Client Alert

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Appellate Court Gets It Right: *Realistic* Product Use Data Can Be Used by Businesses to Defend Lawsuits

By Robert L. Falk

California's First District Court of Appeal issued a unanimous and potentially far-reaching and precedent-setting decision on March 17, 2015, siding with businesses in our defeat of a lawsuit that sought to require cancer and birth defect warning labels for 100 percent fruit juice, packaged fruit, and baby foods that contain trace levels of lead. The case, *Environmental Law Foundation v. Beech-Nut et al.*, was originally brought by an environmental group against multiple manufacturers and retailers in 2011 under California's Proposition 65 law, which imposes the most stringent standard for lead (and many other chemicals) in the world. The decision (available at http://www.courts.ca.gov/opinions/documents/A139821.PDF) has potentially significant implications.

BACKGROUND

ELF's appeal, filed in 2013, fundamentally challenged Alameda County Superior Court Judge Steven Brick's prior acceptance of the exposure assessment proffered by our expert at trial. Her analysis, which concluded that Proposition 65 warnings were not required, was based on data on the average amount of lead that would be ingested from a product based on the number of occasions on which it is typically consumed *over a two-week period*. Her use of the two-week averaging period was supported by testimony from our expert toxicologists concerning the time period of susceptibility relevant to reproductive effects from lead exposure during pregnancy.

With amicus support from the California Attorney General's office, the plaintiff argued to the Court of Appeal that, regardless of real-world data, Proposition 65 required an assumption that an average person uses/consumes the same product *each and every day*. They also argued that the analysis of the level of exposure should be based on *the single highest test result* on the level of lead in the product.

DECISION

In an opinion certified for publication, the appellate court disagreed with the plaintiff and the Attorney General on their view of Proposition 65's requirements and as to their claims that the underlying evidence was insufficient to support the trial court's decision. Citing undisputed real-world data in evidence showing that people do not eat these types of foods more than four times a month, a unanimous three-judge panel instead ruled that the trial court's decision to allow for averaging of consumption over a two-week period was reasonable and consistent with Proposition 65's regulations. The Court of Appeal also found that the lead testing data on which our exposure assessment expert relied was sufficiently representative to meet the requirements of the California Evidence Code and that Proposition 65 and sound science allow for averaging multiple test results to characterize the level of lead in a product.

IMPLICATIONS

Previously, Proposition 65 has been enforced (and hundreds of related settlements have been brokered) based on the artificial notion that people typically use all consumer products and foods each and every day. Since plaintiffs can no longer disregard what actual use or consumption patterns for products and foods are in the real world, the Court of Appeal's decision may have major implications for Proposition 65 and beyond. Indeed, in addition to claims about traces of lead, it may have major implications concerning trace levels of arsenic, cadmium, and other chemicals listed under Proposition 65 for reproductive harm effects. Beyond Proposition 65, the Court's decision also may help to obtain dismissals of other types of lawsuits, including class actions predicated on allegations of failure to disclose the presence of scientifically immaterial trace amounts of lead or other chemicals in a product or food.

In short, this important Court of Appeal opinion supports that sound science and real-world data on a product's content and use characteristics—not plaintiff-friendly, unscientific flat-earth default assumptions—should be the basis for deciding if disclosures and Proposition 65 warning labels are warranted.

The MoFo trial team that worked on this case included San Francisco partners Michèle Corash, Bob Falk, James Schurz, Linda Shostak, Michael Steel, and William Tarantino; former California Court of Appeal Justice Miriam Vogel of Morrison & Foerster's Los Angeles office also helped guide the team's response to the appeal.

Contact:

Robert Falk
(415) 268-6294
rfalk@mofo.com

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