

# BB REVIEW

## *Product Liability and Casualty Litigation Update*

**For Further Information on This Topic, Please Contact:**

Sean Shirley  
205.226.8761  
[sshirley@balch.com](mailto:sshirley@balch.com)

**For Further Information on the Product Liability & Casualty Practice Group, Please Contact:**

**Birmingham**

Teresa Minor  
205.226.8721  
[tminor@balch.com](mailto:tminor@balch.com)

**Montgomery**

Pete Cobb  
334.269.3128  
[pcobb@balch.com](mailto:pcobb@balch.com)

**Atlanta**

Dart Meadows  
404.962.3529  
[dmeadows@balch.com](mailto:dmeadows@balch.com)

**Gulfport**

John Scialdone  
228.214.0408  
[jscialdone@balch.com](mailto:jscialdone@balch.com)

**Jackson**

Bill Reeves  
601.965.8176  
[breeves@balch.com](mailto:breeves@balch.com)

## EPA EXPANDS THE TOXIC SUBSTANCES CONTROL ACT TO RENOVATORS OF TARGET HOUSING AND CHILD OCCUPIED FACILITIES

On April 22, 2008, the Environmental Protection Agency (“EPA”) issued a final rule under Section 402(3) of the Toxic Substances Control Act (“TSCA”) to address potential lead-based paint hazards in a new category of “target housing.” This final rule, which becomes effective June 23, 2008 and is gradually phased by April 22, 2010, makes two major categorical revisions to 40 CFR Part 745: (1) makes the TSCA and its implementing regulations applicable to “child-occupied facilities”; and (2) applies the TSCA and its implementing regulations to certain renovation, repair, and painting projects performed for compensation in “target housing” and “child-occupied facility.”

Prior to this final rule, the TSCA and its implementing regulations only applied to “target housing”, which was defined as “any housing constructed before 1978” except for housing designated specifically for the elderly or persons with disabilities. The new rule adds “child-occupied facilities” to the scope of covered properties and defines the term as:

a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least two different days within any week (Sunday through Saturday period), provided that each day’s visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may include, but are not limited to, day care centers, preschools and kindergarten classrooms.

40 CFR § 745.83 (effective June 23, 2008). The EPA identifies new potentially affected entities as those in the fields of building construction, specialty trade contractors (e.g., plumbing, heating, air conditioning, painting, wall covering, electrical, drywall, insulation, siding, tile, glass and glazing), child care services, elementary and secondary schools, technical and trade schools, and engineering and inspection services.

In addition, the new rule builds upon the definition of “renovation” previously defined in the regulations, but now requires that anyone performing any renovation activity in “target housing” or “child-occupied facilities” meet the same stringent requirements of modernization and abatement activities which includes requiring: (1) firms performing “renovation” work to be certified by the EPA to perform such work; (2) affected parties performing “renovation” work to provide specific lead-

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**Address Change:** If you no longer wish to receive this update or have an address change, please contact:

Nora Yardley  
205.488.3476  
[nyardley@balch.com](mailto:nyardley@balch.com)

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based paint training to all workers performing such work; (3) affected parties to comply with specific work practices to eliminate as far as practicable lead-based paint hazards; (4) affected parties to comply with certain record keeping requirements, and (5) affected parties to provide notice of the renovation activities to all persons potentially affected by the renovation including building owners, lessors, managers and parents and children using the affected facility.

The biggest impact of these regulations is the cost of compliance. The EPA estimates that these new rules will cost contractors, landlords and other similar owners 800 million dollars the first year that all of the new rules are made effective; 400 million dollars the second year with costs reduced annually thereafter by applying a 3-7% discount rate. Although the TSCA and the new regulations do not allow a private right of action for damages based on a violation of the Act or its regulations, *E.g., Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, N.Y.*, 250 F. Supp. 2d 48, 59 (N.D.N.Y. 2003) (noting that “the TSCA only authorizes citizen suits ‘to restrain’ violations of its substantive provisions”); *see also* 15 U.S.C. § 2619(a)(1), the new regulations could serve as the basis for a negligence per se or other similar type claim against entities affected by the new rule.

**Balch & Bingham, LLP – Product Liability and Casualty Litigation Practice Group Toxic Tort Area**

The attorneys in Balch & Bingham LLP’s Product Liability and Casualty Litigation Practice Group have extensive experience in individual, mass, and class action environmental and toxic tort litigation. They have litigated personal injury, property damage, and wrongful death claims relating to alleged exposures to and/or releases of lead-based paint, agricultural herbicides and pesticides, asbestos, benzene, boron trifluoride (BF3), chlorinated solvents, formaldehyde, industrial waste water, carbon black, carbon dioxide, isocyanate compounds (MDI and TDI), Ilemite dust, maleic anhydride mercury, mixed-dust, polychlorinated biphenyls (PCBs), particulate matter, perlite, petroleum hydrocarbons, radioactive material and waste, rutile dust, silica, trimellitic anhydride Tordon, and welding fumes. Balch & Bingham LLP’s Product Liability and Casualty Litigation Practice Group also has extensive experience in insurance coverage matters related to such exposures and releases.

Balch & Bingham attorneys enjoy membership in a number of professional associations, including the highly-selective American College of Trial Lawyers, the International Association of Defense Counsel (IADC), the Federation of Defense and Corporate Counsel (FDCC), Defense Research Institute (DRI), and the Alabama Defense Lawyers Association (ADLA), including one partner currently serving as President and two partners serving on its Board of Directors. A number of Balch & Bingham litigators are listed in *The Best Lawyers in America*, with several included in the new category of “Bet The Company” litigators. Balch & Bingham’s more than 250 attorneys serve our clients from offices in Alabama, Georgia, Mississippi and Washington, D.C.