

# Prop 65

## Food Claims Continue in 2021

*Hundreds of food claims have been initiated in the first months of 2021. What should food producers do?*

### **What is Proposition 65?**

California's Proposition 65 (Prop 65), also known as the *Safe Drinking Water and Toxic Enforcement Act of 1986*, requires "clear and reasonable warnings" on consumer products (including foods) sold in California if use of the products causes an exposure to chemicals on the Prop 65 list, a list of over 900 chemicals, at a harmful level. Prop 65 claims continue to have a significant impact on the California food and beverage industry, as they have throughout, and before, the COVID-19 pandemic.

Prop 65 is a powerful regulation because it contains a "citizen attorney general" provision, and citizen plaintiffs frequently enforce it. It permits citizens to bring claims against alleged violators, initiated by a document called a 60 Day Notice of Intent to Sue (Notice), and to recover their attorneys' fees in so doing. Prop 65 also authorizes monetary penalties of up to \$2,500 per day for each violation.

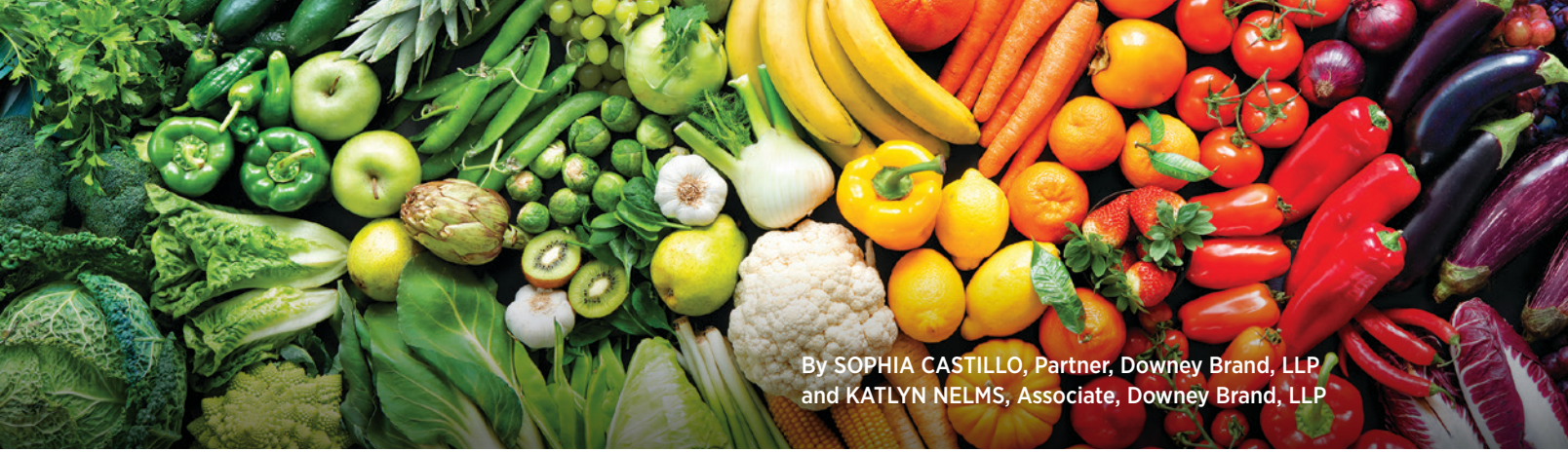
The allegations of "bounty hunter" plaintiffs have evolved over the course of the regulation, and have become quite creative, reaching far above and beyond the traditional Prop 65 claim that products

contain lead, and thus require a standard warning label. Plaintiff groups continue to allege that various chemicals in foods require Prop 65 warning labels, claiming the use or consumption of the products expose California consumers to chemicals in quantities that could cause cancer or reproductive harm. Food claims have skyrocketed for certain foods in particular, which we discuss in this article.

### **Common Prop 65 Notices for Food**

Typically, plaintiffs test foods without warning labels and that contain common chemicals, and initiate a lawsuit if the foods contain chemical(s) on the Prop 65 list by sending a Notice. Prop 65 plaintiffs have sent thousands of Notices over the past several years, and hundreds of Notices in 2021 so far, alleging that a variety of food products contain acrylamide, lead, mercury, arsenic, and cadmium, all chemicals on the Prop 65 list. These Notices allege that the food products contain these chemicals, and therefore, also allege that the products must contain the all too familiar "Prop 65 warning" on their label or packaging. Grocers, national food brands, and private label suppliers have received Notices in the last several years. The defense of these Notices often makes its way up the supply chain through tenders of defense and requests for indemnity, and ultimately can rest with the food suppliers and processors who are at the top of the domestic supply chain.





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Since the implementation of Prop 65 in the 1980s, plaintiffs have sent more than 30,000 of these Notices. The COVID-19 pandemic did not slow these claims. In 2020, plaintiffs sent over 3,500 Notices to companies doing business in California, for foods, personal care products and consumer products.

Chemicals and foods targeted within the last year include:

- Seaweed and packaged/canned seafood products (lead, arsenic and cadmium)
- Canned goods, including fruits and vegetables (mercury, lead and acrylamide)
- Fresh and leafy vegetables (metals)
- Vinegars (lead and carbaryl)
- Spices (metals)
- Various food products including dietary supplements, pasta, rice bites, wraps/tortillas, snack bars, sunflower seeds, chips, cinnamon rolls, mole sauce, ramen, muffins and sunflower seeds (metals)
- Baby food, fruit and vegetable pouches (acrylamide and lead)
- Nut products, including butters (acrylamide)
- Toasted and roasted snack foods including corn, chips, crackers, cookies, tortilla chips, tostadas and taco shells (acrylamide)

These Notices are significant in their variety, and also consistent in their trends. Plaintiffs tend to, for the most part, limit their claims to metals and acrylamide. Occasionally, a new chemical is included in Notice allegations. Some of these Notices have updated prior Notices with supplier/manufacturer information, and other Notices are completely new. Certain products,

including vinegars, baby foods, and canned seafood have been the subject of Prop 65 Notices and settlements in the past.

### **Compliance with Prop 65 and Defense of Prop 65 Claims**

Compliance with Prop 65 is complicated. It requires an understanding of the chemical content of food products sold in California, and whether the consumption of a product “exposes” California consumers to one of the chemicals on the Prop 65 list, at a level that may cause cancer or reproductive toxicity. This exercise includes a calculation of chemical exposure, which is a technical determination as to whether exposure occurs at a level exceeding a “safe harbor” level that is published by the State of California. If exposure occurs, the standard Prop 65 warning is required. If a plaintiff disagrees with a business’ determination that a warning is not required, it may initiate a citizen lawsuit.

The costs of compliance with Prop 65 labeling are significant, as are the costs of defending and resolving Prop 65 citizen lawsuits. Prop 65 lawsuit defense necessarily includes time-intensive expert opinions that justify a defendant’s decision not to post a Prop 65 warning on its products in the first place.

Because of the costs associated with litigating Prop 65 claims, recipients of Prop 65 Notices will typically opt to settle the claims instead of taking the matter to court. Settlement costs, per year, result in millions of dollars paid by defendants to citizen plaintiff groups and their attorneys, as well as penalties paid to the State of California.

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### **Recent Acrylamide Developments**

For the chemical acrylamide, recent proposed amendments to the Prop 65 regulations and a preliminary injunction issued in litigation on behalf of the regulated community may offer some relief. In 2020, the State of California proposed regulatory amendments that would provide levels below which concentrations of acrylamide do not represent an “exposure” that would require a Prop 65 warning label. If acrylamide concentrations in the foods are reduced to the lowest level feasible using appropriate quality control measures, certain foods containing acrylamide below the mandated levels would not be required to bear a Prop 65 warning.

Most recently, the US District Court for the Eastern District of California preliminarily enjoined the filing of lawsuits seeking cancer warnings for acrylamide on food and beverage products sold in California. The ruling stops the filing of any new acrylamide lawsuits seeking to enforce the cancer warning label on food products, and ties the hands of bounty hunter plaintiffs that have sent, or planned to send, Notices alleging that food products contained acrylamide, and therefore required a Prop 65 warning label.

Most recently, the US District Court for the Eastern District of California preliminarily enjoined the filing of lawsuits seeking cancer warnings for acrylamide on food and beverage products sold in California. This ruling has been appealed to the Ninth Circuit Court of

Appeals. Litigation regarding this ruling is ongoing in the Ninth Circuit.

### **What Should Food Producers Do Next?**

Prop 65 is a powerful regulation that citizen plaintiffs frequently seek to enforce. Those in the food industry are well served to monitor Prop 65 60-Day Notice trends and evaluate their California sales for products that could be challenged by Prop 65 plaintiffs in the future.

Those in the food industry are also well served to talk with their customers regarding their preferences for warning labels (some retailers are “ok” with Prop 65 warning labels, others would prefer that the products they sell not contain the labels), and consult their contractual arrangements for indemnity obligations that may already be in place. Many retailers and distributors require those that are “up the supply chain” to defend Prop 65 claims. This obligation often prompts a deeper dive on Prop 65 compliance and a consideration of whether products might need Prop 65 warning labels. The ultimate defense to a Prop 65 claim is, of course, an exposure assessment demonstrating that the consumption of the food product does not expose a California consumer to a chemical on the Prop 65 list, at a level that exceeds the “safe harbor” in the regulation, and therefore, that the food product does not need a warning label.