



Toxic Torts and Environmental Law

The newsletter of the Toxic Torts
and Environmental Law Committee

5/29/2018

Volume 21, Issue 1



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Leadership Note

From the Chair



By John S. Guttman

We are pleased to provide you with the April 2018 edition of the Toxic Tort & Environmental Law Committee's e-newsletter. Thanks to Steven Spaulding of Sinunu Bruni in San Francisco for the excellent article on the impending changes to California's mandatory Proposition 65 warnings. We also owe particular thanks to Susan Van Gelder of the Buffalo office of Goldberg Segalla who chairs our publications subcommittee.

The changes to Proposition 65 should be of interest even to TTEL members who do not practice in California. Consider whether your firm or legal department represents clients who do business in the state. As importantly, assess whether you have clients who make products that are sold in the state or are sold on-line and shipped into the state. If the answer to any of those three questions is yes, Steven's article will provide you with a good summary of why the changes to the Proposition 65 warnings may be important to your clients.

Our committee held its annual seminar in Nashville on March 1-2, 2018. The reviews are in and those in attendance spoke positively about both the content and networking opportunities. Bill Hubbard of Thompson Hine is our current program chair. Kristin Orr of Stites and Harbison is vice chair. They and the rest of the planning committee put together two days of superb content including several presentations that highlighted issues tied to the 25th anniversary of the Supreme Court's *Daubert* decision, which has had such a major impact on our area of practice. In addition, for the first time, we had an afternoon featuring two tracks of content – one focused on litigation related topics and the other devoted to regulatory developments. Striking the right balance between these two areas of practice has been a challenge

for our committee. This approach was well received by those in attendance and will likely be continued.

Networking opportunities are important to members of the TTEL Committee. At the 2018 seminar, we continued the expanded networking events that were introduced in 2017. They were successful once again. Also, in 2017, we began local networking events. We held receptions for TTEL members and potential members in Washington, D.C., and Chicago. Watch for announcements of similar events in 2018. We anticipate three or four this year, including one in Cleveland on a date to be announced shortly.

Finally, look for the June issue of DRI's flagship publication *For The Defense*. It will contain four articles authored by members of our committee. *FTD* and this newsletter are good examples of the publication opportunities that DRI offers to you. Consider taking advantage of them. If you are interested, contact Susan Van Gelder or Irving Jones of Christian & Small in Birmingham, who is our publications vice chair.

John S. Guttman is a principal in the law firm Beveridge & Diamond, P.C., and is based in its Washington, D.C., office. His practice focuses on toxic tort, product liability, environmental, and natural resource damages litigation. He represents clients in a range of industries including oil and gas, chemicals, defense, real estate and consumer products. Over the past 34 years, Mr. Guttman has litigated nationally in federal and state courts, including bench and jury trials. John is the chair of the DRI Toxic Torts and Environmental Law Committee.

Feature Article

Are Your Clients Ready?

Changes to California Proposition 65 Warnings Become Mandatory on August 20, 2018



By Steven S. Spaulding

Newly revised Proposition 65 warning regulations can have significant implications to businesses throughout the country that sell to California consumers. Businesses with sales into California, including those involved in the sale of online products shipped into California, must carefully evaluate the new regulations for compliance by August 20, 2018.

Background

Over thirty years ago, California voters passed Proposition 65 formally titled “The Safe Drinking Water and Toxic Enforcement Act of 1986.” (Codified at Cal. Health & Saf. Code §25249.5 *et seq.*) Proposition 65 regulates substances identified by California as causing cancer, birth defects, or other reproductive harm. It prohibits the known discharge of listed substances into drinking water sources and known exposure of individuals without first providing a clear and reasonable warning. The warning regulation has been the most controversial. Failing to warn can expose an entity to, among other things, a civil penalty “not to exceed two thousand five hundred dollars (\$2,500) per day for each violation,” which is determined by an analysis of subjective factors set forth in the statute. (Cal. Health & Saf. Code §25249.7(a).) The prevailing plaintiff also recovers attorney’s fees and costs. The law has been criticized for the proliferation of “bounty hunter” lawsuits. In 2016, over \$30 million was obtained in settlements, of which 72 percent went to attorneys. <https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/2016-summary-settlements.pdf>. Most circumstances reflect that there is only a technical distinction between counsel and the plaintiff bringing the private enforcement action. Several nonprofit organizations are formed specifically for Proposition 65 enforcement, including As You Sow (asyousow.org), Center for Environmental Health (ceh.org), Environmental Law Foundation (envirolaw.org), and Council for Education & Research on Toxics (no website, but shares address with counsel).

Administration

Proposition 65 is administered by California’s Office of Environmental Health Hazard Assessment (OEHHA). OEHHA develops and maintains the official list of chemicals subject to regulation. Chemicals are continually added, and the list has grown to over 850 chemicals since it was first published in 1986. The chemicals are not banned. Instead, warnings are required for entities with ten (10) or more employees for potential exposures that exceed the daily “safe harbor” levels set by OEHHA. (See Cal. Health & Saf. Code §§25249.10(c) and 25249.11(b).) OEHHA sets two levels: cancer risk-NSRL (No Significant Risk Level); and birth defects/reproductive harm-MADL (Maximum Allowable Dose Level). NSRLs are levels at which there is an occurrence of no more than one (1) cancer within an exposed population of one-hundred thousand (100,000). MADLs are set at a level of exposure that has no observable effect at one-thousand (1,000) times the level in question. These numbers are magnitudes lower than the Permissible Exposure Limits (PELs) set by OSHA. Take for example the chemical Benzene. OSHA’s PEL for benzene is 1 PPM (part per million) on an eight-hour time weighted average or 5 PPM averaged over a 15 minute period. OEHHA establishes the NSRL for benzene at 6.4 micrograms (oral) and 13 micrograms (inhalation) and the MADL is set at 24 micrograms (oral) and 49 micrograms (inhalation). This readily demonstrates the necessity for expert consultants to determine whether exposures are compliant with the OEHHA “safe harbor” levels prior to deciding whether a warning is required. (See the OEHHA website [oehha.ca.gov]) to locate a complete list of regulated chemicals and greater detail on how the agency sets “safe harbor” levels.) It is beneficial to sign-up for OEHHA’s e-mail notifications to stay abreast of its current actions (oehha.ca.gov/about/listserv).

Litigation Examples

In 2015, a California Appellate Court ruled that defendants had no duty to warn of the lead content in their food

products because the average reasonably anticipated rate of exposure to lead fell below the relevant regulatory thresholds. (*Environmental Law Foundation v. Beech-Nut Nutrition Corp.* (2015) 235 Cal.App.4th 307; modified at 235 Cal.App.4th 1317.) The case is instructive where it decides that the averaging of the potential exposures applies to determine whether levels were below the “safe harbor,” rather than a single peak-day exposure. (*Id.* at 324–29.) Since averaged potential lead levels were below those set by OEHHA, the products were not required to have a Proposition 65 warning label. Accordingly, there was no compensable violation.

A contrasting application is reflected in very recent news reports regarding acrylamide in coffee. (See, for example, California Judge Rules That Coffee Requires Cancer Warning, March 30, 2018, apnews.com/936dc7ef09af4f93b6dae742796aa9a4.) In 2010, the Council for Education and Research on Toxics (the nonprofit that shares its counsel’s address), filed suit against over 90 companies in the coffee industry alleging that they failed to provide warnings for coffee products that contained acrylamide, a chemical regulated by OEHHA. (*Council For Education & Research On Toxics v. Starbucks Corp.*, Los Angeles County Superior Court No. BC257467.) Acrylamide is not natural to coffee beans, but forms when beans are roasted. Los Angeles Superior Court Judge Elihu Berle, in an earlier phase of trial, ruled that defendants had not proven that the potential exposure to acrylamide fell below the “safe harbor” threshold. On March 28, 2018, Judge Berle issued a tentative ruling that Starbucks and the other companies failed to show that drinking coffee confers a benefit to human health which outweighed any risks. If he upholds his tentative, the case will proceed to a third phase to assess civil penalties under the daily maximum of \$2,500 for each violation. About a dozen defendants have settled to date. Recent settlements include 7-Eleven, which agreed to pay \$900,000.

Warnings

Over time, businesses have elected to avoid the scientific “safe harbor” analysis and simply provide a warning to be in compliance. This simple warning appears ubiquitously in California on products and at various premises. Most warnings contain variants of the following:

WARNING: This (premises/product) contains chemicals known to the State of California cancer and birth defects or other reproductive harm.

These warnings are so abundant that they essentially have no effective meaning to the general public.

In 2013, California’s Governor Brown proposed reforms. He called for changes to “require more useful information to the public on what they are being exposed to and how they can protect themselves.” He added, “This is an effort to improve the law so it can do what it was intended to do—protect Californians from harmful chemicals.” In 2015, researchers at UC Davis studied the proposed new warning requirements. They interviewed more than 1,500 randomly selected Californians and asked them to compare the new specific warnings to the current generic warnings. Not surprisingly, over 75 percent stated that updated warnings would be more helpful than the current system. (oehha.ca.gov/media/downloads/cnr/112715isorappendixa.pdf.)

New Warning Regulation

New regulations were adopted in 2016 (with amendments in 2017) and take full effect in August of 2018. (See oehha.ca.gov/proposition-65/cnr/notice-adoption-article-6-clear-and-reasonable-warnings.)

Significant changes include the following:

- Warnings for consumer products must now say the product “can expose you to” a listed chemical rather than saying the product “contains” the chemical.
- The warning must now name at least one of the listed chemicals that prompted the warning.
- The warning must now provide the internet address for OEHHA’s new Proposition 65 warnings website.
- A triangular yellow warning symbol must now appear on most warnings.
- New and more “tailored” warnings are required for certain kinds of exposures, products, and places. The new regulations require specific warnings for exposures from alcoholic beverages, food, non-alcoholic beverages, prescription drugs, dental care, wood dust, furniture products, diesel engines, vehicles, petroleum products, and recreational vessels.
- There are also specific premises warnings for hotels, transient lodging facilities, enclosed parking facilities, amusement parks, service stations, vehicle repair facilities, and designated smoking areas.
- Website warnings will be required for products purchased over the internet.
- Warnings in languages other than English are required in some circumstances.

- The roles and responsibilities for manufacturers and retailers are changed and clarified.

New compliant warnings will read more like this for a product:

[Insert rectangular yellow warning symbol] WARNING: This product can expose you to chemicals, including [name one or more chemicals] which is [are] known to the State of California to cause cancer or birth defects or other reproductive harm. For more information, go to www.p65Warnings.ca.gov.

The revised regulations can have broad sweeping implications to businesses that operate within California or operate outside the state but sell products into the California market. Any business with a connection to California (even the sale of an on-line product shipped to California) should evaluate the new regulations to understand com-

pliance obligations and implement same by the mandatory date of August 20, 2018.

Steven S. Spaulding is a partner with the law firm of Sinunu Bruni LLP in San Francisco, California where he practices in environmental and toxic torts, products liability, personal injury, premises liability, Proposition 65 defense, and general insurance/business defense litigation. Steven occasionally serves as a Judge Pro Tem for the San Francisco Superior Court. He currently serves as the TTEL Committee Online Community Vice Chair. Steven can be reached at sspaulding@sinunubruni.com.