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Lead in Lipstick: Manufacturers and Retailers May Be Subject to Citizen Suits in California

A California nonprofit coalition, Campaign for Safe Cosmetics, claims that some name brand red lipsticks used daily by millions of women contain high levels of lead. While the U.S. Food and Drug Administration (FDA) has not set a limit for lead in lipstick, these products may be subject to the consumer warning requirements of California's Proposition 65.

Proposition 65 is a California state law that regulates chemical carcinogens and reproductive toxins in order to protect public and environmental health. The statute requires that manufacturers, distributors, and retailers of products containing chemicals known to the state of California to cause cancer or reproductive harm provide a "clear and reasonable" warning when the concentrations of those chemicals exceed the safe harbor levels established by the California Office of Environmental Health Hazard Assessment (OEHHA). OEHHA has established the carcinogenic "No Significant Risk Level" (NSRL) for lead at 15 micrograms per day and the reproductive toxicity "Maximum Allowable Dose Level" (MADL) at 0.5 micrograms per day.

According to the nonprofit coalition, the Campaign for Safe Cosmetics, among the top brands testing positive for lead were:

- L'Oreal Colour Riche "True Red" 650ppb
- L'Oreal Colour Riche "Classic Wine" 580ppb
- Cover Girl Incredifull Lipcolor "Maximum Red" 560ppb
- Dior Addict "Positive Red" 210ppb

Under Proposition 65, once a chemical has been found in a product, the burden shifts to the defendant to show that the daily exposures are below the NSRL and the MADL set by OEHHA or that a "clear and reasonable" warning has been provided. Establishing that lead concentrations are below the safe harbor level may involve additional testing as well as an

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analysis of such issues as the number of times each day a woman uses her lipstick, the amount of lipstick that is applied each time, and the amount of lipstick that is then ingested.

Proposition 65 is enforceable by the State Attorney General, County District Attorneys, and City Attorneys in cities with populations in excess of 100,000. In addition, Proposition 65 is enforceable by citizen suits. In 2005, over 500 citizen suits were brought under Proposition 65; the 10 biggest targets included Longs Drug Stores, Target Corporation, Rite Aid Corporation, JCPenney Company, and Wal-Mart Stores.

The penalties for violating the warning provision of Proposition 65 include injunctive relief, penalties of up to \$2,500 per violation, and payment of the prevailing plaintiff's legal fees. Each sale is considered a separate violation with a statute of limitations running back one year from the date of the complaint. Prevailing citizen plaintiffs also are entitled to 25 percent of the penalties recovered.

What to Do Now

Manufacturers, distributors, and retailers of lipstick should consider taking immediate action to assess the lead levels in the products sold in California and compare those levels to the safe harbor levels established by OEHHA.

Meanwhile, distributors should consider removing lipsticks with high lead levels from their shelves or, alternatively, posting the appropriate Proposition 65 warnings.