Legal Backgrounder

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CALIFORNIA COURT RELUCTANTLY REJECTS PROPOSITION 65 APPEAL

by

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"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."

-John Adams[1]

On March 11, 2009, California's Court of Appeal for the First District decided in *People v. Tri-Union Seafood*, A116792, that canned tuna is not required to bear a Proposition 65 warning because "substantial evidence supports the trial court's finding that methylmercury in tuna is naturally occurring, thereby removing the Tuna Companies from the reach of Proposition 65." It is also one of the most reluctant rulings you will ever read. The panel should be commended for correctly upholding the trial court's decision despite what appears to have been deep unhappiness with the result.

Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act of 1986,[2] requires consumer warnings on all of the more than 800 substances on California's list of "chemicals known to cause cancer or reproductive toxicity." There are limits, however, to the warning requirement: it does not apply to exposures that are less than 1/1000 of the level that cause no observable reproductive effect;[3] it does not apply when federal law preempts the warnings;[4] and it does not apply to the lowest

[1]Closing argument in *Rex v. Wemms* (the Boston Massacre Trials), October 30, 1770

[2]California Health & Safety Code sections 25249.5 *et seq.*

[3]California Health and Safety Code § 25249.10(c).

[4]California Health and Safety Code § 25249.10(a).

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feasible levels of naturally-occurring substances in foods.[5]

Canned tuna is one of the most convenient and inexpensive sources of the two servings per week of fish and seafood recommended by the American Academy of Pediatrics and the FDA during pregnancy. It contains omega-three fatty acids essential to proper fetal development, it is low in calories, and it is high in protein. Nevertheless, in 2004, California's Attorney General sued to force tuna canners to place birth-defect warnings on tuna cans or grocery aisles because all tuna contains traces of mercury. The tuna canners resisted. The issue has immense public health importance; a warning could discourage women from eating enough seafood during pregnancy.

After a six-week trial, the tuna canners prevailed on the previously listed three grounds. The trial court ruled in a 118-page opinion that (1) the amount of mercury in tuna is below the level that requires a Proposition 65 warning; (2) the FDA's policy against placing warnings on healthy foods contradicts Proposition 65; and (3) the mercury in tuna occurs naturally, emitted from deep-sea vents that release mercury and other chemicals into the sea in gusts of heat from the earth's crust. The Attorney General appealed.

In its March 11, 2009 decision, the Court of Appeal carefully reviewed the record, including the intricacies of determining a "no-observable-effect" level, the details of the FDA's advice to eat fish during pregnancy, and the science behind mercury's natural occurrence in ocean fish.

It is uncontested that ocean fish contain unavoidable traces of mercury from ocean water, and that the mercury in canned tuna fish is at the lowest possible level. The issue at trial: how the mercury gets into the ocean water. If it occurs naturally without any human input, then Proposition 65 does not require a warning. The defendants met their burden to prove this negative.

The opinion includes a lengthy description of expert witness testimony on the sources of mercury in tuna presented by both parties – all from "eminent scientists who had published major peer-reviewed articles." (Slip op. at 25) The court explained that elemental mercury enters the atmosphere from volcanoes and factory emissions, ionizes, and then falls on the earth and oceans as rain. (Slip op. at 12) This "mercury cycle" existed long before humans. Since the industrial revolution, atmospheric mercury has increased by about 300% (according to the tuna canners) or by 200-400% (according to the AG). (Slip op. at 13) However, the amount of mercury in ocean fish has not increased; it may even have decreased over the past thirty years. If the mercury in ocean fish were from factory emissions, it should increase with the rise in atmospheric mercury – but it doesn't. Moreover, the trace mercury found in ocean fish is not elemental mercury; it is "methylmercury," that is, mercury bonded with carbon atoms. Methylmercury is not emitted from factories, and there is no way for elemental mercury from the atmosphere to become methylmercury in ocean water. From this evidence, the trial court found that the mercury in tuna is naturally-occurring. (Slip op. at 16)

So, where does the methylmercury in ocean water come from? The best current hypothesis is that in the deep sea, extreme heat and pressure bond mercury and carbon into methylmercury, which moves into the ocean in bursts of hot water released through the ocean floor. The state argued on appeal that the deep-sea vent hypothesis is not yet fully accepted, and that the defense therefore had not proved that methylmercury occurs naturally in ocean fish. The Court of Appeal disagreed:

[5]Title 27, California Code of Regulations, § 25501.

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> The state confuses the evidence that there is no anthropogenic contribution to methylmercury in ocean fish with hypotheses concerning the source of methylmercury in the ocean. Although the source(s) of methylmercury remains has to be nailed down, every study that has tested whether methylmercury in tuna has anthropogenic contribution has concluded it is naturally occurring. In any event, [the state's expert and the defendants' expert] both agree that deep ocean vents are a source of methylmercury in the deep ocean. . . . It appears that the State confuses the *evidence and finding* that there is no anthropogenic contribution to methylmercury in tuna with the *hypothesis* about the *source* of methylmercury in the ocean. (Slip op. at 23-25, original emphasis)

That is, the canners were required to provide evidence that the mercury in fish occurs naturally without human contribution, and they did. They were *not* required to prove *exactly how* it occurs naturally, although they did provide the current best hypothesis. The Court of Appeal held that there was substantial evidence to support the trial court's decision. (Slip op. at 25)

In several pages of dicta, the Court of Appeal then made its best efforts to limit – one might even say, to undermine – its own holding. First, the court emphasized that it viewed "the trial court findings through the filter of the highly deferential substantial evidence test, a test that is difficult to overcome." The court implied that if it were not required to defer, it would not have done so, lamenting, "When substantial evidence supports the trial court's decision, as it does here, we have no power to substitute our own deductions or preferred set of facts." (Slip op. at 26)

The court then appeared to consider abandoning the substantial-evidence standard, musing that "application of the substantial evidence rule to the testimony and opinions of dueling experts" may not "best derive" the "truth about complex, threshold scientific issues encompassed within Proposition 65." (Slip op. at 26) Did the court mean to say that policies on food warnings should be regulated by federal agencies that are best qualified to make decisions that support the public health, rather than being made by lawyers litigating product-by-product and chemical-by-chemical? Unfortunately, it did not. The court actually proposed another layer of expensive litigation. The court noted that the Evidence Code allows courts to appoint its own experts, and that the use of this procedure "could reduce the risk of a decision based on anything but the most valid scientific investigation and assessment." Of course, the problem with that procedure is its staffing. The parties in high-stakes litigation like this one retain the best-informed, most highly qualified experts for trial. In the tuna case, the experts were highly-qualified professors from prestigious institutions. They testified about the methods and results of their own ongoing scientific studies. It is unlikely that the court's experts would know more about the studies, or explain them better. And who would pay the court's experts? Presumably the parties – whose already exorbitant costs would be further magnified by having to cross-examine the court's experts and then put the outside experts on the stand to affirm, negate, or explain the finds of the court's experts. The only approach to achieve greater certainty would be to deny the parties' rights to confront the court's experts, undermining the adversarial fact-finding our legal system depends on. Suggesting a change from the adversarial system to an inquisitorial system solely for Proposition 65 sounds more like a wish for a different factual finding than a reform for a misguided statutory scheme.

Next, the Court of Appeal asserted that its decision is not "conclusive" for all the issues in the case, because it was "confined" to the naturally-occurring defense. The court disregarded as inconsistent with "modern case law" and earlier California Supreme Court ruling, never "expressly overruled," that a general affirmance renders a judgment res judicata on all issues. (Slip op. at 27)

Finally, the court imagined a number of unlikely "scenarios that could possibly lead to a renewed Proposition 65 claim … that would survive res judicata and collateral estoppel challenges" (slip op. at 28): The naturally-occurring defense might be amended so that it doesn't apply to canned tuna. Or, Proposition 65 might be changed so that the Office of Environmental Health Hazard Assessment and not the court determines whether a substance occurs naturally. Or, new research might indicate that the mercury in ocean fish is not naturally occurring.

Reading this opinion, one cannot avoid the impression that the Court of Appeal disliked its result so much that it wanted to give up the principles of *stare decisis* and *res judicata*, the substantial evidence test, and the advocacy system itself rather than allow canned tuna to go without a Proposition 65 warning. Wanted to – but didn't. In the end, the Court of Appeal carried out its judicial duty to apply the law to the facts as determined by the trial court and supported by substantial evidence. This is great news. Not only does it show that Proposition 65 has its limits – it shows that California still has, as John Adams said, "a government of laws, and not of men."[6] In the end, although the people on the panel may have wished for a different result, the rule of law prevailed. No matter what you think of Proposition 65, we can all be grateful for that.

[6]Oration at Braintree, Massachusetts, 1772.

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