By Eric F. Greenberg, Attorney-at-law

California's Proposition 65: still weird after all these years

It has always seemed that everything about California's Proposition 65 was weird—as in, unusual, unexpected, a tad askew. I can think of at least four such things.

First, though it is a state law, it was passed in 1986 by the citizens of the state as a ballot initiative, not by the state legislature. It's an unusual procedure, though more common in California than in other states.

Second, it cobbles together two very different programs, one aimed at protecting the state's water supplies by placing various obligations on businesses and people within California, and the other aimed at letting people in California know when they are being knowingly exposed to chemicals the state has concluded cause cancer or reproductive toxicity. Yes, that latter obligation falls on businesses located anywhere in the world if their product ends up in California and exposes people to those chemicals.

While the law has exemptions from the warning requirement for smaller businesses with fewer than 10 employees and government agencies, for example, it is really quite broad in its applicability and scope, applying to chemicals that are used in essentially all different kinds of products and contexts. Also, the obligation to warn is not restricted to consumers you expose to listed chemicals, but also to workers in the state.

Third, unlike most regulatory obligations, which are enforced only by regulators, Proposition 65's warning obligations are backed by financial penalties that in some situations can be enforced by private parties rather than the state, and the private parties can keep some of the money. Not surprisingly, a cottage industry has arisen of private lawsuits against big companies designed more to extract settlements than add to the safety of people in California.

Fourth, while the law provides for the state to set 'safe harbor' levels for each listed chemical—if you knowingly expose someone to less than the safe harbor amount, you don't have to provide a warning to people exposed to the chemical—there are a number of chemicals that get listed by the state without any safe harbor number. In those instances, the law is very clear that the company still bears the burden of determining if the exposure that results from its product presents a significant risk and provide the warning if it does. If the company gets that wrong, it faces penalties.

Of interest to packaging makers, for example, California listed bisphenol A as a reproductive toxicant, but without a safe harbor level for ingestion (there is one for dermal exposures). It also listed n-hexane as a reproductive toxicant late last year, and only in September of this year has it proposed 'safe harbor' levels. They are 28,000 mcg/day for oral exposure, and 20,000 mcg/day via inhalation, much, much higher than levels expected to result from packaging uses (but you should confirm as to your own use). These are proposed levels, that is, not yet final, so it's not a legal 'safe harbor' quite yet.

As a result of the uncertainties created when the state lists chemicals but doesn't declare their safe levels, and out of fear of the money damages that might result, many companies decide to avoid using the listed chemicals when they can.

That was one of the motivations of the law in the first place. Most companies find the idea of providing a Proposition 65 warning to be an exceedingly unpleasant prospect, except perhaps for products consumers expect to present some risk, such as industrial chemicals. It just got even more unpleasant. California regulations were updated this year to, for example, require many warnings to make specific reference to the chemical or chemicals involved.

As many people predicted would happen, the law has resulted in such a proliferation of scary warnings on labels and placards around California that any individual warning probably has lesser impact.

And, as many people also predicted, weird listings have occasionally resulted from the law's broadly drawn provisions.

Perhaps weirdest of all is the recent squabble in the state over whether coffee needed to feature a Prop 65 warning about the presence of acrylamide, a naturally formed cancer-causing chemical created when the beans are roasted. Because acrylamide is formed when food is fried, many quick serve restaurant chains in California have reportedly provided Proposition 65 warnings for a number of years. But coffee was too much. The state stepped in after a court ruled earlier this year that a Proposition 65 cancer warning was required on coffee sold by coffee-selling businesses, because acrylamide was listed, was present in coffee, and the retailers did not sufficiently prove that the acrylamide levels in their products were not a significant risk.

If the state hadn't proposed a regulation in June that says coffee doesn't require a cancer warning because it concluded coffee simply doesn't cause cancer, Proposition 65 would have provided that it did.

California regulators say they reviewed a World Health Organization examination of over 1,000 studies that "concluded that there is 'inadequate evidence' that drinking coffee causes cancer." WHO's International Agency for Research on Cancer even found that coffee seems to help reduce the risk of some forms of cancer. Even FDA agrees that coffee has lots of health benefits and said that putting a cancer warning on coffee would mislead consumers.

Regulators and regulations have gotten an especially bad name lately. The regulators' coffee decision appears to be a common-sense rescue of some Californians from the latest Proposition 65 weirdness. **PW**

Eric Greenberg can be reached at greenberg@efg-law.com Or visit his firm's Web site at www.ericfgreenbergpc.com.