

Client Alert

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Court of Appeal Excludes Two Chemicals from the Proposition 65 List: *SIRC v. OEHHA* Limits the Reach of the Labor Code in Determining Proposition 65 Listed Chemicals

On October 31, 2012, the California Court of Appeal affirmed a finding that two chemicals classified by the International Agency for Research on Cancer (IARC) as possibly carcinogenic pursuant to the Labor Code do not meet the standard for inclusion on the Proposition 65 list. In 2009, the Styrene Information and Research Center initiated a lawsuit against the Office of Environmental Health Hazard Assessment (OEHHA), challenging OEHHA's proposed listing of styrene on the Proposition 65 list of carcinogens. On a motion for judgment on the pleadings, the trial court ruled that styrene and vinyl acetate are not "known" carcinogens and therefore cannot be included on the Proposition 65 list. *Styrene Info & Research Ctr. v. Office of Environmental Health Hazard Assessment*, 2012 Cal. App. LEXIS 1146 (2012) ("SIRC v. OEHHA").

The Court of Appeal's decision is welcomed by those who believe that Proposition 65 has been abused by plaintiffs' attorneys who reap easy settlements by taking advantage of the burden of proof scheme under Proposition 65. The decision also creates a roadblock to one of the mechanisms that OEHHA may use to place chemicals on the Proposition 65 list.

Statutory Framework

Proposition 65, a measure adopted by California voters, enacted the Safe Drinking Water and Toxic Enforcement Act of 1986, which prohibits businesses from discharging into drinking water sources any chemical "known to the state to cause cancer or reproductive toxicity" and requires businesses to provide a warning if they "knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity." Proposition 65 requires the governor to publish a list of those chemicals *known* to the state to cause cancer or reproductive toxicity.

Chemicals Must Be *Known* to Cause Cancer or Reproductive Toxicity

At issue in *SIRC v. OEHHA* are two chemicals that OEHHA proposed to be listed on the Proposition 65 list pursuant to Labor Code Section 6382(d). Under the statute and governing regulations, IARC's monographs are specifically identified as a source for "establishing that a chemical is a carcinogen or potential carcinogen." IARC listed vinyl acetate as a Group 2B *possible* carcinogenic based on "inadequate evidence of carcinogenicity in humans and limited evidence of carcinogenicity in experimental animals." IARC listed styrene as a Group 2B *possible* carcinogenic based on limited evidence of carcinogenicity in both humans and experimental animals. The Court of Appeal rejected such a standard as failing to meet the *known* to cause cancer provision of the law:

We conclude the Proposition 65 list is limited to chemicals for which it has been determined, either by OEHHA through one of the methods described in section 25249.8, subdivision (b), or through the Labor Code method of adopting findings from authoritative sources, that the chemical is known to cause cancer or reproductive toxicity. Because the findings in the IARC monograph on which OEHHA relies to list styrene and vinyl acetate do not satisfy that standard, they cannot properly be included on the list on that

basis alone. And because OEHHA does not propose any other basis for including those substances on the list, they must be excluded. Thus, the trial court properly granted judgment on the pleadings for plaintiffs on that issue.

The *SIRC v. OEHHA* decision highlights that chemicals “merely suspected” to cause cancer but not “scientifically known” to cause cancer must not be included on the Proposition 65 list. This prohibition may also logically be applied to chemicals which are only “suspected” of causing birth defects or other reproductive harm. This decision opens the door to challenges on other chemical listings that may fall short of meeting the *known* to cause cancer or reproductive toxicity standard, including additional challenges to the listing or proposed listing of chemicals classified as possible carcinogens by IARC. The case also provides defense counsel with a good argument to dispose of a claim, if the chemical at issue in a 60-day notice of violation was placed on the Proposition 65 list because it is suspected, rather than known, to cause cancer. For more information, please feel free to contact us or visit our [California's Proposition 65 site](#).

Contacts

Malcolm Weiss

mweiss@hunton.com

Prof. Lucas Bergkamp

lbergkamp@hunton.com

Brian E. Barner

bbarner@hunton.com

Diana F. Biason

dbaison@hunton.com

Tim Carlstedt

tcarlstedt@hunton.com

Morgan Evans

mevans@hunton.com

Julieta Stepanyan

jstepanyan@hunton.com