

L.A. Judge Rules in Favor of Rice Company in Prop. 65 Warning Fight

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After overseeing a rare trial over Proposition 65 compliance, a Los Angeles County superior court has dismissed allegations that a rice processing and distribution company violated Prop. 65 by failing to warn the public about lead in its rice.

The case, [*CAG v. Gulf Pacific Rice Co Inc.*](#), is part of a wider coordinated proceeding in Los Angeles County Superior Court involving several lawsuits filed by Consumer Advocacy Group related to lead in rice. The court has been hearing the cases since 2014 and Houston-based Gulf Pacific was the last remaining defendant in the proceeding. The other defendants in the cases have previously reached settlements.

In a [19-page proposed statement of decision](#), Judge Elihu Berle concluded that Gulf Pacific did not run afoul of Prop. 65, pointing to a 2015 state appellate court ruling over lead in baby food, *Environmental Law Foundation v. Beech-Nut Nutrition Corp.*, 235 Cal. App. 4th 307 [see [Appellate Court Upholds Lower Court Decision on Determining Safe Harbor Level for Lead](#), July 10, 2015].

But first, the court rejected all of Gulf Pacific's constitutional claims, including that the Prop. 65 warning requirement violated their First Amendment right against forced speech. The defendants also alleged that the law violated their due process rights because Prop. 65 is unclear and that it burdens interstate commerce in violation of the Commerce Clause. Berle dismissed both of those claims.

The court also rebuffed Gulf Pacific's contention that Prop. 65 is preempted by the Federal Food, Drug and Cosmetic Act.

"Prop. 65 warning requirements were designed to avoid prescribing any particular warning method specifically so as not [to] be in conflict with federal regulations," Berle wrote.

The court did agree with Gulf Pacific's contention that the lead levels in its rice were below the Maximum Allowable Dose Level (MADL), or safe harbor level, for lead, and therefore there was no need to warn.

The Office of Environmental Health Hazard Assessment (OEHHA) set the safe harbor level for lead at 0.5 micrograms per day in 1989. Under Prop. 65, no warning is required for exposures below the safe harbor level.

In his ruling, Berle endorsed the methodology for determining lead exposure that was laid out in *Beech-Nut*. In that Prop. 65 case, the court ruled it was reasonable to average lead content in baby food across multiple samples and to use the geometric mean rather than the arithmetic mean to calculate the average lead content.

Using the geometric mean "is more appropriate in calculating average amounts of lead in rice because it reduces the effect of 'outlier' test results," according to the ruling.

Berle also rejected the plaintiff's argument against using the [National Health and Nutrition Examination Survey](#) (NHANES) data from the Centers for Disease Control and Prevention's National Center for Health Statistics. Gulf Pacific used that data to determine average food consumption rates, but Consumer Advocacy Group argued that it failed to adequately assess exposure within subpopulations, in this case Asian cultures with high rice consumption.

"Using NHANES for calculating lead exposure in this case provides for the inclusion of all consumers of the food and is not limited to any specific subpopulation, ethnicity, gender or other subcategory," Berle wrote. "An assessment that uses data from just one ethnicity is not a valid, representative sample."

Averaging lead content across multiple rice samples from the plaintiff and the defense's one sample, and basing consumption frequency over a 30-day period based on the NHANES data, Gulf Pacific's expert concluded that the rice's lead level was 2.6 parts per billion and that the exposure rate was 0.1 micrograms per day.

"Based on the evidence and credibility of witnesses, the court concludes that Gulf has met its burden of proof by preponderance of the evidence to establish that the level of exposure to lead from the subject product did not exceed the safe harbor level," Berle wrote.

Berle has 30 days to hear objections to his proposed decision.

The coordinated proceeding before the Los Angeles County Superior Court also included a lawsuit that the California Rice Commission and USA Rice Federation filed against Consumer Advocacy Group challenging the notices of violation it had filed against numerous companies related to lead, arsenic and cadmium in rice.

In 2018, [those three parties reached a settlement](#), approved by the California Attorney General's office, that set an industry-wide concentration-based threshold for determining whether rice should carry a Prop. 65 warning. That settlement set the de facto safe harbor level for lead in rice at 56 parts per billion (ppb), 500 ppb for inorganic arsenic and 462 ppb for cadmium. Since then, several rice companies reached settlements in the coordinated proceeding.

According to records on the California Attorney General's website all but one of the 52 notices of violation filed for lead in rice have been filed by Consumer Advocacy Group. Of those, there were 14 listed settlements and judgments totaling \$130,000 in civil penalties, \$1.8 million in attorney's fees and \$116,120 in other payments.

[Consumer Advocacy Group's closing brief in the trial is here](#) and [Gulf Pacific's closing brief is here](#).