

TSCA Reform Must Protect Families Hurt by Toxic Chemicals

If no one is accountable, no one is safe; TSCA reform must not preempt state law

The Toxic Substances Control Act (“TSCA”) does not protect the public from dangerous chemical substances and should be updated; however, TSCA must be reformed in a way that explicitly preserves states’ rights to protect their own citizens. States must be able to continue to enforce: 1) state statutory laws that are more protective of human health than the federal standards; and 2) state tort laws which give Americans the right to file a lawsuit if they are injured or killed by toxic chemicals. Certain proposals to reform TSCA, including S. 1009 as it is currently drafted, would preempt this ability of states by wiping out state statutory laws and citizens’ rights under state tort law.

The ability of states to enact chemical safety laws is critical to the protection of public health, especially when it comes to shedding light on new information regarding the dangers of chemical substances. Chemical testing and regulation at the federal level is often limited by federal resources, rapidly changing technologies, and the ever-expanding proliferation and use of chemicals. In response, most states have enacted laws to protect the health of their citizens from dangerous chemical substances, reflecting the idea that states are often in the best position to know what laws are necessary based on the unique needs and health risks assessed at the state and local levels. This complementary role of the states must be preserved to guide our continued understanding of the dangers of chemical substances and aid a strong federal regulatory system.

Just as preserving states’ rights to enforce state chemical laws is vital to protecting human health and safety, it is imperative that TSCA reform measures ensure injured Americans can pursue claims against chemical manufacturers when their dangerous products cause serious injury or death. Just because a chemical is deemed “safe” by a federal regulator should not mean that the manufacturer’s duty to protect the public ends. If a manufacturer learns additional information about the safety of its product or the manufacturer hid information from the public or the EPA, Americans should have the right to hold that manufacturer accountable in state and federal court.

The following are examples of toxic chemical and exposure cases which would never have been filed if S. 1009 as it is currently written with its preemption provisions were the law. These cases highlight the importance of preserving state tort laws in order to protect consumers, families, and children from the health and environmental hazards of toxic chemical substances:

1) School drinking water causes cancer (chrome)ⁱ

22 students and 6 teachers at Suva Elementary & Intermediate School in California were diagnosed with various forms of cancer, including leukemia & bone cancer, over an 8-year period thanks to toxic pollutants emitted from a nearby chrome-plating facility. Numerous teachers reported miscarriages during the same time period and in 1998, 7 families and Communities for a Better Environment filed lawsuits. The chrome-plating facility agreed to settle these claims for an undisclosed amount, abandoned the chrome-plating operations of the facility, and donated \$25,000 to an environmental awareness foundation.

2) Love Canal - birth defects, cancer, and miscarriages (benzene, dioxin, toluene, benzoic acid, lindane, trichloroethylene, dibromoethane, benzaldehydes, methylene chloride, carbon tetrachloride, chloroform)ⁱⁱ

Hooker Chemical (now Occidental Petroleum Corporation) dumped more than 20,000 tons of toxic waste in the unfinished Love Canal during the 1940s and 50s. In 1953, the canal was buried over and sold to the local school district for \$1 with a caveat explaining the waste dumping. Over the next 20 years toxic chemicals burned through the storage drums and oozed into the ground of the working-class Love Canal section of Niagara Falls – seeping into basements, leeching into schools buildings, contaminating pipes, and polluting the air – and exposed more than 6000 citizens to over 240 industrial chemicals, particularly benzene and dioxin. Children suffered burns on their hands and faces from playing outside. Pregnant women exposed to these chemicals experienced heightened instances of reproductive problems including low birth weights, still births and a 300% increase in miscarriages. An astonishing 56% of children born in the area from 1974 to 1978 suffered birth defects such as extra teeth, eye defects, arterial defects, pernicious anemia, mental disabilities, kidney disease, epilepsy, auto-immune diseases and cancers including Leukemia. Thousands of families had to be evacuated and by 1998, nearly three thousand victim lawsuits were filed against the manufacturers. As a result, Love Canal was announced as the first ever federal health emergency for a non-natural disaster and paved the way for the well-known Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) – better known as Superfund. The cleanup of the damage took more than two decades and cost in excess of \$400 million.

3) Baby bottles cause birth defects (BPA (bisphenol A))ⁱⁱⁱ

The plastic strengthener BPA is an extremely common chemical that is most commonly used in food & drink storage containers, especially baby bottles, sippy cups, and baby formula cans. BPA exposure negatively effects the brain, behavior, and prostate, with research showing a connection between BPA and cancer, obesity, diabetes, heart disease, ADHD, and down syndrome. BPA's negative health effects are most pronounced in infants and young children and stunt fetal growth. This hormone-disrupting chemical blocks or mimics hormones and disrupts the body's normal functions, especially in pregnant women, fetuses, infants, and young children. BPA exposure in utero or before birth can cause genital deformities, impaired learning, increased aggression, early onset of sexual maturation, decreased levels of testicular testosterone, and decreased sperm production. In 2008, a class action lawsuit was filed against a manufacturer of baby bottle glass. The case resulted in a settlement for affected families and a 4-year injunction restricting the sale of BPA baby bottles. Since the onset of BPA-related litigation, 12 states have passed a BPA ban: California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, Vermont, Washington, and Wisconsin.

4) Semiconductor Clean Rooms cause Birth Defects (trichloroethane, freon)^{iv}

Semiconductor fabrication facilities are highly sensitive to contaminants so they are manufactured in clean rooms. The measures taken in clean rooms, including the use of toxic chemicals and industrial cleaners, are for the protection and benefit the actual semiconductor products, not the workers. In 1981, over 65,000 San Jose, CA residents were affected by drinking water contaminated by two local semiconductor factories when the factories' underground storage tanks leaked trichloroethane, Freon, and other industrial solvents into the local groundwater supply. The contamination caused higher rates of miscarriages and birth defects in

the neighborhoods affected by the leaks with children born to workers suffering from kidney disease, heart problems, cerebral palsy, autism, blindness, spina bifida, epilepsy, sterility, delayed language development, and brain malformations. Many of the children also suffered from physical or skeletal problems. The fact that the demand for semiconductor technology will not be receding any time soon only highlights the need for effective and comprehensive state and federal regulation complemented by the civil justice system to ensure the safety of workers and affected communities.

5) **Hexavalent chromium causes cancer (Erin Brockovich)^v**

In the 1950s, a compressor station operated by utility company Pacific Gas & Electric began leaking chromium 6 into the surrounding groundwater in Hinkley, California. The chemical was used to prevent rust from corroding the company's water-cooling system. For more than two decades the residents were slowly poisoned as they drank, bathed and swam in the polluted water. Hinkley residents suffered numerous physical ailments, including intestinal problems, rotten teeth, tumors, and bloody noses. This known carcinogen also causes higher rates of lung cancer, respiratory system problems, allergies, burning eyes, ulcers, and skin sores. 650 victims filed suit in 1993 and were able to reach a settlement with PG&E including an injunction ending the use of hexavalent chromium and an agreement to clean up the affected area. The case prompted other utilities to take similar actions and inspired the film *Erin Brockovich*.

6) **Children's toys cause developmental disorders (lead)^{vi}**

For years lead was used in a variety of household items including batteries, paint, glassware, and even children's toys. Lead, however, is a highly toxic metal that causes a wide range of health problems when absorbed into the human body, especially in young children. It affects the brain, blood, kidneys, and nervous system. It leads to anemia, learning disabilities, mental retardation, behavioral problems, hearing loss, seizures, and even death. Because of lead contamination, toy giant Mattel recalled over 1 million toys in 2007 in response to a class action lawsuit. The class action was filed on behalf of millions of children and families who received contaminated toys and settlement proceeds were used to pay for testing children for lead poisoning.

7) **Learning disabilities caused by candy (lead)^{vii}**

A 2004 investigative series by the Orange County Register found ingredients, such as chilies and tamarind, were contaminated with lead from local factory emissions in Mexico. This resulted in high levels of lead in candies sold in the United States. The California AG, Center for Environmental Health, EHC, and other local officials sued more than 30 candy makers. A settlement was reached in 2006 in which three of the major candy makers, including Hersheys and Mars, agreed to strict standards for protecting children from lead exposure in candies imported from Mexico. The manufacturers are now required to use new manufacturing processes and packaging materials and conduct independent audits. This became the first time the industry entered into a binding agreement requiring them to ensure their products do not pose a health risk to children. The settlement was the driving force behind a California bill that banned lead tainted candies.

8) **Libby, Montana (asbestos)^{viii}**

In 1999, the Seattle-Post Intelligence revealed that there had been hundreds of deaths and illness over a 70 year time period in Libby, Montana thanks to occupational and non-occupational

exposure to asbestos. North of Libby is a vermiculite mining facility owned formerly by Zonolite Corporation and later by W.R. Grace. Vermiculite contains a naturally occurring amphibole asbestos mix that is particularly toxic to humans. Residents were exposed to high levels of asbestos fibers & dust in the air and vermiculite materials that were used in local schools, parks, baseball fields, and public buildings. Not only does asbestos exposure cause Mesothelioma, but it causes higher rates of lung cancer, asbestosis, and pleural disorders. From 1979-1998, Libby residents suffered an asbestosis mortality rate 40-80 times higher than expected and a 20-40 percent increase in malignant and non-malignant respiratory deaths. Years later, after numerous individual and class-action lawsuits for asbestos-exposure, W.R. Grace Corporation was finally forced to expend nearly \$250 million in clean-up costs, the largest clean-up settlement by a single corporation in Superfund EPA history. To date, at least \$447 million has been spent on the cleanup, and the town remains under a public health emergency declaration.

9) Cancer and other diseases for military families - Poisoning America's Marines^{ix}

It was recently unveiled that Marine Corps Base Camp Lejeune's main drinking water system has been contaminated with a variety of toxic chemicals as early as 1948 and exceeding safety levels since 1953. More than 1 million marine veterans and their family members have been exposed to chemicals and volatile organic compounds -- such as perchloroethylene (PCE), trichloroethylene (TCE), BTEX, and vinyl chloride -- at rates sometimes 150 times higher than the recommended level. Most of these chemicals are found in legal solvents used in dry cleaning or to clean machinery and weapons. The Agency for Toxic Substances and Disease Registry found that drinking water contaminated with PCE and TCE can cause fatal disease such as lung cancer, breast cancer, rectal cancer, leukemia, and non-hodgkin's lymphoma. Exposure can also cause kidney cancer, prostate cancer, end-stage renal disease, auto-immune related skin disorders, Hodgkins disease, and neurological effects. PCE-contaminated drinking water causes lower birth weights for infants and more miscarriages. Children who exposed in utero to TCE and/or PCE have been found to have Leukemia, major heart defects, neural tube defects, cleft lip, eye defects, and deformed nasal passages. More than 1,000 babies were stillborn or died in infancy aboard the base from 1947 to 1987, according to a survey of death certificates filed at the local County Register of Deeds. Veterans began filing suit in federal court but most of these cases are still pending. Congress signed the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 to expand healthcare benefits to marines and their dependants have suffered. While most of the service men and women will file suit under federal law, civilian residents and workers on the base will have to pursue litigation in state court.

10) Childhood leukemia - A Civil Action^x

The Boston suburb of Woburn has been home for many years to leather-tanning factories and chemical factories producing arsenic-based products, textiles, and glue. In 1982 residents filed a class action against W.R. Grace and Beatrice Foods; this famous case centered on the alleged contamination of two municipal supply wells with toxic chemicals, primarily trichloroethylene and perchloroethylene. 12 children contracted the rare childhood cancer acute lymphocytic leukemia and 8 of these children lived within a ½ mile radius of each other. Adults suffered from high incidences of cancer, liver disease, skin rashes, vision problems, headaches, and miscarriages. A total of 16 children died because of their exposure to the toxic chemicals. After years of litigation, W.R. Grace settled with the plaintiffs and the case was later the basis for the movie A Civil Action.

- ⁱ Perales et al. v. Chrome Crankshaft Co., et al., No. VC027180 and Communities for a Better Environment v. Chrome Crankshaft, Inc., No. VC028531 (Cal. Super. Ct., Los Angeles County, first Amended Complaint for Damages Filed Dec. 22, 1998, complaint for Civil Penalties filed Jan. 19, 1999); Olivio, Antonio, *Families' Lawsuit Targeting Factory's Contamination is Settled*, LA TIMES, Aug. 7, 2000, <http://articles.latimes.com/2000/aug/07/local/me-181>; *Fact Sheet: Lawsuits Save Children's Lives*, CENTER FOR JUSTICE DEMOCRACY, <http://centerjd.org/content/fact-sheet-lawsuits-save-childrens-lives> (last visited June 18, 2013); *Fact Sheet: Environmental Tort Lawsuits: Holding Polluters Accountable*, CENTER FOR JUSTICE DEMOCRACY (Jan. 23, 2007), <http://centerjd.org/content/fact-sheet-environmental-tort-lawsuits-holding-polluters-accountable>; Gold, Matea, *A School, Factories and Plenty of Fear*, LA TIMES, Feb. 27, 1999, <http://articles.latimes.com/1999/feb/27/news/mn-12186>; *Ca Suit Says Chrome Plating Facilities Tainted Schools' Water Supply* Perales v. Chrome Crankshaft Co., 16 No. 18 ANDREWS TOXIC CHEM. LITIG. REP. 8 (1999)
- ⁱⁱ In re Love Canal Actions, 161 A.D.2d 1169 (NY App. Div. 1990); *The Real Numbers Behind Man-made Environmental Disasters*, ENVIRONMENTAL PROTECTION (May 10, 2013), <http://eponline.com/articles/2013/05/10/the-real-numbers-behind-manmade-environmental-disasters.aspx>; *Love Canal - Public Health Time Bomb: A Special Report to the Governor and Legislature: September 1978*, NEW YORK STATE DEPARTMENT OF HEALTH (Sept. 1978), http://www.health.ny.gov/environmental/investigations/love_canal/lctimbmb.htm; Hatfield, Jennifer, *The Love Canal*, ENVIROMENTOR (2012), <http://www.asse.org/professionalsafety/docs/Jennifer%20Hatfield%20Article.pdf>; James, Susan D., *Love Canal's Lethal Legacy Persists*, ABCNEWS.COM (Aug. 11, 2008), <http://abcnews.go.com/Health/story?id=5553393&page=1#.UcCIHee1H-Z>; *Fact Sheet: Environmental Tort Lawsuits: Holding Polluters Accountable*, CENTER FOR JUSTICE DEMOCRACY (Jan. 23, 2007), <http://centerjd.org/content/fact-sheet-environmental-tort-lawsuits-holding-polluters-accountable>; AMERICAN ASSOCIATION FOR JUSTICE, HAZARDOUS TO YOUR HEALTH: HOW THE CIVIL JUSTICE SYSTEM HOLDS CORPORATE POLLUTERS ACCOUNTABLE (July 2011), http://www.justice.org/cps/rde/xbc/justice/Enviro_Report.pdf
- ⁱⁱⁱ *In re Bisphenol-A ("BPA") Polycarbonate Plastic Products Liability Litigation*, MDL No. 1967. Case No. 4:08-1967-MD-W-ODS (the "BPA MDL") (W.D. Mo.); Zeratsky, Katherine, *What is BPA? Should I Be Worried About It?*, MAYO CLINIC (May 21, 2013), <http://www.mayoclinic.com/health/bpa/AN01955>; *About Bisphenol A*, SAFER STATES (Jan. 1, 2010), <http://www.saferstates.com/2010/01/bisphenol-a.html#.UcCwkee1H-Y>; *How Environmental Exposure May Affect Your Child: The Facts About Bisphenol A*, WEBMD.COM (July 28, 2010), <http://children.webmd.com/environmental-exposure-head2toe/bpa>; *Judge OKs Settlement in BPA Class Action Suit*, MISSOURI LAWYERS MEDIA BLOG (Jan. 7, 2011, 1:50 PM), <http://molawyersmedia.com/molawyersblog/2011/01/07/judge-oks-settlement-in-bpa-class-action-suit/>; *Philips Avent Baby Bottle BPA Class Action Lawsuit Settlement*, TOP CLASS ACTIONS, <http://www.topclassactions.com/open/1144-philips-avent-baby-bottle-bpa-class-action-lawsuit-settlement#> (last visited June 18, 2013); *California Joins 10 other States in Banning BPA from Infant Feeding Containers*, CONSUMERREPORTS.ORG (Oct. 6, 2011), <http://news.consumerreports.org/safety/2011/10/california-bpa-ban.html>.
- ^{iv} Joseph Erwin, Jr. et al. v. Motorola, Inc., Case No. 1-09-2847 (Ill. App. Ct) (Case No. 08-L-010824, Cook County Cir. Ct), <http://www.state.il.us/court/Opinions/AppellateCourt/2011/1stDistrict/March/1092847.pdf>; Molina v. Semiconductor Corporation, Case No. N10C-12-267 JRJ (Del. Super. Ct., New Castle County, first amended complaint filed April 27, 2012; Holden, Jason & Kelty, Christopher, *The Environmental Impact of Manufacturing Semiconductors*, CONNEXIONS (June 2, 2009), <http://cnx.org/content/m14503/latest/>; Pimentel, Benjamin, *The Valley's Toxic History: IBM Trial is Latest Round in Long-Running Dispute Over the Tech Industry's Environmental Record*, S.F. CHRONICLE, Jan. 30, 2004, <http://www.sfgate.com/bayarea/article/The-valley-s-toxic-history-IBM-trial-is-latest-2826844.php>; Wong, Wailin, *Ex-Workers Sue Motorola Over Kids' Birth Defects*, CHICAGO BREAKING BUSINESS (July 26, 2010), <http://archive.chicagobreakingbusiness.com/2010/07/motorola-sued-over-birth-defects-in-ex-workers-kids.html>; Howley, Nicole, *Motorola Sued for Alleged Birth Defects Among Employee's Children*, JUSTICENEWSFLASH (July 30, 2010), http://www.justiceneWSflash.com/2010/07/30/motorola-sued-for-alleged-birth-defects-among-employees-children_201007305137.html
- ^v Anderson et al. v. Pac. Gas & Elec., Case No. BCV-00822 (Cal. Super Ct., San Bernardino County, settlement July 2, 1996); *Fact Sheet: Environmental Tort Lawsuits: Holding Polluters Accountable*, CENTER FOR JUSTICE DEMOCRACY (Jan. 23, 2007), <http://centerjd.org/content/fact-sheet-environmental-tort-lawsuits-holding-polluters-accountable>; AMERICAN ASSOCIATION FOR JUSTICE, HAZARDOUS TO YOUR HEALTH: HOW THE CIVIL JUSTICE SYSTEM HOLDS CORPORATE POLLUTERS ACCOUNTABLE (July 2011),

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^{vi} In re Lead Paint Litigation, 924 A.2d 484 (N.J. 2007); Sherwin-Williams Co. v. Gaines ex rel. Pollard, 75 So.3d 41 (Miss. 2011); NATIONAL TOXICOLOGY PROGRAM, NTP MONOGRAPH ON HEALTH EFFECTS OF LOW-LEVEL LEAD (June 13, 2012), http://ntp.niehs.nih.gov/NTP/ohat/Lead/Final/MonographHealthEffectsLowLevelLead_prepublication_508.pdf; *EPA Fails to Revise Key Lead-Poisoning Hazard Standards*, USA TODAY, Mar. 10, 2013, <http://www.usatoday.com/story/news/nation/2013/03/10/epa-has-not-revised-lead-hazard-standards-for-dust-and-soil/1971209/>; *About Lead Paint*, U.S. DEP’T OF HOUSING AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/healthyhomes/lead (last visited June 18, 2013); *Lead Poisoning: Definition*, MAYO CLINIC, <http://www.mayoclinic.com/health/lead-poisoning/FL00068>; *About Lead Poisoning*, KIDSHEALTH.ORG, http://kidshealth.org/parent/medical/brain/lead_poisoning.html; Story, Louis, *Lead Paint Prompts Mattel to Recall 967,000 Toys*, N.Y. TIMES, Aug. 2, 2007, <http://www.nytimes.com/2007/08/02/business/02toy.html>; *Mattel Hit with Lead paint Class Action Suit*, CNN MONEY (Aug. 20, 2007), http://money.cnn.com/2007/08/20/news/companies/mattel_lawsuit/; Elliott, Jack, Jr., *Sherwin-Williams’ Appeals Miss. Lead Paint Verdict*, BUSINESS WEEK (Apr. 19, 2011), <http://www.businessweek.com/ap/financialnews/D9MMVQRG0.htm>.

^{vii} <http://www.ceh.org/making-news/press-releases/27-lead-in-candy/151-pressrelease09>; http://www.ceh.org/index.php?option=com_content&task=view&id=40&Itemid=55; <http://www.oeregister.com/news/lead-195251-health-candies.html>; <http://oag.ca.gov/news/press-releases/attorney-general-lockyer-announces-settlement-hershey-and-mars-subidiaries>; *People of the State of California v. Alpro Alimento Proteinico, S.A. de C.V., et al.*; http://www.huffingtonpost.com/2013/05/01/whole-foods-traders-joes-sued_n_3196393.html

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^{ix} Ordonez, Franco, *Scientists Confirm marines’ Poisonous Camp Lejeune Water Wells Date Back to Mid-Century*, McCLATCHY NEWSPAPERS, Mar. 15, 2013, <http://www.mcclatchydc.com/2013/03/15/185993/scientists-confirm-marines-poisonous.html#.UcDwR-e1H-Y>; AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, REPORTED HEALTH EFFECTS LINKED WITH TRICHLOROETHYLENE, (TCE), TETRACHLOROETHYLENE (PCE), BENZENE, AND VINYL CHLORIDE (VC) EXPOSURE (June 2010), http://www.atsdr.cdc.gov/sites/lejeune/tce_pce.html; CAMP LEJEUNE TOXIC WATER: THE FEW, THE PROUD, THE FORGOTTEN, <http://www.tftptf.com/>; Litoff, Alice & Hinman, Katie, *Sick Families of N.C. Military Base Water Contamination May Finally Get Help, 30 Years later*, ABC NEWS (June 28, 2012), <http://abcnews.go.com/US/sick-families-nc-military-base-water-contamination-finally/story?id=16670758#.UcD0Bue1H-Y>; Wilcox, Amanda & Kay, Lindell, *Lejeune Water Victim Speaks Out*, THE DAILY NEWS (NC), Sept. 3, 2012, <http://www.military.com/daily-news/2012/09/03/lejeune-water-victim-speaks-out.html>

^x *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); AMERICAN ASSOCIATION FOR JUSTICE, HAZARDOUS TO YOUR HEALTH: HOW THE CIVIL JUSTICE SYSTEM HOLDS CORPORATE POLLUTERS ACCOUNTABLE (July 2011), http://www.justice.org/cps/rde/xbcr/justice/Enviro_Report.pdf; Science Education Resource Center, *Case Summary – Anne Anderson et al. v. W.R. Grace & Co. et al.*, CARLETON COLLEGE http://serc.carleton.edu/woburn/Case_summary.html (last visited June 18, 2013); Films for Justice Institute, *Anderson v. W.R. Grace: Background / About the Case*, SEATTLE UNIVERSITY SCHOOL OF LAW, <http://www.law.seattleu.edu/centers-and-institutes/films-for-justice-institute/lessons-from-woburn/about-the-case> (last visited June 18, 2013).