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June 3, 2005

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Re: *Comments: Workshop on Potential Regulatory Action Exempting from the Proposition 65 Warning Requirements, Exposures from Chemicals that Form from Natural Constituents in Food During Cooking or Heat Processing*

Dear Ms. Oshita:

First, let me concur in the views of others expressing appreciation for the workshop hosted by the Office of Environmental Health Hazard Assessment ("OEHHA") on May 9 in Sacramento regarding the above subject. The discussion was lively, well-informed, and I believe it heightened OEHHA's awareness of the range of issues implicated in the potential regulatory action under discussion. I also appreciate the opportunity to submit further comments.

My comments come from my prospective as a counselor regarding Proposition 65 compliance and providing defense of Proposition 65 claims made against businesses. Recently I have been especially involved in the defense of grocery retailers and have become increasingly concerned about the impact of Proposition 65 as it has developed on this category of business.

The proposed "conceptual regulation" would provide as follows:

> "Chemicals Formed From Natural Constituents in Foods
>
> For purposes of Health and safety section 25249.6, an exposure does not occur ***if the person otherwise responsible can show that the chemical in question formed solely from constituents naturally present in food and as a result of the food being cooked or heat processed, and that the concentration of the chemical in question has been reduced to the lowest level currently feasible using good cooking and manufacturing processes.***" [emphasis added]

There are many good reasons to exempt unintended byproducts of cooking from Proposition 65. Those have been well-presented in the workshop and doubtless will be repeated in written submissions.

My focus is on one specific aspect of the "conceptual regulation" – the consequence of its placing the burden of proof regarding the issues italicized and bolded above on the "person otherwise responsible" for the exposure; in this case, a grocery retailer. The effect of this provision will be to make the "exemption" illusory for this category of business and encourage a continuation of the "bounty hunter" litigation that has already brought Proposition 65 to the brink of disrepute.

Grocers sell food products that may have been produced, cooked, or otherwise processed anywhere on the globe. The retailer has no way of knowing exactly what cooking or manufacturing processes may have been used. Proving that " ***the concentration of the chemical in question has been reduced to the lowest level currently feasible using good cooking and manufacturing processes"*** will, in almost all cases, require an expensive and protracted effort to marshal the evidence from suppliers that may or may not be cooperative and retention of experts to opine as to the quality of the processes used. This means that, as a practical matter, the target of a Proposition 65 enforcement action has no practical alternative but to settle the claim, pay a negotiated penalty and attorneys' fees, and post a warning that may or may not be actually required by law.

Consider the following example. Suppose a grocery retailer receives a Proposition 65 notice of intent to sue regarding acrylamide in baked cereal products. The retailer probably sells cereal products from a number of manufacturers and countries, all of which use different cooking and manufacturing techniques. The plaintiff has essentially no burden of proof, because the presence of acrylamide in this food category is well known and easily demonstrated. The defendant, however, faces hundreds of thousands of dollars in expenses if it attempts to invoke the exception. The result will be a settlement.

It is important to understand that Proposition 65 is primarily enforced not by the Attorney General or other public officers but by private "bounty hunters" represented by lawyers expecting to earn a fee. Any doubt about this issue can be dispelled by looking at the Proposition 65 settlement data that is published on the Attorney General's website. The law requires that all Proposition 65 settlements be reported to the Attorney General, and the Attorney General must make summaries of the reports available to the public.[1]

For the five years 2000-2004, a total of 833 Proposition 65 enforcement cases were reported settled. Of these, bounty hunters brought 771, or 93% of all cases.[2] A total of $54.2 million was paid in settlements. Of that, the Attorney General's office collected $2.4 million, or 4.4%. Bounty hunters acting alone collected $45.9 million, or 84.7% of all dollars paid in Proposition 65 settlements. Perhaps even more telling is where the bounty hunters' recoveries went. Of the $45.9 million they collected, only $5.7 million went to civil penalties. $31.9 million, or 70%, went to bounty hunters' attorneys' fees and costs.[3]

Proposition 65, in practice, is primarily a vehicle for transferring substantial amounts of money from businesses to bounty hunters and their lawyers.[4] One of the reasons this vehicle is so successful in doing that is because the expensive burden of proof under Proposition 65 and many of its regulations falls uniquely on the defendant, not the plaintiff. This is one of the main reasons almost all Proposition 65 enforcement cases are settled. These realities, and their implications, should be considered by OEHHA every time it makes or proposes changing a regulation.

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[1] California Health & Safety Code Sections 25249.7 (f-g). The Attorney General's Proposition 65 reporting website is http://caag.state.ca.us/prop65/.

[2] Another 25 cases were prosecuted jointly by the Attorney General and a bounty hunter, which almost certainly means that the 60 days of exclusive public enforcement had expired, the bounty hunter had filed, and the Attorney General later intervened.

[3] Another $10.6 million collected by bounty hunters went to "other" uses. Typically, such funds were simply paid to the bounty hunter for some project allegedly related to environmental or health protection.

[4] The amounts described above exclude the defense costs and fees paid by the targeted defendants. The defendant usually ends up paying both for its defense and its prosecution. All of these costs, of course, are passed on to the consumer that Proposition 65 is supposed to protect.

The "conceptual regulation" would be vastly improved by striking the last clause and leaving the burden of proof to be allocated by the courts, so that the regulation would read:

> "For purposes of Health and Safety Code section 25249.6, an exposure does not occur if the chemical in question formed solely from constituents naturally present in food and as a result of the food being cooked or heat processed."

If OEHHA believes that a consideration of good cooking and manufacturing processes should be required, an alternative would be the following:

> "For purposes of Health and Safety Code section 25249.6, an exposure does not occur if the chemical in question formed solely from constituents naturally present in food and as a result of the food being cooked or heat processed, unless the person or party alleging a violation can show that the concentration of the chemical in question has not been reduced to the lowest level currently feasible using good cooking and manufacturing processes."

Either of these would represent a fair and scientifically responsible way of dealing with the issue in question.

Again, thank you for all of your work on this important subject.

I appreciate the opportunity to continue the dialogue with OEHHA in its continuing effort to develop regulations that are sensible, practical, and further the purposes of Proposition 65.

Very truly yours,

Charles C. Ivie

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