

## CALIFORNIA COURT SHOULD BAR PROP 65 ANTI-CHOCOLATE SUIT

by  
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For the last fifteen years, countless consumer products have come within the sights of bounty hunters suing under California's Proposition 65, and the law's inexplicable and single-minded obsession with remote and even non-existent risks. The last two years alone have seen enforcement actions alleging that California citizens are exposed to carcinogens and reproductive toxins from products as diverse as crystal drinking vessels, photo frames, light bulbs, Christmas lights, keys, electrical tape, orthodontic products, implanted medical devices, game darts, dietary supplements, Tiffany-style stained glass lamps, irrigation products, fire logs, exercise weights, hammers, terrariums, tools, cue chalk, cosmetics, and even Slim-Fast®. Yet now, a former Proposition 65 defense attorney and his client have gone a bridge too far, filing a bounty hunter lawsuit alleging that chocolates expose consumers to lead that requires a warning.

Proposition 65 allows private citizens — even if completely unharmed by alleged misconduct — to sue “in the public interest” and enforce the law's requirement that “clear and reasonable warnings” be given for exposures to chemicals “known to the state to cause cancer or reproductive toxicity.” If successful, the enforcer retains 25% of any civil penalties assessed (up to \$2,500 per violation per day). The enforcer can also seek an injunction requiring that warnings be provided, and restitution on behalf of allegedly defrauded consumers. It can also seek an order that the defendant pay attorneys' fees under California's private attorney general statute. Once the enforcer shows a “detectable” exposure, the burden shifts to the defendant to establish a “highly technical, scientific” defense by showing that the level of exposure does not require a warning.<sup>1</sup> Because of this burden, the cost of litigation, and the crippling penalties imposed if a company is liable, most businesses have opted to settle, rather than fight.

On May 8, 2002, a group called the American Environmental Safety Institute filed a Proposition 65 enforcement action against several chocolate manufacturers, including Hershey, Nestle, Kraft, and See's Candies, Inc. According to the complaint and plaintiff's well-timed publicity blitz (three days before Mother's Day), chocolates expose consumers to lead and cadmium in amounts that require a warning under Proposition 65. Armed with knowledge of the defense strategies used in previous Proposition 65 litigation that required the defendants to choose between reducing the minuscule lead content in their products or provide a product-killing warning, the plaintiff has now decided to put the chocolate industry to the same test. The plaintiff claims that the lead exposures in chocolate can be reduced by “an order of magnitude” if the industry would make what it claims are minor changes in their practices. It also claims that the lead

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<sup>1</sup>For details on this scientific defense as interpreted by a California Court of Appeal, see Margulies, *Court Ruling Reveals Absurdity of California's Proposition 65*, LGL BACKGRD. (Wash. Lgl. Found.), Vol. 17, no. 8 (Feb. 8, 2002).

content in a typical chocolate candy is double the average daily amount of lead ingested in the diet of American consumers.

The manufacturers will be quick to point out that trace levels of metals in chocolates are well below industry and government standards, and like many foods, have never been shown to cause harmful effects. However, manufacturers are in for an uphill battle, considering that Prop 65 shifts the burden to the manufacturers to establish that no warning is required even for exposures to trace levels of metals that regulatory bodies have found safe, and the courts' strict interpretation of that burden.

The California Attorney General's office has taken the self-described "unusual" step of publicly commenting that the merits of the chocolate case appear to be lacking, based on the industry's substantial data demonstrating the naturally occurring level of heavy metals in cocoa from which the chocolate is made. On the one hand, this is very positive. The Attorney General is not known as being particularly friendly to industries that it believes can reduce lead exposures, and has brought litigation over exposures to trace amounts of lead in food and other products. On the other hand, it probably will be of no benefit. Even where the Attorney General believes a case is frivolous, he is powerless to prevent a plaintiff from proceeding.

Regardless of the technical merits of the risk assessment defense and the Proposition 65 "naturally occurring" exemption, the concept that eating chocolates is harmful due to exposure to lead is counterintuitive. Humankind has been eating chocolate for centuries, and if heavy metals in chocolate were really harmful, one would think that we would have long ago seen signs of lead toxicity in chocoholics. The claims made in this and other Proposition 65 lawsuits just make one wonder why Californians are not keeling over daily from the exposures alleged by citizen enforcers and public prosecutors intent on bringing these supposedly dangerous products to justice.

On a different level, even if the plaintiff is correct that there is some way to reduce exposure to heavy metals in chocolate, it seems highly unlikely that the outcome of this lawsuit will ever lead to a warning. It is extremely improbable that the manufacturers will ever voluntarily agree to warn that a chocolate candy bar causes cancer or birth defects. If the plaintiff can demonstrate some technical violation of Proposition 65, any resolution of the case would (like previous enforcement actions involving calcium supplements, antacids, multivitamins, and other similar products) likely create some new ultra low "acceptable" level of lead that has little relationship to any harm actually caused by the product, but allows the plaintiff to claim a victory.

Fortunately, to date, consumers seem not to care about the plaintiff's claims. It could be that they are tired of hearing about yet another unfounded health scare. More likely, the lack of public outcry is due to the fact that chocolate is already perceived as "sin" food. Although it is clearly not the plaintiff's plan, public sentiment can remain neutral, and the resolution of these dubious claims can proceed without undue hysteria.