney and supervising attorney at Manibog Law PC. *Previously, she was an associate at* Abir Cohen Treyzon Salo, LLP. *Her practice focuses on areas of complex business litigation, civil rights, product liability, catastrophic personal injury, sexual assault/molestation and insurance bad faith.*