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The "Naturally Occurring" Defense In Proposition 65 Cases Involving Food Products

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California's Proposition 65 requires businesses to provide reasonable warnings before knowingly and intentionally exposing individuals to chemicals known to the state to cause cancer or reproductive toxicity. This duty to warn is triggered once an exposure to a listed chemical exceeds the "no significant risk" level for carcinogens or 1,000 times the "no observable effect" level for reproductive toxins. The issue in many Proposition 65 cases is whether the alleged exposures reach these trigger levels in the first instance, and if they do, whether the defendant that caused the exposures has a defense to liability for failure to warn.

The Proposition 65 regulations provide that manufacturers, distributors, and retailers of food products are not responsible for exposures resulting from chemicals that naturally occur in food. Thus, no duty to warn is triggered if the exposure is caused by a chemical naturally occurring in the food product. In *People v. Tri-Union Seafoods, LLC* (2009) Court of Appeal Case No. A116792, the First Appellate District affirmed the trial court's finding that methylmercury in tuna is naturally occurring, thereby removing canned tuna from the reach of Proposition 65. In the course of doing so, the Court of Appeal clarified how trial courts should apply the "naturally occurring" defense in cases involving food products.

Before a trial court considers a "naturally occurring" defense to a Proposition 65 claim concerning food products, the plaintiff first must establish a per se violation of Proposition 65, i.e., that the exposure to the chemical caused by consuming the food is high enough to trigger the duty to warn. To make this threshold determination, courts must engage in a three-step process. First, the court must determine the "level in question" for the chemical

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exposure at issue (in other words, how much of the chemical is in the food product). *Tri-Union Seafoods*, slip op. at 2; Cal. Code Regs. tit. 27, §§ 25721(a) and 25821(a).

Second, depending on whether the chemical at issue is a carcinogen or a reproductive toxin, the court must determine the rate of exposure, which is the "lifetime exposure" for carcinogens or "the reasonably anticipated rate of exposure for an individual" for reproductive toxins. Cal. Code Regs. tit 27, §§ 25721(b) and 25821(b).

Third, once the court has determined the level in question and the rate of exposure, it multiples those two numbers to determine whether the expected exposure is great enough to trigger a duty to warn under Proposition 65. *See Tri-Union Seafoods*, slip op. at 2; Cal. Code Regs. tit. 27, §§ 25721(c) and 25821(b). If the exposure triggers a duty to warn, the defendant either must provide the required warning prior to exposing any individual to the chemical *or* prove one or more of the Proposition 65 defenses.

One such defense for food products is that the chemical naturally occurs in the food. "Human consumption of a food is not an 'exposure' under Proposition 65 if a defendant can show that the targeted chemical is naturally occurring in food." *Tri-Union Seafoods*, slip op. at 4, *citing* Cal. Code Regs. tit. 27, § 25501(a). The chemical naturally occurs only if it "is a natural constituent of a food" and is not added as a result of any human activity, including but not limited to pollution or the manufacturing process. *Id.* If a portion of the chemical naturally occurs in the food product and a portion results from human activity, only the portion resulting from human activity counts as an exposure under Proposition 65. The defendant has the burden of proof on this issue. *See Tri-Union Seafoods*, slip op. at 17.

Generally, parties to a Proposition 65 case establish the extent to which a chemical naturally occurs in a food product by offering competing expert testimony. As in any case, the trier of fact—typically the trial judge in a Proposition 65 case—weighs such competing expert testimony, accepting the testimony that it finds more compelling. So long as substantial evidence supports the trier of fact's "naturally occurring" finding, that finding will not be disturbed on appeal. *See Tri-Union Seafoods*, slip op. at 25-26.

The *Tri-Union Seafoods* court, however, opined in dicta that the usual competing expert approach may not be the best practice for courts to apply in a Proposition 65 case. It questioned "whether the truth about complex, threshold scientific issues encompassed

within Proposition 65" is best derived by the competing testimony of partisan experts at trial. *Tri-Union Seafoods*, slip op. at 26. The court suggested that a trial court, pursuant to California Evidence Code sections 730 and 732, could appoint an expert to opine on these threshold scientific issues, subject to cross-examination, to "reduce the risk of a decision based on anything but the most valid scientific investigation and assessment." *See Tri-Union Seafoods*, slip op. at 26.

Lastly, although the *Tri-Union Seafoods* court upheld the trial court's judgment in favor of the defendants based on the "naturally occurring" finding, it made plain that the res judicata and collateral estoppel effect of that finding could be transient. It noted that future events could subject the *Tri-Union Seafoods* defendants to liability for violations of Proposition 65 related to these same claims despite the judgment in their favor. Such possible future events include the Office of Environmental Health Hazard Assessment (OEHHA)—the agency charged with implementing Proposition 65—amending the regulations to exempt certain chemicals from the "naturally occurring" rules for foods, or OEHHA establishing a lower "naturally occurring" baseline level for the chemical in a certain food product. The court warned that the trial court's determination of naturally occurring in any given case is limited to "*a given point in time*." *Tri-Union Seafoods*, slip op. at 28 (emphasis in original).

Despite the potentially transient nature of the *Tri-Union Seafoods* court's decision, it solidifies the appropriateness of the "naturally occurring" defense to Proposition 65 claims involving food products.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

Brent Cheney Mr. Cheney's practice focuses on a wide range of complex litigation, with an emphasis on environmental, real estate, trust and probate disputes, securities, and other commercial matters. His environmental practice focuses on counseling clients on CERCLA, Proposition 65, the Clean Water Act, and other hazardous waste matters, and negotiating the scope and timing of cleanup and the allocation of cleanup costs among responsible parties. Mr. Cheney's real estate and financial services practice includes litigation concerning purchase agreements, deed disputes, landlord/tenant issues, and environmental contamination, as well as litigating or negotiating workouts of failed transactions. His trust and estates practice

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