Under the Microscope: California’s Proposition 65

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How Did It Start?

“Safe Drinking Water and Toxic Enforcement Act”
- Passed by public referendum in 1986
- “Proposition 65” on the California ballot
- Intent: To promote water and environmental safety

Statutory Mandate

“No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving a clear and reasonable warning.”
How Does It Work?

Chemicals on two lists
- Substances “known to cause cancer”
- Substances “known to cause reproductive harm”

Maximum levels set low
- Carcinogens: “No Significant Risk Level” (NSRL)
  - Intake level triggering one more cancer death per 100,000 over 70 years
- Reproductive Harm: “Maximum Allowable Dose Level” (MADL)
  - Intake level for “no harm,” further reduced by a factor of 1,000
- Alternative “Safe Harbor Level” for Acrylamide
  - 0.2 micrograms per day
  - 8 ounces of coffee = approx. 2.0 micrograms

How Does It Work?

Proposition 65 Warning
- Posters in retail stores
- Signs in supermarket aisles
- Warnings on packaging

Exceptions
- Fewer than 10 employees
- Government agencies
- Naturally occurring substances
- Cooking necessary for palatability
How Does It Work?

Penalties (for failure to warn)
- Fines
  - $2,500 per day per violation
  - Successful plaintiff gets 25%
- Fees
  - Successful plaintiff also entitled to attorneys’ fees

Enforcement
- Public enforcers – CA Attorney General, district & city attorneys
- Any private individual or organization
  - Must first issue 60-day notice of intent to file suit

What Has It Become?

Growing List of Chemicals – over 800
- Exclusive Authority: CA Office of Environmental Health & Hazard Assessment (OEHHA)
- Routes to Listing
  - CA Science Advisory Board Committee finds toxicity evidence
  - Via CA Labor Code
    - Formally identified as toxicant by one of five authoritative bodies (EPA, FDA, IARC, NTP, NIOSH)
    - AND added to the California Labor Code
    - THEN chemical can be transferred to Proposition 65 list from Labor Code
What Has It Become?

“Cottage Industry” of industry lawsuits

<table>
<thead>
<tr>
<th>Food</th>
<th>Prop 65 Chemical</th>
<th>Status of Lawsuit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chocolate</td>
<td>Lead</td>
<td>Dropped on Eve of Trial</td>
</tr>
<tr>
<td>Tuna</td>
<td>Mercury</td>
<td>Defense Judgment after Trial</td>
</tr>
<tr>
<td>Meat</td>
<td>PCBs</td>
<td>Defense Judgment on Motion</td>
</tr>
<tr>
<td>Vinegar</td>
<td>Lead</td>
<td>Small Importers settled despite strong defenses</td>
</tr>
<tr>
<td>Chips, Fries</td>
<td>Acrylamide</td>
<td>Settlement</td>
</tr>
<tr>
<td>Grilled Chicken</td>
<td>PhiP</td>
<td>Pending</td>
</tr>
<tr>
<td>Cereal</td>
<td>Acrylamide</td>
<td>Pending</td>
</tr>
<tr>
<td>Coffee</td>
<td>Acrylamide</td>
<td>Pending</td>
</tr>
</tbody>
</table>

How is Coffee Affected?

Labor Code Transfer

- Coffee
  - CA Superior Court affirms Labor Code transfer mechanism
  - CA Chamber of Commerce appeals, with NCA support
  - Argued transfer mechanism was intended only to create initial Proposition 65 list
  - Court of Appeals upholds lower court, affirms Labor Code transfer / Proposition 65 listing

- Styrene
  - Styrofoam makers appeal Labor Code transfer listing for styrene
  - Argued insufficient toxicity evidence for styrene, not Labor Code transfer mechanism
  - Court overturns ruling, removing styrene from Proposition 65 list

- Inconsistent court rulings may elevate issue to CA Supreme Court
How is Coffee Affected?

Acrylamide

- In complex form, polyacrylamide, a common industrial chemical
- In 2002, Swedish scientists uncover acrylamide molecules in foods
- Natural product of “Maillard Reaction,” or browning
- Created in cooking at 120 degrees Celsius or higher
- Present in all foods with certain sugars and asparagine, a protein component

Coffee Lawsuits

- Coffee in the Cup: April 2010
  - Plaintiff: Council for Education and Research on Toxics (CERT)
  - Defendants: 15 large retailers
  - Outcomes:
    - Peet’s and Starbucks voluntarily post signs
    - Mediated settlements pending with donut shops and convenience stores
- Roast & Ground Coffee: May 2011
  - Plaintiff: Council for Education and Research on Toxics (CERT)
  - Defendants: 22 Roasters and 14 Retailers
  - Outcomes:
    - Case pending in Los Angeles Superior Court
    - Case is “related to” Coffee in the Cup case under the same judge
## Where To From Here?
### Other Acrylamide Dispositions

<table>
<thead>
<tr>
<th>Product</th>
<th>Defendants</th>
<th>Total</th>
<th>Penalties</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Frozen fries, tots</td>
<td>Heinz</td>
<td>$600k</td>
<td>$500k</td>
<td>$100k</td>
</tr>
<tr>
<td>Potato crisps</td>
<td>Procter &amp; Gamble</td>
<td>$1.25M</td>
<td>$1M</td>
<td>$250k</td>
</tr>
<tr>
<td>Potato chips and crisps</td>
<td>Frito-Lay</td>
<td>$950k</td>
<td>$600k</td>
<td>$350k</td>
</tr>
<tr>
<td></td>
<td>Kettle Foods</td>
<td>$350k</td>
<td>$250k</td>
<td>$100k</td>
</tr>
<tr>
<td></td>
<td>Lance</td>
<td>$145k</td>
<td>$97.5k</td>
<td>$47.5k</td>
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<tr>
<td>Fries</td>
<td>KFC</td>
<td>$341k</td>
<td>$208k</td>
<td>$133k</td>
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<tr>
<td></td>
<td>Wendy’s</td>
<td>$342k</td>
<td>$209k</td>
<td>$133k</td>
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<tr>
<td></td>
<td>Burger King</td>
<td>$1.15M</td>
<td>$350k</td>
<td>AG-$200k / CERT - $700k</td>
</tr>
<tr>
<td></td>
<td>McDonald’s</td>
<td>$941k</td>
<td>$666k</td>
<td>AG-$275k / CERT-?</td>
</tr>
</tbody>
</table>

### Where To From Here?
### Other Acrylamide Dispositions, cont’d

<table>
<thead>
<tr>
<th>Product</th>
<th>Defendants</th>
<th>Total</th>
<th>Penalties</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Snack Foods: Corn chips, popcorn, cheese puffs, pretzels, tortilla chips, vegetable crisps, pita chips</td>
<td>Frito-Lay</td>
<td>$2.675M</td>
<td>$2.625M</td>
<td>$50k</td>
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<tr>
<td></td>
<td>Gruma</td>
<td>$2.675M</td>
<td>$2.625M</td>
<td>$50k</td>
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<tr>
<td></td>
<td>Snyder’s Hanover</td>
<td>$105k</td>
<td>$90k</td>
<td>$15k</td>
</tr>
<tr>
<td></td>
<td>Lance</td>
<td>$1k</td>
<td>$1k</td>
<td>$0</td>
</tr>
<tr>
<td></td>
<td>Snak-King</td>
<td>$290k</td>
<td>$275k</td>
<td>$15k</td>
</tr>
<tr>
<td></td>
<td>Kettle</td>
<td>$25k</td>
<td>$10k</td>
<td>$15k</td>
</tr>
<tr>
<td></td>
<td>Birds Eye</td>
<td>$1k</td>
<td>$1k</td>
<td>$0</td>
</tr>
<tr>
<td></td>
<td>Corazonas</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
</tbody>
</table>
Where To From Here?

Unlimited Pipeline of Lawsuits
- “Race to Zero”
  - Advanced technologies enable discovery of trace chemicals
  - How many other Proposition 65 chemicals can be discovered?
- Process will continue with other substances
- More legal actions likely

Ultimate Solution
- Change the law

What Will the Industry Face?

California
- Required Warnings
  - Packaging: special labels for California?
    - Logistics
    - Expense
  - Signs in supermarket aisles
    - Strong resistance from retailers
- Legal Penalties & Fees

Elsewhere
- Association of “coffee” with “cancer” in news stories
- Unlike in CA, public is not desensitized to Proposition 65 warnings
Under the Microscope:
California’s Proposition 65