DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

2101 WEBSTER STREET, 12th FLOOR
OAKLAND, CA 94612
(510) 286-4200

FACSIMILE: (510) 286-4020
(510) 286-1364

June 12, 1995

Martin B. Wasser
Phillips, Nizer, Benjamin, Krim & Ballon
31 West 52nd Street
New York, NY 10019-6167

RE: Proposition 65 Notice to Harve Bernard Ltd -
Responsibility for exposures to perchloroethylene

Dear Mr. Wasser:

This is in response to your inquiry in your letter of May 2, 1995, concerning the 60-day notice sent by the Mateel Environmental Justice Foundation and the Pacific Justice Center on March 21, 1995, alleging that Harve Bernard Ltd., has violated California's Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65. The notice alleges that your client is an entity that manufactures, distributes or sells "dry clean only" clothing, and that as such it is responsible for exposures to perchloroethylene, a chemical known to the State of California to cause cancer, that occur when the clothing is dry-cleaned using that chemical.

This question raises a number of issues concerning the responsibility for exposures where the exposure results in some way from the interaction of two or more products or services. Accordingly, in order to explain our views and how they have informed our enforcement policy, and answer some of the questions raised, we have decided to address the issues more broadly.[1/]

We hope this analysis of the statute and the existing regulations provides helpful guidance to the public. If, however, some of these issues were addressed by subsequent changes in regulations (within the scope of the statute), the views expressed in this letter would be subject to revision in the light of those changes. In developing the views expressed in this letter, we have consulted with the designated lead agency for Proposition 65, the Office of Environmental Health Hazard

---

1. This letter addresses consumer product exposures only, not environmental or occupational exposures. In addition, it addresses liability under Proposition 65 only.

Assessment (OEHHA). OEHHA has authorized us to state that it concurs in the analysis and conclusions reached in this letter.

A. Statutory and Regulatory Background

The "warning" requirement of Proposition 65, Health and Safety Code section 25249.6, provides:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

The statute provides no more specific guidance concerning the determination of what person creates the "exposure" subject to the Act.[2/]

The regulations define exposure in two contexts. First, "expose" is defined as follows:

> The term "expose" means to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a chemical. An individual may come into contact with chemical through water, air, food, consumer products and any other environmental exposure as well as occupational or workplace exposures.

(22 CCR § 12201(f).) This broad definition simply establishes that if one "causes" a person to "come into contact" with a listed chemical, one has "exposed" persons within the meaning of the statute. Consumer product exposures are defined more specifically:

---

2. Section 25249.11(f) provides that regulations shall "to the extent practicable place the obligations to provide any warning materials such as labels on the producer or packager rather than on the retailer seller, except where the retail seller itself is responsible for introducing a (listed) chemical(.)" This language suggests that more that one party can be responsible for giving a warning, and directs the agency to develop regulations. It is relevant primarily to the issue of which party in the chain of distribution of a given product must provide the warning, however, rather than the issue of the interaction of different products and services.

> A "consumer products exposure" is an exposure which results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good or any exposure that results from receiving a consumer service.

(22 CCR § 12601(b).)

The regulations also set forth "safe harbor language" concerning certain "consumer products that contain a (listed) chemical(.)" (22 CCR § 12601(b)(4).) While it has been suggested that this limits the duty to warn to products that actually contain a listed chemical, this construction cannot be reconciled with the broad definition of consumer product exposure, which is not so limited. Instead, this language merely establishes that the adopted safe-harbor warning language for consumer product exposures is limited to those situations in which the product contains the chemical. There is no safe harbor language available for other types of consumer product exposures.

Finally, there are some regulatory provisions determining that certain parties are not responsible for exposures to a listed chemical, even though it might be argued that the party has provided the instrument or mechanism by which the exposure occurs. In these situations, the person's actions do not actually increase the level of exposure to any individual over what it otherwise would be. For example, where a person provides water from a public drinking water system that contained a listed chemical when received, it is not responsible for the exposure to chemicals in that water. (22 CCR §12503.) Similarly, a person who provides air containing a listed chemical is not responsible for that exposure if it was contained "in air that the person received from the ambient air." (22 CCR § 12504.) Each of these regulations provides that "a person otherwise responsible for an exposure to a listed chemical does not 'expose' an individual within the meaning of Health and Safety Code Section 25249.6" where the criteria of the regulation are established. This shows that the agency has found that there are some circumstances under which, even though a person might in a general sense be considered "responsible for an exposure," the agency may define "expose" under the statute in a manner more directly tailored to the party that appropriately bears legal responsibility.

B. Analysis

Based on these provisions, we offer the following analysis of which person is responsible for the exposure in circumstances set forth below[3]:

1. Product Containing the Listed Chemical.

Where a consumer product actually contains the chemical to which persons are exposed, the provider[4] of that product is responsible for the exposure.

2. Product That Creates the Listed Chemical.

Where the storage, consumption or use of the product actually creates the chemical in question, the provider of that product is responsible for the exposure.

For example, where a product uses an internal combustion engine, and the combustion process creates listed chemicals that are not contained in the product, or in the fuel, the provider of the product is responsible for the exposure.[5]

---

3. We refer to the "person responsible for the exposure," rather than who must give a warning because no actual duty to warn would exist unless other elements of the law are established, e.g., knowing and intentional exposure, level of exposure posing a significant risk. In the examples discussed in this letter, however, the exposure in fact would appear to be known to the provider of the product, and the result of its intended use.

4. We use the term "provider" because this discussion is intended to address which product manufacturer is responsible for the exposure, not which party in the "chain of distribution" actually will provide any necessary warning. As to these chain of distribution issues, it has been our consistent position that while responsibility for an exposure originates with the manufacturer of a product that causes an exposure, any party in the chain of distribution that knows of the exposure also becomes subject to the potential duty to warn.

5. There may be some circumstances under which a business causes exposure to a non-listed chemical, which is then converted by the human body into a listed chemical. This letter does not address liability under those circumstances.

3. Products That Neither Contain Nor Create a Listed Chemical, But Which May be Associated With Exposure to a Listed Chemical.

a. Service or Maintenance of Products Resulting in Exposures

In some instances, a product does not contain a listed chemical, but the continued use of the product either requires, or generally is the object of, certain maintenance, repairs, or other services, and the receipt of those services results in exposure to a listed chemical.

As discussed above, a "consumer products exposure" "results from a person's acquisition, purchase, storage, consumption, or ... use of a consumer good or any exposure that results from receiving a consumer service." (22 CCR § 12601(b).)

In these situations, it is our view that the exposure does not result from the "acquisition, purchase, storage, or ... use" of the initial product. Rather, it is proximately the result of "receiving a consumer service," and the exposure is the responsibility of the provider of the service.

As to your specific inquiry, certain clothing is sold with a direction to "Dry Clean Only." This dry cleaning normally is done using the Proposition 65-listed carcinogen perchloroethylene. A residue of that chemical remains in the clothing and slowly vaporizes into the surrounding air, resulting in an exposure. The manufacturer indeed knows that the exposure will occur, and it is an indirect consequence of the intended use of the product. We think, however, that the exposure is more directly the result of "receiving a consumer service," i.e., dry cleaning, than the result of the purchase of the garment. Accordingly, the dry cleaner, as the provider of the service that uses the listed chemical, and the party that provides the perchloroethylene to a dry cleaner knowing its intended use, are the proper parties to be held legally responsible for the exposure.

As another example, a photocopying machine may require periodic service that includes cleaning with solvents that contain a listed chemical. We do not think the manufacturer of the photocopying machine would be responsible for the exposure.

b. Other Products That Substantially Increase Exposure to a Listed Chemical

Where a product changes the physical form of a listed chemical or disperses the chemical in a manner that substantially increases the exposure to the chemical, the provider of that product is responsible for the exposure. For example, an engine-

powered lawn mower uses gasoline containing benzene. While not actually a product of combustion, the combustion process and subsequent venting of engine exhaust in the vicinity of the operator convert the benzene from a liquid form in which exposure would be minimal, into a gas form, or at least particles carried in a gas. This substantially increases the exposure to benzene, and the provider of the lawn mower is responsible for that exposure. (We recently filed a suit and Consent Judgment against a number of manufacturers of such products, People v. Ariens Company, et al., San Francisco Superior Ct. No. 969549, filed May 12, 1995.)

Where a product is merely a passive vessel used in the consumption of another product containing a listed chemical, the provider of the vessel is not responsible for the resulting exposure. For example, the provider of a champagne glass is not responsible for exposure to alcoholic beverages consumed from the glass, even though such exposure is the result of the known and intended use of the product.[6/] The provider of the vessel has done nothing to increase the level of exposure to the listed chemical, but has simply provided an item that is necessary or helpful in use of the product that actually contains the listed chemical. The provider of the product that contains the listed chemical is responsible for the exposure to that chemical, which should assure that the consumer actually receives any required warning.

We hope this is of some assistance to everyone concerned.

Sincerely,

DANIEL E. LUNGREN
Attorney General

EDWARD G. WEIL
Deputy Attorney General

cc: William Verick, Pacific Justice Center

---

6. Of course, if the champagne glass is made of leaded crystal, which leaches lead into beverages placed in it, then the provider of the glass is responsible for that exposure to lead.