

Appellate Court Rules That Alcohol Safe Harbor Warning is Sufficient to Shield Wine Producers from Prop. 65 Claim Based on Arsenic Levels

APPELLATE CASES, LITIGATION

By ROGER PEARSON, June 12, 2018

The Second District Court of Appeal has ruled that wine manufacturers, distributors, and retailers ("producers"), who provided OEHHA's generic safe harbor warning for alcoholic beverages, are not liable for failing to provide a separate Proposition 65 warning due to the presence of arsenic in their products. The decision upholds a lower court decision. **Doris Charles et al. v. Sutter Home Winery et al., Opinion, Second District Court of Appeal, #B275295¹** (May 9, 2018).

This lawsuit was brought by a group of private-party plaintiffs alleging that the defendant wine producers failed to provide a "clear and reasonable" warning to consumers exposed to alcohol and arsenic, which are listed under Prop. 65 as both carcinogens and reproductive toxicants. In addition the plaintiffs claimed violations of the state's Unfair Competition and Fair Advertising laws, as well as miscellaneous tort law violations.

Prior to this lawsuit a number of wine producers, which included many of these same defendants, entered into a consent decree resolving an earlier lawsuit against them. The consent decree in that case—**Bonilla v. Anheuser-Busch²**—provided that the settlement resolved "any violation of Proposition 65 that has been or could have been asserted against them..."

In this case the defendants had all provided the generic "safe harbor" warning covering alcoholic beverages that is contained in OEHHA's regulations. That warning reads as follows: "WARNING: Drinking Distilled Spirits, Beer, Coolers, Wine and Other Alcoholic Beverages May Increase Cancer Risk and, During Pregnancy, Can Cause Birth Defects." Based on this warning the defendants demurred to all counts of the plaintiffs' complaint.

In response, the plaintiffs noted that the defendants specifically add inorganic arsenic to their products for various purposes in amounts that exceed the safe harbor level for that chemical—10 micrograms/liter. Because of this deliberate addition the plaintiffs argued that the defendants should have provided an additional warning of the presence of the inorganic arsenic modeled after the OEHHA regulations generic warnings for carcinogens and reproductive toxicants. Such a warning, argued the plaintiffs, would prevent consumers from being misled that the only listed chemical in alcoholic beverages is the alcohol itself.

In response the Second District noted that Prop. 65 is designed to warn consumers of the presence of carcinogens and/or reproductive toxicants. The generic alcohol warning does exactly that: warn

consumers of both the carcinogenic and reproductive toxicant effects of alcohol consumption. Even assuming that including arsenic would be better policy, it is up to OEHHA to make that determination, the law does not require it.

The Court notes that as of August 31 of this year a new set of regulations governing warnings provides that a safe harbor warning must, for the first time, list at least one of the listed carcinogens and/or reproductive toxicants that are covered by the warning. However, this does not apply in the case of alcoholic beverages. The new regulations essentially adopt the now existing generic alcohol warning language.

Res Judicata and Collateral Estoppel

As an additional ground for its demurrer ruling, the lower court held that the res judicata effect of the Bonilla ruling prevented any Prop. 65 lawsuit against the settling parties in that case and that any action against non-settling parties was barred by collateral estoppel. The Second District upheld these rulings rejecting several arguments by plaintiffs.

Other Causes of Action

Finally the Second District upheld the lower court's dismissal of the Unfair Competition, Fair Advertising, and tort law claims agreeing that all of those claims were based on Prop. 65 and therefore failed along with the dismissal of the action.

Resources for this article

1. Doris Charles et al. v. Sutter Home Winery et al., Opinion, Second District Court of Appeal, #B275295
<https://prop65clearinghouse.com/documents/26781>

2. Bonilla v. Anheuser-Busch
<https://prop65clearinghouse.com/cases/3126>