



MEMORANDUM

TO: All CH&LA Members

FROM: Jim Abrams

DATE: May 7, 2003

SUBJECT: PROPOSITION 65 FOOD/BEVERAGE WARNINGS

THIS MEMO CONTAINS EXTREMELY IMPORTANT INFORMATION FOR EVERY CH&LA MEMBER WHO SERVES FOODS OR BEVERAGES – BE SURE TO READ IT CAREFULLY AND TO COMPLY ASAP WITH ITS DIRECTIONS!!

There have been a number of recent Proposition 65 developments involving food products, including the filing of lawsuits by the California Attorney General against grocery stores, restaurants, and hotels regarding the presence of *mercury in fish and seafood* and the ongoing debate about what, if any, harm is posed by the presence of *acrylamide* in many food products.

Failure to provide proper warnings related to Prop. 65 chemicals in foods and beverages can result in very substantial financial liability under both Prop. 65 and California's "unlawful competition law" (Business and Professions Code Section 17200). In fact, one attorney has already filed a suit against a number of restaurants and hotels regarding this issue. **This makes it imperative that every innkeeper who sells or serves foods and/or beverages in his or her operations – including those of you who do nothing more than provide a continental breakfast in the morning – post a warning ASAP.**

This memo provides you with further information about what is involved in this area, tells you exactly what you should do immediately, and provides you with the warning document that you need to be sure that you are complying with Prop. 65 as it relates to foods and beverages.

NOTE: CH&LA and its legal counsel are in the process of developing a more comprehensive Proposition 65 warning/notification procedure that will protect innkeepers for a much wider variety of Prop. 65 chemicals, that is, not just for foods and beverages. We anticipate having that procedure approved by the court in CH&LA's global Proposition 65 settlement this summer. But, in order to provide our members with immediate protection for chemicals in foods and beverages, we are providing this memo and the attached sign for your immediate use. Any member with questions about this complex issue should contact Jim Abrams at CH&LA (**916-554-2676** or jabrams@chlaonline.com) or competent Prop. 65 legal counsel.

1. Is every innkeeper covered by Proposition 65?

No! Proposition 65 applies only to those employers who have **ten or more full- and/or part-time employees**. If you have ten or more employees on some days but not on all days, Prop. 65 applies to you, at the very least, with respect to the days on which you have ten or more employees.

2. Are there Prop. 65 Chemicals in Foods/Beverages Served at Hotels and Inns?

Yes! There are over 600 chemicals on the Proposition 65 list of “chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm.” Some of those chemicals are found in foods and beverages sold, served, and consumed everyday. For example, alcoholic beverages contain *ethyl alcohol*, peanuts contain *aflatoxin*, *benzo[a]pyrenes* are created when meat, poultry, and fish are broiled, and *acrylamide* is produced when certain starch-containing foods are cooked at high temperatures or for a long time (e.g., french fries and bread). **The bottom line is that every innkeeper who serves foods/beverages is at risk for a Prop. 65 claim and should provide the warnings described below!**

3. What Foods/Beverages Require a Proposition 65 Warning?

- a. **Alcoholic Beverages:** Every innkeeper who sells or serves alcoholic beverages of any kind must post or otherwise provide very specific Prop. 65 warning language at each and every place where alcoholic beverages are sold or served (including via room service, in guest room mini-bars, in private meeting and banquet rooms, and outdoors). The required signs and notices are generally available free from the distributors who sell you your alcoholic beverages.

The Prop. 65 regulations regarding alcoholic beverages are very detailed, the warnings have to be posted regardless of whether any other food- or beverage-related warning is required, and they must be kept separate from any other Prop. 65 warnings (that is, they cannot be incorporated in other warning signs or notices). **For a comprehensive discussion of all of the details related to warning about alcoholic beverages, see Chapter 25 of CH&LA’s newly published law book, *Laws Pertaining to the California Innkeeper* (3rd rev. ed.).** You can obtain a copy by contacting Sue Norton at CH&LA (916-444-5780 or snorton@chlaonline.com).

- b. **Mercury in Fish and Seafood:** Fish and seafood can be an important source of nutrition and an important part of a balanced diet. **However**, nearly all fish and seafood contain some amount of mercury and related compounds, which are on the Proposition 65 list. Of particular concerns is methylmercury, which can harm an unborn child’s developing nervous system.

But not all types of fish and seafood contain equal amounts of these chemicals. Some of the longer-lived larger fish, including shark, swordfish, and tuna, accumulate higher levels of methylmercury and pose a greater risk to people who eat them regularly. For this reason, FDA advises that pregnant women, women who may become pregnant, nursing mothers, and young children should not eat the larger fish that contain high levels of methylmercury: shark, swordfish, king mackerel, and tilefish. (In addition, both the FDA and the EPA advise women who are pregnant or who may become pregnant, nursing mothers, and young children to limit their consumption of fish and seafood generally.)

The presence of methylmercury in most, if not all, fish and seafood, is what has prompted the Attorney General to sue a number of large grocery store chains, restaurant chains, and at least one prominent hotel company for failure to provide Prop. 65 warnings.

- c. **Acrylamide and Other Prop. 65 Chemicals:** Private Prop. 65 lawsuits have been filed against McDonalds and Burger King because acrylamide is in their french fries, as well as against other entities. But the Attorney General’s office is currently of the view that it is unclear whether the mere fact that there is acrylamide present in various foods means that a warning is required under Proposition 65, and the State of California and a number of other entities are currently examining this issue on a comprehensive basis.

Nonetheless, there is little doubt that private litigants are going to start filing notices of violations against restaurants and hotels that serve foods/beverages. Regardless of whether your foods/beverages contain listed chemicals that require a warning, the potential risk of liability is so high that most business people will settle these claims rather than fight them. **For this reason, CH&LA strongly urges all innkeepers who serve foods/beverages of any kind to provide the Prop. 65 warning discussed below in order to protect themselves as much as possible against claims.**

4. What Do I Need to Do?

Although the current legal proceedings involving grocery stores, restaurants, and hotels involves mercury in fish and seafood, it is clear that innkeepers face Proposition 65 risks with respect to a number of other chemicals that are present in foods and beverages. **Therefore, CH&LA strongly recommends that every innkeeper who serves any type of foods/beverages post a sign which contains the legal “safe harbor” language which satisfies the Prop. 65 warning obligations for all listed chemicals (i.e., not just mercury) in foods and beverages.**

Note: Posting the required sign in the manner discussed below will protect you from and after the day on which you first post it, but it will not protect you going backwards. That is, you can still be subject to a claim that you violated Prop. 65 for each of the days prior to when you first posted the warning. However, the CH&LA members which are participating in CH&LA's global Prop. 65 settlement will have protection that will apply retroactively.

The sign that you need to post is attached to this memo. For those of you receiving this memo via e-mail, you can download the sign and print it out on your printer and post it immediately. This memo and the required sign are also available on CH&LA's web site and can be downloaded from it (www.chlaonline.com).

There are several important aspects of using this sign which need to be noted:

- ▶ CH&LA is in the process of printing the required signs, and we will provide them free to members. But if you want to get your signs up in the meantime, you can copy or print the attached sign and post it ASAP.
- ▶ If you wish to prepare your own signs, be sure that you do not change **any** of the wording or the punctuation. **Any deviation whatsoever can open you up to potential liability.**
- ▶ The Attorney General's office has informed CH&LA that there is no minimum size for this sign, but given the fact that the alcoholic beverage warning sign is required to be 10" x 10", CH&LA strongly advises that the mercury-in-fish/seafood signs should be at least 8½" x 11".
- ▶ As far as **free-standing restaurants** are concerned, the Attorney General's office has indicated that one of these signs should be posted at every public entrance to the restaurant. The placement of the sign should be such that it will be easily seen and read by everyone entering the restaurant.

Although the wisest course of action is to post one of these signs at each public entrance, because everyone who enters the restaurant will be sure to see it, this doesn't mean that the sign(s) can't be placed somewhere else, such as, for example, at the host/hostess station. *If* you elect to use some different location(s) than the public entrance(s), the key is to be sure that everyone who will eat at the restaurant will see the sign before ordering and consuming fish/seafood.

- ▶ The issue of where these signs should be posted in hotels and other lodging establishments is troublesome. **If your establishment is all contained in one building, then posting the signs at each public entrance will be sufficient.** Everyone entering the building will see the signs before ordering or consuming fish/seafood – regardless of whether that is in one of your restaurants, via room-service, or at a private meeting or banquet.

- ▶ **If, however, your property consists of more than one building, you need to develop a procedure to provide the warning in different locations and in connection with different types of food-service scenarios.** For example, if your property consists of many separate guest accommodations (e.g., if you have separate bungalows or cabins, or if you have two or more buildings in which people can get foods and beverages) you need to devise a way to provide the required warning in a manner appropriate to each situations. Specifically:
 - For room service, CH&LA recommends that the exact same language that is on the required sign be placed on the first page of your room service menu. Depending on the size of your room service menu, you can either place the 8½" x 11" sized warning in it or reduce the warning so that it is appropriate to the size of the menu but still of a size and in a location so that no one can reasonably argue that it couldn't be seen and easily read.
 - For food/beverage service in private meeting and banquet rooms, CH&LA suggests that the warning signs be posted at each entrance to each meeting banquet room. If guests will be obtaining their foods/beverages at a buffet line in a meeting or banquet room, one could instead put the warning on the buffet table; however, CH&LA believes that the safest course to follow is to post the sign at each entrance.
 - For food/beverage service conducted outdoors, you will need to have signs posted so that everyone going outside will see the warning. If there are exits to your outdoor service areas, post the signs at the exits. If, however, people can get to the outdoor service area without going out one of those exits (e.g., if they can get to the pool or lawn area directly from their guest rooms), you will need to have the signs posted as appropriate (e.g., on a stanchion or on food/beverage service tables) in the outdoor areas.

Concluding Caveat: Although the information in this Bulletin and in the materials which are attached represent the best thinking of CH&LA and its attorneys, CH&LA is not engaged in the practice of law. This document is being provided to CH&LA's members solely as an information resource, and any member with questions or concerns regarding this complex issue, or Prop. 65 generally, should be sure to consult with competent legal counsel.

WARNING

**Chemicals Known To The State Of California To
Cause Cancer, or Birth Defects or Other
Reproductive Harm May Be Present In Foods Or
Beverages Sold or Served Here.**