MLA Proposition 65 Advisory

McKenna Long & Aldridge LLP

Styrene Information and Research Center v. Office of Environmental Health Hazard Assessment

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Court's Ruling that IARC Designation of Chemicals as "Group 2B" Carcinogens Is Not Sufficient Basis for Listing Under "Labor Code Listing Mechanism" Examines Bases for Determining Whether a Chemical is "Known to the State to Cause Cancer"

The California Court of Appeal, Third Appellate District, issued a long-awaited decision in the case of ***Styrene Information and Research Center v. OEHHA, et al.,*** (*"SIRC"*) No. C064301, on October 31, 2012. In a unanimous opinion, the Court upheld a ruling by the Superior Court for Sacramento that enjoined the State's Office of Environmental Health Hazard Assessment ("OEHHA") from listing two chemicals – styrene and vinyl acetate – as chemicals "known to the state to cause cancer" for purposes of the Safe Drinking Water & Toxic Enforcement Act (commonly referred to as "Proposition 65").

In reaching this decision, the *SIRC* Court interpreted two of its previous opinions arising from Proposition 65 listing disputes: (1) *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3rd 425 *("Deukmejian")*,which held that Proposition 65 requires listing of chemicals shown to be carcinogenic on the basis of animal testing alone; and, (2) *Western Crop Protection Ass'n v. Davis,* (2000) 80 Cal.App.4th 741 ("*WCPA*"), which authorized the listing of chemicals as reproductive toxicants on the basis of their inclusion on the federal Toxics Release Inventory ("TRI"), on a case-by-case basis. The Court also drew upon the recent decision of the Fourth Appellate District in *California Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233 ("*Cal/Chamber*"), which upheld the validity of the highly controversial "Labor Code Listing Mechanism."

The *SIRC* opinion, addressing all of these landmark decisions in a single factual context, offers new guidance for companies whose chemical products are proposed for listing under the Labor Code Listing Mechanism. The ruling demonstrates that the ultimate test in determining whether a chemical should be listed under Proposition 65 is whether the substance is "***known*** to the state to cause cancer or reproductive toxicity," and suggests that judicial review may be available to examine whether that standard is met, regardless of which Listing Mechanism is employed.

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McKenna Long & Aldridge LLP represented the Vinyl Acetate Council at the trial level in this matter. We were pleased to assist in developing the record regarding the proper interpretation of the federal Hazard Communication Standard ("HazCom Standard"). We offer our analysis below.

Factual Background

OEHHA had proposed the listing of both chemicals under the highly controversial Labor Code Listing Mechanism. The Agency contended that Section 25249.8 of Proposition 65 (which requires the Governor to establish and update the Proposition 65 list of chemicals "known to the state to cause cancer and reproductive toxicity") must include those substances identified "by reference" to Section 6382(d) of the California Labor Code, which in turn requires persons subject to the federal and California HazCom Standards, to treat a chemical as "hazardous" if it is identified as a hazard by one of several possible sources, which include the International Agency for Research on Cancer ("IARC"). OEHHA noted that IARC had evaluated vinyl acetate and styrene and placed both chemicals in Group 2B ("Possibly Carcinogenic to Humans").

The Argument for Listing

OEHHA argued that the Agency was required by the Court's previous decision in *Deukmejian* to include on the

Proposition 65 list not only those chemicals known to cause cancer in humans, but also chemicals known to cause cancer in animals. By extension, the Agency contended that *Deukmejian* required the listing of all IARC Group 2B chemicals, including those with less than adequate evidence of carcinogenicity in animals, because these chemicals were "within the scope" of the chemicals for which warnings were required under the federal HazCom Standard. If styrene and vinyl acetate had been designated as Group 2B chemicals at the time that *Deukmejian* was decided, the Court would have required them to be listed.

The Court's Decision

Among the arguments advanced by the appellants, SIRC argued that the Labor Code Listing Mechanism was intended only as a means to populate the initial Proposition 65 list, rather than to supplement the list after the initial list was published. The Court rejected this argument, acknowledging the recent decision of the 4th Appellate District in *Cal/Chamber* on that issue. With two appellate districts now having reached the conclusion that the Labor Code Listing Mechanism is valid, it would appear that any further challenges to its validity are unlikely.

In the balance of the opinion, however, the Court unraveled OEHHA's argument for listing Group 2B chemicals. The Court began by placing its previous *Deukmejian* ruling in proper context.

The Court explained that *Deukmejian* arose from the Governor's decision to include on the initial Proposition 65 list only chemicals that were known to be human carcinogens, excluding chemicals for which the only evidence of carcinogenicity was animal data. Quoting from *Deukmejian*, the Court wrote: "Although [Proposition 65] clearly was intended to protect people and not household pets or livestock, the suggestion that only known human carcinogens are subject to [Proposition 65] ignores the plain language of section 25249.8 . . . which mandates the initial list include, 'at a minimum,' those chemicals identified by reference in Labor Code section 6382 . . . [which] refers expressly both to human and animal carcinogens and . . . incorporates the [HazCom Standard] which includes known animal carcinogens."

Nevertheless, "the standard remains ***known*** carcinogens." (Emphasis in original.) "[O]ur decision in *Deukmejian* was premised on an understanding that, for chemicals included in Group 2B, there was sufficient evidence of carcinogenicity in animals. . . . But, . . . that is not in fact necessarily the case. Group 2B includes substances for which 'there is ***limited evidence of carcinogenicity*** in humans and ***less than sufficient evidence of carcinogenicity*** in experimental animals." (Emphasis in original.)

Finally with respect to *Deukmejian*, the Court wrote: "[T]he only issue presented in *Deukmejian* was whether the Proposition 65 list must include both human and animal carcinogens, and we answered that question in the affirmative. We were not asked to consider ***the question here***, ***i.e., whether substances indentified by reference in an IARC monograph for which there is not sufficient evidence of carcinogenicity in either humans or animals must be included on the list."*** (Emphasis added.)

Turning to this pivotal issue, the State addressed OEHHA's other principal argument. The Agency contended that the language of Section 25249.8, referring to the provisions of section 6382 of the Labor Code that address "any substance within the scope of the federal [HazCom Standard]," dictates "that any chemical that meets [these statutory] criteria is***, by definition,*** "known to the state to cause cancer . . . ." (Emphasis in original.) In support, OEHHA argued that documents issued by the federal Occupational Safety and Health Administration ("OSHA") providing guidance on compliance with the HazCom Standard "make clear that all Group 1, 2A and 2B chemicals are to be considered carcinogens under the [Standard]."

The argument above is circular. As the Court explained, "the [HazCom Standard] is concerned with 'hazardous chemicals' . . . which include more than 'chemicals known to the state to cause cancer . . . .' Of course, the phrase "'any substance within the scope of the federal [HazCom Standard]' includes chemicals other than known carcinogens." Proposition 65 "itself, however, [is] concerned only with those substances that . . . are ***known to cause cancer*** or reproductive toxicity. Thus, the initial [Proposition 65] list . . . need not include all substances listed under [the HazCom Standard] but only those ***known carcinogens*** and reproductive toxins listed there." (Emphasis added.)

As to the OSHA guidance documents, the Court responded: "[t]his is not surprising since . . . the [HazCom Standard] expressly states that manufacturers, importers and employers must treat various sources, including IARC monographs, 'as establishing that a chemical is a carcinogen ***or potential carcinogen*** for hazard communication purposes.' (Emphasis added.) Thus, the [HazCom Standard], by its very terms, is not concerned solely with chemicals that are known to cause cancer . . . ."

Guidance for Future Disputes?

With the principal issues decided, the Court turned to an ancillary argument that its previous decision in *WPCA* would support the listing of styrene and vinyl acetate. That decision arose from a challenge to the listing of chemicals as reproductive toxicants for purposes of Proposition 65 under the Authoritative Bodies Listing Mechanism (not asserted as

the basis for listing styrene or vinyl acetate). The Court's analysis in resolving this argument may presage the path for future argumentation regarding chemicals proposed for listing under the Labor Code Listing Mechanism.

In *WCPA,* the plaintiff argued that the listing of chemicals as reproductive toxicants solely because they were designated for reporting under the TRI, administered by the United States Environmental Protection Agency (EPA) was improper, because EPA's TRI standard required listing of all chemicals that "either cause or 'can be reasonably anticipated to cause' reproductive toxicity."

Given the absence in the record of any evidence to demonstrate what standard EPA had applied with respect to individual chemicals, the Court declined to provide the plaintiff any relief: "on the record before us, we could not ascertain whether the standard applied by the EPA was broader than that applicable to Proposition 65. We then went on to assess whether, assuming the EPA standard is broader, ***OEHHA could nevertheless determine on a chemical-by-chemical basis whether the criteria used by the EPA satisfied the Proposition 65 standard.***" (Emphasis added).

"In other words, ***as long as there is sufficient evidence that EPA placed a particular chemical on the TRI list based on criteria sufficient to satisfy Proposition 65's requirement that the chemical be known to cause reproductive toxicity, it does not matter that the federal standard may otherwise be broader*** and that other chemicals may have been placed on the TRI list based on a lesser showing." (Emphasis added).

Known to Cause Cancer or Reproductive Toxicity

The Third District's decision in SIRC surely will have an impact on listing decisions for chemicals other than styrene and vinyl acetate. At the most basic level, the decision shows that the mere designation of a chemical as an IARC Group 2B "carcinogen" will not support listing. The Court's discussion of *WCPA* may indicate that OEHHA may examine IARC's underlying findings and the record of an IARC Monograph for support for listing. That discussion, however, as well as the holding in *SIRC,* also serve as reminders that any of OEHHA's listing decisions must be supported by the scientific record, and that the ultimate question is whether the chemical is "***known*** to the state" to cause cancer or reproductive toxicity.