



Summary of California Proposition 65 Settlement Related to Lead and Cadmium Exposure from Outside Surfaces of Glass and Ceramicware

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This is a summary of the August 18, 2005 settlement between plaintiff Russell Brimer and a distributor of glass and ceramicware with outside surface decorations. This summary is intended to provide a broad general review of the settlements. For details, you and your legal counsel are advised to review the actual settlement documents. For a copy of the settlement as approved by the court, contact Andy Bopp at 703-838-2810. This summary is for informational purposes only, and you should consult with your own legal counsel to review your particular situation and what actions you should take.

Proposition 65 Background

California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) requires warnings to consumers if a product exposes consumers to a wide variety of chemicals including lead and cadmium. California's Office of Environmental Health Hazard Assessment (OEHHA) has established the maximum daily exposure levels for each chemical beyond which a consumer warning is required. Proposition 65 does not ban any product; it simply requires warnings. Proposition 65 applies only in California, and it covers all products distributed in the state.

Legal proceedings to enforce Proposition 65 may be instituted by the State of California or private citizens. If a private citizen is successful in such an action, he or she can receive monetary awards and attorneys fees. There have been thousands of such suits since 1986.

On November 12, 1991, the Attorney General of California brought a suit against several producers of ceramic foodware alleging that they were required to warn that their products could expose consumers to reproductive injury because the products contained lead. There were no allegations in the suit that any products leached lead in excess of certain standards established by the U.S. Food and Drug Administration (FDA) or that anyone was harmed by the products. These allegations were only related to exposure to lead from the food contact surfaces of tableware.

On January 15, 1993, a settlement was reached between the State of California and a majority of the defendants to resolve the 1991 suit. This settlement required the settling defendants to do a number of things in order to comply with Proposition 65. In general, the settlement decree can be considered the current standards California enforcement officials expect for the food contact surfaces of ceramic foodware. The release limits for lead are: 0.226 ppm for flatware and 0.100 for hollowware based on AOAC/ASTM 24-hour leaching tests as used for lead under FDA standards. The settlement document is 58 pages long. The entire document is available to members on request, and this settlement is also summarized in SGCD's "White Paper" summary of health and safety laws and regulations pertaining to decorated glass and ceramic items. For more detail, you are encouraged to examine the White Paper or the entire settlement document. Contact Andy Bopp for a copy of either document.

On May 1, 1998, cadmium was formally listed by the State of California under Proposition 65 as a chemical that would require warnings for consumer exposure. After reviewing exposure thresholds, the California Attorney General's Office issued a written advisory that the Attorney General would consider compliance with specific cadmium release results to be compliance with the Proposition 65 standard. The cadmium release limits are: 3.164 ppm for flatware; 0.322 ppm for small hollowware; and 0.084 for large hollowware based on AOAC/ASTM 24-hour leaching tests as now used both under FDA and California standards. These thresholds apply only to the food contact surface of tableware. More details are provided in the "White Paper."

Proposition 65 Allegations and Non-Food Contact Surfaces

SGCD was informed in 1997 by Edward G. Weil, Assistant Attorney General for the State of California, that the 1993 consent judgment and the markings and warnings required thereby apply only to lead leaching with respect to the food contact surface of ceramicware used for food. According to Mr. Weil, it would not apply to decoration on the outside of an item used for food, such as a mug or bowl. However, in 2001, a private plaintiff instituted a private Proposition 65 action claiming that certain imported hand-painted drinking glasses should bear a warning. The decoration was below the lip and rim area. The case was settled in 2002.

A number of Proposition 65 complaints were subsequently filed in 2003 by a private plaintiff (not the State of California) relating to allegations that consumers were exposed to lead and cadmium from the outside surface of glass and ceramic drinkware. In the ensuing period, SGCD worked with counsel for various defendants, the plaintiff and the California Attorney General's office to develop a test protocol to determine exposure from the outside non-lip/rim surface of drinkware. The Attorney General's office, however, did not participate in the resolution of the allegations.

On August 31, 2004, a settlement between the plaintiff and a group of manufacturers, importers and approximately twenty retailers was approved by the Superior Court of California in relation to the allegations. The settlement stipulated thresholds below which warnings would not be required in California, and it stipulated warning requirements. SGCD was not a party to the August 31, 2004 or any other settlements

which are binding only on the signing parties. No party was found by the court to have violated Proposition 65, and each maintained that no violation occurred. A number of parties did not settle and are still in litigation.

In other private Proposition 65 cases, several other companies had reached agreement with the plaintiff before the August 31, 2004 group settlement, and these agreements contain other clauses, varying compliance standards, and bind only the parties involved. We note that all of these suits were carried forward by a private party, not the State of California. A copy of the August 31, 2004 settlement is available to SGCD members.

A large number of Proposition 65 notices were served in California by private plaintiffs after the August 31, 2004 settlement alleging exposure to lead and cadmium from the non-food contact surfaces of glass and ceramic tableware and ware not designed for food use. In several of these cases, the plaintiff and defendants agreed to settlements that differed significantly from the August 31 settlement.

Summary of August 18, 2005 Settlement Provisions

On August 18, 2005, a California Superior Court in San Francisco approved still another settlement between a distributor of glass and ceramicware and a private plaintiff regarding California Proposition 65 allegations related to lead and cadmium exposure and the non-food contact and lip/rim surfaces of glass and ceramicware. This settlement includes restrictions on the use of both lead and cadmium bearing colors and the outside non-lip/rim surface of glass and ceramic tableware as well as for glass and ceramic ware that is not for use with food or beverages including figurines, decorative tiles and other products. The settlement includes provisions allowing other parties to “opt-in” to the settlement for a limited time by agreeing to the terms of the settlement and paying fees consisting of civil penalties, plaintiff’s attorneys’ fees and settlement related costs. The settlement provides for varying monetary fees based on the type and size of the settling “opt-in” party. It also limits a party’s option to warn.

In addition to monetary penalties and attorneys’ fees, the defendant and plaintiff in the “opt-in” settlement agreed to “reformulation” requirements that are described in broad, general terms here. The settlement includes a provision for warnings as well as a provision whereby the defendant agrees to “reformulate” at least 80 percent of covered ware manufactured after December 31, 2006 while undertaking all commercially reasonable efforts to sell 100 percent “reformulated” products after that date in California. This may limit their ability in the future to select the warning method of Proposition 65 compliance. The settlement warning provisions cover specific warning language and positioning of warnings on packages, at the point of sale, in mail order catalogs, on internet websites, and in restaurants and bars.

The August 18, 2005 settlement defines both glass and ceramic ware used for food or beverages as “reformulated” using either a NIOSH 9100 wipe test with a result of no greater than 1 microgram/wipe for lead and no greater than 8 micrograms/wipe for cadmium for ware not decorated in the lip/rim area; or decoration of ware using materials

that contain no more than 0.06% lead or 0.48% cadmium by weight using EPA Test Method 3050B. To comply with this settlement, decorating materials used in the lip/rim area must contain no more than 0.02% lead and 0.08% cadmium by weight. There are separate provisions that both define and establish limits for “children’s products.”

In addition to the thresholds above, ceramicware can also be defined as “reformulated” using a Total Acetic-Acid Immersion Test with maximum leaching levels for lead of 0.99 ppm and 7.92 ppm for cadmium after correcting for internal volume. Also for ceramicware, a result of 0.5 ppm or less for lead and 4.0 ppm or less for cadmium using an ASTM C927 lip and rim test can be used to establish “reformulation.”

As an alternative standard for both glass and ceramic ware that is not for food/beverage use, “reformulated” ware under the August 18, 2005 settlement can be defined as ware that achieves a result of less than 4 micrograms/wipe for lead and 32 micrograms/wipe for cadmium using a NIOSH 9100 wipe test applied to all decorated surfaces of the ware.

The settlement is legally binding on the parties to the agreement, and it only applies in California. It is not related to FDA’s mandatory lead and cadmium release standards or to the lip and rim release standards monitored by FDA. The settlement also does not preclude the plaintiff or anyone else from pursuing similar or related allegations against any other retailer, distributor or manufacturer of ware in California.

As noted, the provisions of the settlement are not binding on any other party; however, companies could consider the possibility that allegations could be made at any time relating to ware sold in California. By meeting the standards agreed to by the settling parties, it could assist a company in establishing a defense based on a claim that the ware in question would not require a warning. Such a defense would be made through the Proposition 65 legal process.

We encourage members of the industry to consult with their own legal counsel to ascertain their own method of compliance and the impact of adhering to any settlement or other legal action.

Proposition 65 Warnings

The August 18, 2005 settlement provides the defendant with the option of posting warnings for ware that fails to meet the warning threshold criteria established by the settlement. The warning provision is limited to ware for which “reformulation” requirements are not specified as noted above. Specific warning methods and language are described in the settlement and reviewed briefly below. Please contact Andy Bopp, 703-838-2810, for a copy of the settlement which provides full details. The warnings apply for products manufactured after June 10, 2005.

Product Labeling:

The August 18, 2005 settlement provides that a warning can be applied to the packaging, labeling or directly to the product itself by the settling defendant, its agent, the manufacturer, decorator, importer, distributor or retailer that states:

WARNING: The materials used as colored decorations on the exterior of this product contain lead and/or cadmium, chemicals known to the State of California to cause birth defects or other reproductive harm.

The settlement stipulates that this warning be “prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions prior to use or purchase.” The settlement specifically notes that a warning statement or sticker placed on the bottom of the product packaging is not an adequate warning. The settlement also stipulates that a warning placed inside the packaging that is not intended to be opened prior to leaving the retail establishment is not an adequate warning. Further explanation is provided in the settlement document.

Point-of-Sale Warnings:

The settlement also stipulates that a defendant can execute its warning obligations by posting signs at retail in California where the product is sold. Point-of-Sale warnings may be posted at or near the point-of-sale or display of the covered products and state:

WARNING: The materials used as colored decorations on the exterior of this product contain lead and/or cadmium, chemicals known to the State of California to cause birth defects or other reproductive harm.

or

WARNING: The materials used as colored decorations on the exterior of the following products contain lead and/or cadmium, chemicals known to the State of California to cause birth defects or other reproductive harm:*

** This warning may be used where more than one covered product is sold in proximity to items that do not require a warning. A list of each product requiring a warning must be displayed.*

The settlement establishes methods for identifying what specific ware in the store is covered by the warning. The settlement also includes language that establishes that the warnings must be prominently placed in the retail setting.

In addition, if the defendant elects to utilize point-of-sale warnings, the settlement stipulates that the defendant must provide notice to each entity to whom the defendant ships a covered product and obtain written consent from the retailer that it will transmit the warning sign to customers. Such notice must include any required warning materials

such as camera-ready signs and posting instructions. The settlement also stipulates that notice shall also be given once a year by the defendant to retailers regarding the warning requirement. These requirements are further described in the settlement.

Mail-Order and Internet Warnings:

The August 18, 2005 settlement also stipulates that the settling defendant place warnings if required in mail order catalogs sent to California addresses or on websites offering items for sale in California or with the product when it is shipped to California. The settlement contains details regarding where the warning notice must be placed in a catalog and on a website. It also contains details regarding warnings that are provided as a package insert or label.

Warnings for Restaurants, Bars and other Food Service Entities:

The August 18, 2005 settlement stipulates how a settling defendant that is a restaurant, bar, amusement or recreation establishment that distributes, serves or sells food or beverages can satisfy warning obligations. Generally, the settling defendant can execute its warning obligation by placing signs in a conspicuous location with the following language in a manner in which consumers understand which specific products are warned:

PROP 65 WARNING

The materials used as colored decorations on the exterior of glassware products used or sold in this establishment contain lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

The August 18, 2005 settlement also stipulates how a settling defendant that sells covered products to a restaurant, bar, amusement or recreation establishment that distributes, serves or sells food or beverages in California can satisfy warning obligations. Generally, the settlement requires such a defendant to send a certified letter to the central purchasing office for all restaurant/bar/food service entity suppliers or each restaurant, bar or food service entity with whom it transacts business for the use of covered products in California. The notice must include two copies of the warning sign and identify the covered products that would require a warning and explain the warning program and provide posting instructions. The settlement stipulates that these materials be sent to the restaurant/bar/food service entity at least every calendar year in which business is transacted. A settling defendant that receives written consent to post warnings from the restaurant/bar/food service entity would not be held liable for failures to appropriately post warnings.

Ongoing Allegations

There have now been approximately 125 Proposition 65 notices related to glass and ceramicware filed since the August 18, 2005 settlement. A large number of previous Proposition 65 allegations also remain to be either settled or litigated. Although there is

no official state warning threshold for non-food contact surfaces of glass and ceramicware, Proposition 65 warnings are an option for companies to establish a defense against allegations that ware exposes consumers in California to lead or cadmium. We encourage members of the industry to consult with their own legal counsel to ascertain their particular method of compliance.

You can obtain a complete e-mailed copy of the August 31, 2004 or August 18, 2005 settlement documents by contacting Andy Bopp, 703-838-2810 or andyb@sgcd.org. This summary is intended to provide a broad general review of the settlement. For details, you and your legal counsel are advised to review the actual settlement documents.

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