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## Safety First: “Childproof” Not Always the Safest Option

*Tiffany D. Corona*

### *Code Section Affected*

Health and Safety Code § 13139 (amended).

AB 1100 (Ruskin); 2008 STAT. Ch. 5 (*Effective April 14, 2008*).

### I. INTRODUCTION

Three-year-old Jenna Bullen was playing in her garage when she accidentally knocked over a portable gasoline container, spilling gasoline across the floor.<sup>1</sup> Unfortunately, the nearby hot-water heater ignited the fumes, and Jenna sustained second-degree burns over ninety-five percent of her body.<sup>2</sup> This all-too-common scenario has prompted legislative attempts to regulate child safety standards of portable gasoline containers at the state and federal level.<sup>3</sup>

However, these childproof standards<sup>4</sup> have been neither practical nor safe when applied to certain types of gasoline containers called “safety cans.”<sup>5</sup> Because the design needs of safety cans require a specialized venting system, such cans cannot be “childproofed” in accordance with the American Society for Testing and Materials (ASTM) standards.<sup>6</sup> Chapter 5 exempts these safety cans from the strict childproof standards for portable gasoline containers, provided that they are clearly labeled “NOT CHILDPROOF.”<sup>7</sup>

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1. Robert Medley, *Long Road for Young Burn Victim*, DAILY OKLAHOMAN, July 8, 1999, at 1.

2. *Id.*

3. Dennis Moore, *Congressional Hearing Held on Moore’s Gasoline Safety Bill*, U.S. FED. NEWS, June 6, 2007. See generally CAL. HEALTH & SAFETY CODE § 13139 (West 2006) (requiring portable gasoline containers to comply with one of two child-restraint standards); U.S. CONSUMER PRODUCT SAFETY COMM’N, REPORT ON THE SAFETY OF PORTABLE FUEL CONTAINERS (GAS CANS) 1, 29-30 (2003) (providing background information on past attempts to regulate portable gasoline containers).

4. U.S. Consumer Product Safety Comm’n, Voluntary Standards: Gasoline Containers (Child-Resistant), <http://www.cpsc.gov/volstd/gascon/gascon.html> (on file with the *McGeorge Law Review*); ASTM International, Standards, F2517-05 Determination of Child Resistance of Portable Fuel Containers for Consumer Use, <http://www.astm.org/Standards/F2517.htm> (last visited May 22, 2008) [hereinafter ASTM International Standards] (on file with the *McGeorge Law Review*).

5. Telephone Interview with Peter Hartnett, Staff Member, Assembly Member Ira Ruskin (May 22, 2008) [hereinafter Hartnett Interview] (notes on file with the *McGeorge Law Review*).

6. *Id.*; ASTM International Standards, *supra* note 4; see also ASTM International, About ASTM International, <http://www.astm.org/ABOUT/aboutASTM.html> (last visited Nov. 7, 2008) [hereinafter ASTM International About] (on file with the *McGeorge Law Review*) (“ASTM International is one of the largest voluntary standards development organizations in the world—a trusted source for technical standards for materials, products, systems, and services.”).

7. CAL. HEALTH & SAFETY CODE § 13139(c)(2) (amended by Chapter 5).

## II. BACKGROUND

### A. *The Importance of Labels*

In 1961, California passed the Misbranded Hazardous Substances law focusing on child safety and labeling requirements.<sup>8</sup> The law required appropriate labeling of hazardous substances intended for household use.<sup>9</sup> These requirements include the “usual or chemical name” of the substance, the manufacturer, signal words such as “DANGER,” instructions on the use and storage of the substance, the word “Poison,” and the statement “Keep out of the reach of children.”<sup>10</sup>

The U.S. Consumer Product Safety Commission (CPSC) began examining the safety of portable gasoline containers in the 1980s.<sup>11</sup> The initial subcommittee on the matter developed two safety standards, one regarding labeling requirements, and the other pertaining to safety performance requirements.<sup>12</sup> However, the ASTM did not contemplate child-resistance when developing its initial requirements.<sup>13</sup> Rather, the ASTM was concerned with general “consumer misuse” and thus focused on “cautionary warnings about use and storage of gasoline.”<sup>14</sup> The ASTM’s labeling standard essentially required compliance with the Federal Hazardous Substances Act of 1960, which required hazardous substances—such as gasoline and other flammable substances—to be labeled.<sup>15</sup>

### B. *Childproofing and its Problems*

When the California Air Resources Board (CARB)<sup>16</sup> adopted spill-control regulations for gasoline containers,<sup>17</sup> “manufacturers began to investigate

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8. *Id.* § 108200 (West 2006).

9. *Id.*; see also *id.* § 108680(b)(3) (West 2006 & Supp. 2009) (“Household substance’ . . . [is] [a] substance intended for use as fuel when stored in a portable container and used in the heating, cooking, or refrigeration system of a residential dwelling.”).

10. *Id.* § 108200.

11. U.S. CONSUMER PRODUCT SAFETY COMM’N, *supra* note 3, at 1 (“In 1980, a subcommittee, [American Society for Testing Materials] F15.10, was formed to look specifically at the safety of gas cans.”).

12. *Id.* at 29.

13. *Id.* (“Child-resistance of gas cans was not party of these early deliberations.”).

14. *Id.*

15. *Id.* at 29-30.

16. See generally ARB 40th History, California Air Resources Board, <http://www.arb.ca.gov/knowzone/history.htm> (last visited Oct. 15, 2008) (“ARB’s mission is to promote and protect public health, welfare and ecological resources through the effective and efficient reduction of air pollutants, while recognizing and considering the effects on the state’s economy.”).

17. U.S. CONSUMER PRODUCT SAFETY COMM’N, *supra* note 3, at 30 (“In September 1999, the California Air Resources Board (CARB) adopted emission and spill-control regulations for gas cans to reduce smog-forming pollution from gas cans.”).

incorporating child-resistance.”<sup>18</sup> In July of 1999, the ASTM met with the CPSC to discuss the development of a child-resistant standard.<sup>19</sup>

In 2006, Chapter 473 added provisions to the California Health and Safety Code, requiring that all portable gasoline containers be made and sold with childproof caps.<sup>20</sup> The law permitted manufacturers and sellers to “sell through existing supplies of portable gasoline containers” until April 1, 2008, when the prohibition of non-childproof cans would take effect.<sup>21</sup> In early 2008, the State Fire Marshal notified state legislators that the law would ban the safety containers necessary for use in industrial settings.<sup>22</sup> In response, the Legislature enacted Chapter 5 to ameliorate this situation.<sup>23</sup>

### III. CHAPTER 5

Chapter 5 exempts certain gasoline containers from the requirement of a child-resistant cap.<sup>24</sup> Chapter 5 applies only to those containers that fall into the category “safety cans,”<sup>25</sup> and requires that such cans are labeled appropriately so that consumers will know that the cans are not childproofed.<sup>26</sup>

Because safety cans are not child resistant, Chapter 5 mandates that these cans be labeled as such.<sup>27</sup> The label must clearly state the words “NOT CHILDPROOF” in a prominent place on the can, in a legible font size, against a contrasting background, and in both English and Spanish.<sup>28</sup>

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18. *Id.* at 31.

19. *Id.* (stating that this meeting did result in a new standard, and in 2001, the ASTM issued the “Provisional Standard Specifications for Child-resistant Portable Gasoline containers for Consumer Use”).

20. CAL. HEALTH & SAFETY CODE § 13139 (amended by Chapter 5). *See generally* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2022 (Sept. 26, 2006).

21. CAL. HEALTH & SAFETY CODE § 13139(a), (d) (amended by Chapter 5).

22. Hartnett Interview, *supra* note 5.

23. *Id.*; *see also* AB 1100, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended on Feb. 23, 2007, but not enacted) (noting that AB 1100 was introduced by Assembly Member Ira Ruskin on February 23, 2007, as a bill that would require the labeling of any food containing products of cloned animals. It was later completely re-tooled as an amendment to an existing fire-safety law in February 2008).

24. CAL. HEALTH & SAFETY CODE § 13139(c)(1)-(2) (amended by Chapter 5); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008) (stating that Chapter 5 builds on a 2006 law, Chapter 473, which prohibited the sale of all gas containers that did not comply with child-resistant standards).

25. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008) (explaining that a “safety can” is one that contains specially-designed vents, which keep it from exploding upon exposure to fire or high temperatures).

26. CAL. HEALTH & SAFETY CODE § 13139(c)(2) (amended by Chapter 5).

27. *Id.* § 13139 (amended by Chapter 5).

28. *Id.* § 13139(c)(2) (amended by Chapter 5) (requiring the font to be at least 12-point on cans that are larger than one quart, and at least eight-point for cans one quart and smaller).

#### IV. ANALYSIS OF CHAPTER 5

If the Legislature had been aware of the existence of safety cans at the time it drafted Chapter 473, it likely would have included Chapter 5's provisions.<sup>29</sup> Chapter 5's exemption is not particularly controversial, as it deals with gasoline containers that would not ordinarily find their way into children's hands.<sup>30</sup> More importantly, Chapter 5 does not diminish Chapter 473's goal of child safety because children are unlikely to encounter safety cans exempted by the law.<sup>31</sup>

Assembly Member Ruskin's office noted that safety cans "simply cannot meet the state's existing child-resistance requirements and the OSHA venting requirements," and should therefore be exempted from the child-resistance requirements.<sup>32</sup> Because safety cans are used only in industrial settings, such as mines and laboratories, safety vents are more important than childproof caps.<sup>33</sup>

Most incidents involving children and portable gasoline containers occur at the child's home, when the child is playing alone in the garage or basement.<sup>34</sup> Because safety cans are used in industrial settings, rather than the home, there is much less of a need for them to have childproof caps.<sup>35</sup> Furthermore, because safety cans are used in dangerous settings, such as mines and laboratories, the specially-designed vents—which let pressure out of the can and protect from explosion—are far more valuable than the potential safety a childproof cap may provide.<sup>36</sup>

Under California law, there are two tests for liability based on a product's design defect: whether the benefits of the current design outweigh the risk of dangers inherent in that design, and whether the product performed as safely as expected by the ordinary consumer when used in a reasonably foreseeable manner.<sup>37</sup> Regarding the safety cans affected by Chapter 5, the benefits of the

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29. Hartnett Interview, *supra* note 5 (noting that Assembly Member Ruskin became aware of the need for such an exemption after being contacted by the State Fire Marshal, who explained why the safety cans could not meet the child-resistant requirements of Chapter 473).

30. *Id.* (stating that there was no opposition to AB 1100 on file with the office).

31. *Id.*

32. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008).

33. Hartnett Interview, *supra* note 5.

34. See U.S. CONSUMER PRODUCT SAFETY COMM'N, *supra* note 3, at 19-20 (illustrating that twenty-six of the thirty-three gas can incidents involving children ages zero to four reported to the Consumer Product Safety Commission from 1991-2001 involved a fire being ignited after a child doused in gasoline came within reach of a lit pilot light of an appliance, such as a water heater or furnace).

35. Hartnett Interview, *supra* note 5.

36. *Id.*; see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008) (explaining how the safety cans are "designed to vent pressure when subjected to fire or high temperatures").

37. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 435, 573 P.2d 443, 457 (1978).

We hold that a trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the

current design—the specially-designed vents—outweigh the risk of dangers inherent in not having a childproof cap because of the settings in which they are used.<sup>38</sup> As for the second test, presumably an ordinary consumer would know that gasoline is flammable and that children should not play around gas cans, regardless of whether there is a childproof cap. Aside from that, as discussed above, these safety cans are not intended for use in the home, but rather for industrial settings where children are not present.<sup>39</sup>

Even though children rarely come into contact with safety cans, Chapter 5 still requires a warning label.<sup>40</sup> In the rare instances when employees keep such containers in their personal vehicle or home, these labeling requirements serve as a precautionary measure alerting them to the fact that these containers are not childproof.<sup>41</sup> This labeling requirement also comports with the California common law requirement that manufacturers warn of any dangerous propensities in their products or in the use of their products which the user of the product would not ordinarily discover.<sup>42</sup> Even so, the labeling requirement of Chapter 5 dispenses with the liability that would otherwise likely arise from the manufacturer's duty to warn under common law.

## V. CONCLUSION

Chapter 5 is a simple and uncontroversial law, partly because it comports with the relevant tort law,<sup>43</sup> but mainly because it does not substantively affect the public at large.<sup>44</sup> Because safety cans are unlikely to end up in homes, and thus unlikely to end up in the hands of children,<sup>45</sup> Chapter 5 does not hinder the goals of Chapter 473, nor does it put children like Jenna Bullen at any greater risk of injury.<sup>46</sup> Indeed, this law furthers the ultimate goal of safety by recognizing that safety cans are actually safer without the childproof cap.<sup>47</sup>

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risk of danger inherent in such design.

*Id.*

38. *Id.*; ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008) (explaining how the safety cans are "designed to vent pressure when subjected to fire or high temperatures").

39. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008); Hartnett Interview, *supra* note 5.

40. CAL. HEALTH & SAFETY CODE § 13139 (amended by Chapter 5).

41. Hartnett Interview, *supra* note 5.

42. *Groll v. Shell Oil Co.*, 148 Cal. App. 3d 444, 448, 196 Cal. Rptr. 52, 54 (1983) ("Likewise, a manufacturer or a supplier of a product is required to give warnings of any dangerous propensities in the product, or in its use, of which he knows, or should know, and which the user of the product would not ordinarily discover.").

43. *Id.*; *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 435, 573 P.2d 443, 457 (1978).

44. Hartnett Interview, *supra* note 5.

45. *Id.*

46. *Medley*, *supra* note 1 (discussing the story of Jenna Bullen, who was burned over ninety-five percent of her body when fumes from an open portable gas container were ignited by the water heater's pilot light in the garage where she was playing).

47. Hartnett Interview, *supra* note 5.