

One Minute Memo®



Impact of California Appellate Decision on Proposition 65 Actions Unclear

By Jay Connolly, Aaron Belzer and Jared Palmer

On April 28, 2015, the Environmental Law Foundation (“ELF”) filed a petition in the California Supreme Court for review of the Court of Appeal’s recent decision in *Environmental Law Foundation v. Beech-Nut Nutrition Corp., et al.*, No. A139821, 2015 WL 1212155 (Cal. Ct. App. Mar. 17, 2015) (“*ELF v. Beech-Nut, et al.*”). The Court of Appeal’s decision is widely viewed as providing a measure of relief for companies defending against the flood of bounty hunter enforcement actions brought under California’s Proposition 65 (“Prop. 65”). Moreover, it is unclear whether the Supreme Court will find review warranted given the straightforward analysis of the trial court and Court of Appeal.

Prop. 65 (officially the Safe Drinking Water and Toxic Enforcement Act of 1986) requires businesses to warn California consumers of potential exposure to carcinogens or reproductive toxins in a company’s products. By law, a company must provide such warnings unless it can demonstrate that exposure to a Prop. 65 chemical in its product poses “no significant risk” of cancer if daily exposure to it over 70 years would result in no more than one excess case of cancer per 100,000 individuals exposed, and/or that exposure to a reproductive toxin causes “no observable effect” to humans or laboratory animals at 1,000 times the level present. To guide businesses in determining whether a warning is necessary, the Office of Environmental Health Hazard Assessment (“OEHHA”) has developed “safe harbor” levels for certain chemicals. A business is not required to warn if exposures to those chemicals are at or below these “safe harbor” levels.

In its decision, the Court of Appeal affirmed the trial court’s ruling that the level of exposure to a Prop. 65 chemical could properly be calculated by averaging exposures over time and over multiple products, rather than by using a maximum exposure from a single product on a single day. The ruling thus clarified the applicable standard for determining whether potential exposures require Prop. 65 warnings, and increased the burden on plaintiffs to claim credibly that potential exposures require warnings.

While the Court of Appeal’s decision in *ELF v. Beech-Nut, et al.* is significant, it now must survive ELF’s Petition and potential review by the Supreme Court. Moreover, the decision faces other threats that may reduce its impact even if the Petition is denied or the case is affirmed by the Supreme Court.

The *ELF v. Beech-Nut, et al.* Decision

In 2011, ELF sued the manufacturers and retailers of various foods intended for babies and toddlers to enforce Prop. 65. It alleged that defendants failed to warn California consumers of harmful levels of lead in certain of defendants' products. After a bench trial, the trial court found in defendants' favor, concluding that they had no duty to warn because they sufficiently demonstrated that the average consumer's reasonably anticipated rate of exposure to lead fell within the regulatory "safe harbor" levels. ELF appealed the judgment, arguing that the trial court erred in interpreting Prop. 65 so as to allow defendants to average lead test results over multiple lots, and to average the level of exposure over multiple days. The California Attorney General filed an *amicus curiae* brief in support of ELF's position.

The Court of Appeal affirmed the trial court's ruling. Specifically, the Court of Appeal found that nothing in the Prop. 65 regulations prohibited defendants from calculating exposure by averaging lead test results over multiple lots, instead of evaluating each lot individually, nor prohibited defendants from averaging the single-day lead exposure from their products over a number of days before comparing the exposure to the "safe harbor" levels. It found that sufficient evidence existed to support defendants' methodology of averaging test results across lots for a single product—noting that ELF's expert relied on the same sample results as defendants' expert—and that substantial evidence also supported defendants' averaging of exposures based on the amount of lead to which a consumer was exposed over a 14-day period, despite the fact that lead is capable of acute toxicity. In reaching its decision, the Court of Appeal rejected ELF's contention that Prop. 65 prohibits defendants from calculating an average exposure over an extended period of time and then comparing it to the OEHHA "safe harbor" levels, but rather requires defendants to accept a single day exposure period (i.e., that a defendant cannot convert a single-day maximum exposure over the "safe harbor" level into an average exposure over an extended period of time).

Threats to the Decision

The *ELF v. Beech-Nut, et al.* decision may shield Prop. 65 defendants from claims based solely on a single test of a single sample by allowing defendants to calculate exposure based on average exposure over time (and based on test results averaged over multiple lots). The decision, however, must survive several challenges before defendants may feel its impact. Not only must it survive ELF's Petition and potential review by the Supreme Court, but also proposed changes to Prop. 65 itself, as well as legal challenges to the relevant "safe harbor" levels.

On January 16, 2015, OEHHA formally proposed extensive modifications to the Prop. 65 warning regulations. Because the proposed changes have yet to be adopted or implemented, it is yet to be seen whether OEHHA may attempt to expand the scope of the proposed modifications to address the *ELF v. Beech-Nut, et al.* decision.

Similarly, the impact of the *ELF v. Beech-Nut, et al.* decision may be limited with respect to alleged lead exposures by a recent challenge to the existing "safe harbor" levels for lead. In *Mateel Environmental Justice Foundation v. California Office of Environmental Health Hazard Assessment*, No. RG15754547 (Alameda Sup. Ct. Cal. Jan. 13, 2015), plaintiff seeks a writ of mandate to compel OEHHA to invalidate the safe harbor for lead, arguing that there is no safe harbor for lead. If plaintiff is successful, defendants in lead cases will no longer be able to rely on the *ELF v. Beech-Nut, et al.* decision to support their defense.

Conclusion

The Court of Appeal's decision in *ELF v. Beech-Nut, et al.* provides defendants in Prop. 65 enforcement actions with a clear standard for determining whether potential exposures require warnings. Nonetheless, in light of the various challenges it faces, its impact on Prop. 65 enforcement suits remains unclear.

Please see [here](#) for additional information regarding the implications of Proposition 65 for retailers.

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Seyfarth Shaw LLP One Minute Memo® | May 18, 2015

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