

California's Proposition 65 and Its Application to Furniture

*All Things Formaldehyde:
A Formaldehyde Issues Update*

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Today's Presentation

- Proposition 65
- Prop 65 formaldehyde cases
- Future Implications in light of CARB formaldehyde regulation

Prop 65 Passed By Voters in 1986

- Initiative process
- Almost 2/3 voted yes
- Legislative changes may only promote initiative goals

Four Key Elements of Prop 65

- Right to know warning requirement
- Prohibition on discharge unless safe (discharge will not be discussed today)
- Private cause of action
- Bounty hunter provision

Chemicals Known to the State of California to Cause Cancer or Reproductive Toxicity

- Cancer chemicals
- Reproductive toxins
- Listing by authoritative bodies
 - IARC
 - NTP
 - NIOSH
- Review by Scientific Review Panel

Required Warning

- 25249.6. *Required Warning Before Exposure To Chemicals Known To Cause Cancer Or Reproductive Toxicity.* 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 clear and reasonable warning to such individual, except as provided in Section 25249.10.

Warning Requirement

- Prior to exposure
- Exposure types
 - Consumer
 - Worker/Site Visitor
 - Environmental
- Warning required if cancer risk greater than 1 in 100,000
- Warning required if reproductive toxin risk is greater than $1/1000^{\text{th}}$ of the no observable effect level

WARNING:

- This product contains chemicals known to the State of California to cause cancer or reproductive toxicity
- Regulators hate the generic consumer warning

Failure to Provide Warning

- Penalty of \$2500 per day per violation
- Per violation mean per exposed person or per action of violator
- Note that penalty is for failure to warn not for causing exposure

Purpose of Prop 65 is to Cause Product Reformulations

- Choose between warnings and toxic tort claims
- Ubiquitous warnings dull impact
- Results of settlement generally reformulation

Not All Exposures Covered

- Exposure in the course of doing business
- Government exempt
- Less than 10 employees
- Federal preemption
- Timing of exposure vs. listing of chemical

Not All Exposures Covered

- Safe levels
- Regulatory safe harbor
- Risk based safe level
- Formaldehyde = 40 micrograms/day

Requirement Exposure Be Knowing and Intentional

- Knowledge of exposure, not impact or level
- Intentional adds little

Enforcement of Proposition 65

- Attorney General
- District Attorney
- City Attorney of large cities
- Private parties

Notice Prior to Filing

- 60 days before lawsuit can be filed
- Certificate of Merit
- Identify route of exposure
- Serve notice on Attorney General and District Attorneys

Prop 65 Statute of Limitations

- Prior year's exposures
- Four year statute under Unfair Competition Act (B&P Code Section 17200)

Examples of Prop 65 Actions

- Acrylamide – French fries
- Asphalt – paving and roofing
- Diesel exhaust – multiple contexts
- Dioxin– charbroiled burgers
- Lead – jewelry and toys
- Mercury – fish

Formaldehyde in Baby Furniture

- As You Sow sent out notices in May 2008
- California Attorney General lawsuit filed on September 23, 2008
 - Child Craft Industries
 - Delta Enterprise
 - Jardine Enterprise
 - South Shore Industries
 - Stork Craft Manufacturing
- Does 1-100???

Prop 65 Formaldehyde Cases: Next Steps

- Parties in discussions
 - No common understanding among the parties
 - No class settlement foreseen
- Determine exposure analysis
 - Per day vs. 70-year exposure
 - Furniture passed down for years, perhaps generations
 - Declining formaldehyde emissions over time
- Will AG add more defendants?
- Require warnings?
- Reformulate products?

Formaldehyde Prop 65 vs California Air Resource Board Airborne Toxics Control Measure

- Attorney General says no ATCM yet
- Warning requirement still applies if risk greater than 1×10^{-5}
- Safe harbor in micrograms/day
- CARB requirements in parts per million
- Dr. Shull references 9 to 285 micrograms per cubic meter
- Attorney General says regulations authorize extrapolation from known exposure or concentration (very conservative)

Thank You!

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