

Litigator of the Week: Michèle Corash of Morrison & Foerster

By Scott Flaherty
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Forcing companies to disclose harmful chemicals in their products sounds like a no-brainer. It did for a majority of voters in California, who in 1986 adopted such a measure, known as Proposition 65. But what if you're certain your product contains too little of a toxic substance to pose any threat, and including it on a label would scare customers away?

Accused of failing to warn consumers about lead in baby food, Beech-Nut Nutrition Corp. and other major food companies turned to Morrison & Foerster, where partner Michèle Corash has been battling Prop 65 since before it became law. Corash's efforts paid off this week, turning a potential nightmare for the companies into a litigation victory that's bound to have ripple effects for other businesses.

Six weeks after Corash argued for all the defendants, California's First District Court of Appeal sided unanimously on Tuesday with Beech-Nut, Dole Foods Inc., Gerber Products Co. and 13 other companies that make baby food, fruit juice and packaged fruit. The Environmental Law Foundation had sued the companies in 2011, alleging that their products contained lead at levels that warranted warnings under Prop 65. But the court rejected ELF's measure of lead exposure, upholding an earlier win for the food companies and tossing the case.

"It was very gratifying to me that it was a unanimous decision," Corash said. "The opinion was clear, and it should have impact."

Backed by Corash and her partners Robert Falk, Linda Shostak and Miriam Vogel, a Morrison & Foerster team led by James Schurz had originally persuaded Alameda County Superior Court Judge Steven Brick to dismiss the case back in 2013. The judge ruled then that the challenged products didn't contain enough lead to trigger Prop 65's labeling requirements.



Michèle Corash

Photo: Hillary Jones-Mixon

On appeal, ELF and its lawyers at Baron & Budd, with amicus support from California Attorney General Kamala Harris, argued that Prop 65 required an assumption that a given food product is eaten every day. Corash and her team countered that exposure should be based on how often consumers eat the product over a two-week period.

The appeals panel agreed with MoFo's arguments on Tuesday, holding that "substantial evidence supports the conclusion that it was appropriate to evaluate the level of exposure over time."

Corash's Prop 65 experience goes way back. She authored one of the principal arguments against the California ballot initiative before it was passed three decades ago, and she's since litigated and advised on hundreds of enforcement actions.

Corash told us it's exceedingly rare for a Prop 65 case to go to trial, which helped to account for the widespread interest in the case. Since it centered on questions that had gone largely unaddressed in California's courts, she said, this week's decision will likely have a wide-reaching effect on other Prop 65 cases.

The litigation drew a host of amici on both sides. Several food retailers, including Target Corp., Trader Joe's Co. and The Kroger Co., were also targeted as defendants alongside the food manufacturers, but the case against the retailers was put on hold while the courts decided the manufacturers' liability.

ELF legal director James Wheaton declined to comment. The group and its lawyers have 30 days to ask the California Supreme Court to hear the case.

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