

TAKING “BABY STEPS” TOWARDS PROTECTING OUR CHILDREN: WHY PROPOSITION 65 DOES NOT DO ENOUGH TO PROTECT INFANTS FROM LEAD EXPOSURE

I. INTRODUCTION

“WARNING: This product contains a chemical known to the State of California to cause cancer, birth defects, or other reproductive harm.”¹ If parents read this warning on the packaging of the food that they intended to purchase for their baby to consume, they probably would not purchase that product. Parents deserve to be given the opportunity to make an informed decision when purchasing food for their children.² In order to make an informed decision, full disclosure of the contents of the food that they are purchasing is necessary.³

According to market research, thirty-five percent of United States consumers would spend more money on a product that was environmentally-friendly.⁴ This is evident by the popularity of products like the “Baby Bullet,” slogans from Gerber like “Start Healthy, Stay Healthy,” and several makers of puree baby food, which claim to be “organic.”⁵ This increasing support for environmentally-friendly products earmarks that today’s parents feel a growing sense of

¹ See Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. CODE REG. tit. 27 § 25601 (1989) (stating that the “[M]essage must clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm.”).

² Letter from Dianne Feinstein, United States Senator for California, to Corina Burchfield (Sept. 6, 2013) (on file with recipient).

³ *Id.*

⁴ *U.S. Consumers Still Willing to Pay More for ‘Green’ Products*, ENVTL. LEADER (Mar. 29, 2010), www.environmentalleader.com/2010/03/29/u-s-consumers-still-willing-to-pay-more-for-green-products/.

⁵ See *Baby Food Industry: Market Research Reports, Statistics and Analysis*, REPORT LINKER, <http://www.reporterlinker.com/ci02047//Baby-Food.html> (last visited Dec. 28, 2013) (stating that there is a “growing awareness among parents as to the health benefits of nutrient-dense food.”); The “Baby Bullet” is a system for making and storing fresh baby food. BABY BULLET, LLC, <https://www.babybullet.com/site/faq> (last visited Jan. 12, 2014).

responsibility to stay informed on what is best for their children when it comes to health and nutrition.⁶

Recently, an environmental group discovered that several brands and flavors of puree baby foods were found to contain lead.⁷ In a civil suit against major baby food companies, it was alleged that this discovery required that brands and flavors containing lead should bear a warning pursuant to Proposition 65.⁸ Proposition 65 is a California law that requires any product containing an enumerated dangerous substance to include a clear and reasonable warning⁹, unless the substance is “naturally occurring”¹⁰ or falls below a specified “safe harbor” level.¹¹ When confronted with this lawsuit, the baby food companies conceded that there was some level of lead contained in particular stages and flavors of their products;¹² however, the companies claimed that the “naturally occurring” and “safe harbor” level exemptions to the warning requirement were applicable, and thus, their products did not necessitate a warning.¹³

This comment will demonstrate that baby food containing lead that is specifically marketed to children under the age of two should not be subject to the exemptions outlined in Proposition 65. There is not a safe of level of lead for such young children, and parents should be given a fair warning that the food they are giving their child contains this toxic chemical.¹⁴ Once these food manufacturers are required to

⁶ *Id.*

⁷ *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 1 (A.C.S.C. July 15, 2013).

⁸ *Id.*

⁹ *Proposition 65 in Plain Language!*, OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, <http://oehha.ca.gov/prop65/background/p65plain.html> (last visited Dec. 28, 2013).

¹⁰ Trenton H. Norris, *Consumer Litigation and FDA-Regulated Products: The Unique State of California*, 61 *FOOD & DRUG L.J.* 547, 551 (2006).

¹¹ *Proposition 65 in Plain Language!*, *supra* note 9.

¹² *Envtl. Law Found.*, No. RG11597384, slip op. at 1; Examples of flavors and stages that contain lead are Beech-Nut Stage 2 Tender Sweet Carrots and Stage 3 Sweet Potatoes, as well as Gerber 1st Foods Organic Sweet Potatoes, NatureSelect Carrots, 2nd Foods Carrots, 3rd Foods Peaches, and 3rd Foods Pears. *Not in My Baby's Food*, ENVTL. LAW FOUND., <http://www.envirolaw.org/documents/2013BabyFoodGuide.pdf> (last visited Dec. 28, 2013).

¹³ *Id.* at 1-2.

¹⁴ See *CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations in “Low Level Lead Exposure Harms Children: A Renewed Call of Primary Prevention,”* CENTERS FOR DISEASE CONTROL AND

give a warning, the hope is that they will then make serious efforts to eliminate lead from all of their foods, as a warning would seemingly have a drastic effect on their business.

Part II of this comment will provide background information on lead poisoning as it pertains to children, the baby food market, and discuss why Proposition 65 does not do enough to protect children under the age of two. Part III will then analyze both the “safe harbor” and “naturally occurring” exemptions found in Proposition 65 as they pertain to baby food. Part IV will explain why these exemptions should not apply when the food in question is marketed toward children under the age of two. Part V will discuss the ways that children are protected from Bisphenol-A (“BPA”) and lead in paint and how the public policy behind these protections should be applied when there is lead unearthed in baby food. Part VI will analyze the feasibility of providing a warning to consumers or eradicating the problem. Part VII will give recommendations on providing a warning on baby foods that contain lead and how that could potentially lead to baby food companies eliminating lead from their product altogether.

II. PROPOSITION 65 AND ITS RELEVANCE TO BABY FOOD

A. Lead Poisoning and Children

Studies have shown that there is not a safe level of lead for children and that the best approach to lead poisoning is to prevent a child from exposure.¹⁵ Lead causes the most harm to “children under six years of age”.¹⁶ It can contaminate food through the process of packaging, storage, or production.¹⁷ According to the Centers for Disease Control and Prevention (“CDC”), more than 500,000 children in the United States are believed to have blood lead levels that call for public health

PREVENTION, http://www.cdc.gov/nceh/lead/ACCLPP/CDC_Response_Lead_Exposure_Recs.pdf (last visited Dec. 28, 2013).

¹⁵ *See id.* (indicating that low levels of lead can have deleterious effects. Since even low levels are unsafe for young children, the best way to protect them is to avoid ingestion of lead altogether).

¹⁶ Agency for Toxic Substances and Disease Registry Case Studies in Environmental Medicine (CSEM) Lead Toxicity 40 (2007) [hereinafter Agency for Toxic Substances CSEM], *available at*

<http://www.atsdr.cdc.gov/csem/csem.asp?csem=7&po=0>.

¹⁷ *Id.* at 12

interventions.¹⁸ Lead poisoning is difficult to detect, as it can accumulate in a child's body without apparent symptoms and has consequences that may be irreversible and untreatable.¹⁹

Compared to adults, young children and infants are disproportionately affected by lead poisoning, due to differences in excretory and metabolic capabilities.²⁰ Both the developing brains and nervous system of children are ultra-sensitive to lead²¹; thus, there is "no known threshold exposure level" for the adverse health effects that have been identified in children as a result of lead.²² While adults only absorb six to ten percent of the lead that they consume per day, young children retain "thirty to fifty percent of the lead consumed daily."²³ California's Environmental Health Hazard Office did a study in 2009, which estimated that the IQ of an average child in California can be lowered by one point when the level of lead in their blood is raised by just one microgram per deciliter.²⁴ Despite the detrimental effects of even small proportions of lead, the United States Food and Drug Administration ("FDA") set an "action level of 0.5 milligrams per deciliter for lead in products intended for use by infants and children."²⁵

The CDC's Advisory Committee for Childhood Lead Poisoning and Prevention ("ACCLPP") made a recommendation that the term "blood lead level of concern" be eliminated since even low levels of lead in the blood are associated with behavioral disorders, lower IQ, and poor academic achievements.²⁶ The elimination of this term was deemed necessary, since there is not an identifiable blood lead level without adverse effects and there is evidence that the effects lead can have on children are irreversible.²⁷

¹⁸ *Health Effects of Childhood Lead Poisoning*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://ephtracking.cdc.gov/showChildhoodLeadPoisoning.action> (last visited Dec. 28, 2013).

¹⁹ Daniel J. Penofsky, J.D., *Childhood Lead-Based Poisoning Litigation*, 66 AM. JUR. TRIALS 47 (1998).

²⁰ *Id.*

²¹ Agency for Toxic Substances CSEM, *supra* note 16, at 19.

²² *Id.*

²³ Penofsky, *supra* note 19.

²⁴ Meghan D. Rosen, *Lead's Everlasting Legacy*, SCIENCE NOTES 2012, sciencenotes.ucsc.edu/2012/pages/lead/lead.html (last visited June 27, 2013).

²⁵ Agency for Toxic Substances CSEM, *supra* note 16, at 24.

²⁶ *CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations*, *supra* note 14.

²⁷ *Id.*

While the CDC agreed with the recommendations made by ACCLPP, the CDC added that they did not “have the funding, staff, and control over the means to implement the recommendation.”²⁸ The effects of the aforementioned incapacities are paramount and place children at an overwhelming disadvantage.²⁹ Children are severely limited behaviorally, academically, and in health, by the effects of a dangerous contaminant, when exposure to it can be prevented in many instances.³⁰ Eliminating lead from baby food products is a realizable way to protect young children from its dangerous effects, as there is not a proven safe level of lead for children.³¹

B. Baby Food

The term “baby food” refers to “the processing of canned fresh fruits and vegetables, meats, eggs, fruit juices, cereal, formulated entrees, desserts and snacks using fresh, pre-processed, or any combination of these and other food ingredients necessary for the production of infant foods.”³² The purpose of baby food is to introduce semi-solid or solid foods to an infant’s diet in addition to breast milk, infant formula, or follow-up milk.³³ Parents who buy these products assume the product is safe and the healthiest choice for their babies since the product is specifically marketed for that age group.³⁴

The Environmental Law Foundation (“ELF”) filed a complaint in Alameda County Superior Court in 2011 against a number of manufacturers and distributors of baby food containing lead.³⁵ Among the defendants are well known leaders in the baby food industry, such as Gerber, Beech-Nut, and Del Monte.³⁶ The lawsuit claims that defendants manufacture and distribute food and beverages that contain

²⁸ *Id.*

²⁹ See Agency for Toxic Substances CSEM, *supra* note 16, at 19.

³⁰ *Id.*

³¹ See generally Agency for Toxic Substances CSEM, *supra* note 16, at 19.

³² 7 C.F.R. § 407.81 (1986).

³³ See *Baby Food Not Up to Snuff*, CONTEMPORARY PEDIATRICS, <http://contemporarypediatrics.modernmedicine.com/contemporary-pediatrics/news/baby-food-not-snuff> (last visited Dec. 28, 2013) (stating that baby food is intended to “enhance nutrient density and expand taste and texture in infants’ diets.”).

³⁴ See generally *Baby Food Industry: Market Research Reports*, *supra* note 5.

³⁵ *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 2 (A.C.S.C. July 15, 2013).

³⁶ *Id.* at 3.

lead and that these products containing lead are intended for consumption by babies and toddlers.³⁷ Both the plaintiffs and defendants in this case agree that some lead is found in particular stages of carrots, peaches, pears, and sweet potatoes.³⁸

C. Proposition 65

1. What is Proposition 65?

California voters approved Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, in 1986.³⁹ The Act states that, “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”⁴⁰

Proposition 65 was promoted for the purpose of environmental protection, as it prohibited certain chemicals in drinking water.⁴¹ The intent behind the measure was to “protect Californians from health threats posed by hazardous chemicals.”⁴² Following its enactment, the legal system has been inundated with claims alleging that consumer products fail to warn of listed chemicals contained in their product.⁴³ The associated list of chemicals includes 700 compounds.⁴⁴ The list has expanded over the years since the inception of Proposition 65, as the technology used to detect different chemical compounds at lower and lower levels has rapidly improved.⁴⁵ The list includes chemicals

³⁷ *Id.* at 2.

³⁸ *Id.* at 1; While this case is not binding and there is no word as of yet that it will be published, it is a prime example of how the situation of lead in baby food was handled by a court.

³⁹ *Proposition 65 in Plain Language!*, *supra* note 9.

⁴⁰ CAL. HEALTH & SAFETY CODE § 25249.6 (West 1987).

⁴¹ Norris, *supra* note 10, at 548.

⁴² Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65* (1996) 23 *ECOLOGY L.Q.* 303, 305 (1996).

⁴³ Norris, *supra* note 10, at 548.

⁴⁴ Jennifer Yu Sacro, *Proposition 65 and Food: You Have Now Been Warned*, 18 *A.B.A. SEC. BUS. LAW TODAY* 5 (2009).

⁴⁵ *Id.*

such as lead, asbestos, cadmium, carbon monoxide, mercury, and unleaded gasoline, to name a few.⁴⁶

Proposition 65 allows for both “civil penalties of up to \$2,500 per violation per day” and injunctive relief.⁴⁷ Proposition 65 does not require a warning when federal law preempts state law.⁴⁸ If a federal law allows a product to contain a contaminant, then that law supersedes any state authority.⁴⁹ Exemptions to Proposition 65 include if the amount of the contaminant is below the pre-determined “safe harbor level” or if the contaminant is “naturally occurring” in the product.⁵⁰

If a product contains one of the chemicals covered by Proposition 65 and the amount of the chemical either does not fall below the “safe harbor” level or is not deemed “naturally occurring,” then a clear and reasonable warning is required.⁵¹ A clear and reasonable warning is one that is reasonably calculated to warn an individual, prior to their exposure.⁵² In this context, the term “exposure” is defined as “a person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good”⁵³ The message of the warning must “clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm.”⁵⁴

2. Baby Foods That Contain Lead Do Not Have a Warning.

Although baby food companies have conceded that there is some level of lead found in particular stages and flavors of their products, there is currently no such warning found on their product or

⁴⁶ *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*, OEHHA, http://oehha.ca.gov/prop65/prop65_list/files/P6509272013.pdf (last visited Jan. 8, 2014).

⁴⁷ Norris, *supra* note 10, at 549.

⁴⁸ CAL. HEALTH & SAFETY CODE § 25249.10 (West 1987).

⁴⁹ See *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th 910, 923 (2004) (stating that “[N]o State or political subdivision of a State may establish or continue in effect any requirement (2) that is different from or in addition to, or that is otherwise not identical with” federal law).

⁵⁰ HEALTH & SAFETY § 25249.10; CAL. CODE REGS., tit. 27, § 25501 (1989).

⁵¹ CAL. HEALTH & SAFETY CODE § 25249.6 (West 1987); CAL. CODE REGS. tit. 22, § 12601.

⁵² CAL. CODE REGS. § 12601.

⁵³ *Id.*

⁵⁴ *Id.*

packaging.⁵⁵ Instead, packaging for these types of products claim that the products are “a perfect choice for baby,” as they contain ingredients that promote “healthy brain development.”⁵⁶ The messages pointing to the benefits are clear, color coded, and reasonably calculated to be seen by the consumer prior to exposure.⁵⁷ Yet, parents are not afforded any information as to the harmful contaminants contained in the very same product.⁵⁸

In the *ELF* case, plaintiff made the claim that there was “no safe level of lead for children” and that infants were at the “greatest risk of harmful effects from lead exposure.”⁵⁹ The baby food companies claimed that the levels were below the standards in Proposition 65 that require a warning and that lead in the fruits and vegetables used in the product were “naturally occurring.”⁶⁰

The court concluded that defendants did not violate the warning requirements of Proposition 65.⁶¹ Although defendants did not establish the “naturally occurring” defense, the court was persuaded that the products were below the “safe harbor” exposure level.⁶² In finding in favor of the baby food companies as to the safe harbor level exemption, the court cited *DiPirro v. Bondo Co.*, 153 Cal.App.4th 150 (2007), which noted that Proposition 65 was not intended as “an entirely one-sided public protection statute” and that the necessity to warn of dangerous chemicals should be weighed against “the negative consequences that ensue from the decision to avoid use of a potentially beneficial product.”⁶³

⁵⁵ See *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 1-2 (A.C.S.C. July 15, 2013) (stating that “[T]here is no dispute that Defendants’ products contain small amounts of lead” and that “Defendants argue that no warnings are required.”).

⁵⁶ GERBER, www.gerber.com/ (last visited Jan. 8, 2014).

⁵⁷ See *id.* (showing that the product highlights are readily visible on the packaging and on the description that is available on the website).

⁵⁸ See *id.* (showing that there are no warnings that there is lead in particular flavors of baby food).

⁵⁹ Compl. for Pl. at 2, *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384 (A.C.S.C. filed Sept. 28, 2011).

⁶⁰ *Envtl. Law Found.*, No. RG11597384, slip op. at 1-2.

⁶¹ *Id.* at 2.

⁶² *Id.*

⁶³ *Id.* at 21; Bondo Co. manufactured touch up paint for cars and their product contained the industrial solvent toluene, a reproductive developmental toxin. Bondo Co. placed Proposition 65 warnings on data sheets that came with wholesale

III. EXCLUSIONS FROM THE WARNING REQUIREMENT

A. “Safe Harbor” Level Exemption

There are exemptions from the Proposition 65 warning requirement.⁶⁴ The first exemption allows a level of exposure that is less than the “safe harbor” level, or 1/1000 of the level known to pose a significant risk.⁶⁵ The permissible limit of exposure for lead, for both adults and infants alike, is “fifty micrograms per cubic meter of air.”⁶⁶ When divided by 1000, the allowable level of lead per day (the “safe harbor” level) is 0.5 micrograms.⁶⁷ Since no safe level of lead exists for children, 0.5 micrograms is most certainly not a *safe* level of lead for an infant and the “safe harbor” level exemption should not apply to infants that are in the midst of key developmental milestones.⁶⁸

In *ELF*, the court found that defendants did establish the “safe harbor” defense.⁶⁹ In reaching that decision, the court sided with defendant’s expert that it was appropriate to average the results of the lead tests for the products, rather than test based on daily exposure.⁷⁰ The court was persuaded that products tested met the “no observable effect level” (“NOEL”) by “showing that the average user who consumed their products was exposed to less than 0.5 micrograms per day of lead, averaged over a scientifically-appropriate period of fourteen days.”⁷¹

shipments and they were sued for not placing a warning on the individual bottles of touch up paint. *DiPirro v. Bondo Co.*, 153 Cal.App.4th 150, 164 (2007).

⁶⁴ CAL. HEALTH & SAFETY CODE § 25249.10 (West 1987).

⁶⁵ *See id.* (indicating that an “[E]xposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity ...”).

⁶⁶ *Envtl. Law Found.*, No. RG11597384, slip op. at 33.

⁶⁷ *Id.*

⁶⁸ *See* Richard Gray, *Arsenic and Toxic Metals Found in Baby Foods*, THE TELEGRAPH (Apr. 9, 2011, 9:00 PM BST), www.telegraph.co.uk/health/healthnews/8440126/Arsenic-and-toxic-metals-found-in-baby-foods.html (stating that “[Y]oung infants are particularly vulnerable to toxic elements because they are going through rapid development.”).

⁶⁹ *Envtl. Law Found.*, No. RG11597384, slip op. at 2.

⁷⁰ *See Env'tl. Law Found.*, No. RG11597384, slip op. at 22 (stating that “Defendants presented substantial evidence that ... each of the products tested meets the no observable effect test ... by showing that the average use who consumed their products was exposed to less than 0.5 micrograms per day of lead, averaged over a scientifically-appropriate period of fourteen days.”).

⁷¹ *Id.*

Not only would allegedly “safe” levels of lead be inapplicable to babies, but there is also an issue of exposure.⁷² The court’s decision to average the results does not consider that lead is dangerous to babies, regardless of the level of exposure.⁷³ Due to differences in physiology and behavior, children are affected by lead exposure to a greater extent than adults.⁷⁴ Since children experience a higher sensitivity to elevated blood lead levels, the potentially adverse effects to a child’s developing brain and nervous system poses a higher risk than that which is posed to adults at the same level of exposure.⁷⁵

Although the *ELF* court specifically discusses the balancing test in *DiPirro*, there was no application.⁷⁶ Instead, the court focused on the issue of exposure.⁷⁷ Applied here, the balancing test in *DiPirro* looks at the necessity to warn that there is lead in baby food and weighs that against the loss of potential health benefits that result from infants eating baby food.⁷⁸ The necessity to warn is high, since infants are consuming food that contains a chemical which can have lifelong detrimental effects.⁷⁹ The negative consequence of avoiding these foods is very low, as there is little to no loss in this regard.⁸⁰ Purchasers of baby food can simply choose other flavors that do not contain lead and their children will still retain all of the health benefits that go with feeding your child puree baby food.⁸¹ Had the *ELF* court applied this test, the analysis would have shown that the necessity to warn largely outweighed the potential health benefits of the particular flavors that contain lead.⁸²

⁷² See discussion *infra* Part II.A. ; See *Envtl. Law Found.*, No. RG11597384, slip op. at 22 (discussing the various ways that the court considered when averaging consumption of baby food).

⁷³ Agency for Toxic Substances CSEM, *supra* note 16, at 19.

⁷⁴ *Id.* at 18.

⁷⁵ *Id.* at 19.

⁷⁶ See generally *Envtl. Law Found.*, No. RG11597384, slip op.

⁷⁷ *Id.* at 22-23.

⁷⁸ See *id.* at 21 (indicating that Proposition 65 “[S]eeks to balance the need for a warning of dangerous chemicals against the negative consequences that ensue from the decision to avoid use of a potentially beneficial product.”).

⁷⁹ Agency for Toxic Substances CSEM, *supra* note 16, at 19.

⁸⁰ See GERBER, *supra* note 56 (indicating that there are 131 choices of flavors and stages in the Gerber brand alone).

⁸¹ See *id.*

⁸² See generally *id.* (showing that there are no health benefits to particular flavors, given the variety of flavors available for parents to choose from); see generally Agency for Toxic Substances CSEM, *supra* note 16, at 19 (showing there is a

The term “safe harbor” level is misleading when applied to children.⁸³ Regardless of how the amount of lead found is calculated, there is no amount of lead that is safe for young children, and children will get the same benefit from the variety of other flavors that do not expose them to lead.⁸⁴ This mantra also remains true whether or not the lead contained in the product is determined to be “naturally occurring.”⁸⁵

B. “Naturally Occurring” Exemption

1. The Elements of the “Naturally Occurring” Exemption and the Public Policy Behind It

Another exemption exists if the chemical that is present is “naturally occurring.”⁸⁶ A chemical is deemed “naturally occurring” if it is naturally a part of the food or if it resulted from the “absorption or accumulation of the chemical which is naturally present in the environment in which the food is raised, or grown, or obtained.”⁸⁷ The chemical cannot be deemed “naturally occurring” if it is the result of any “known human activity.”⁸⁸ If a chemical is present in part because of human activity and in part because it is “naturally occurring,” then the level of exposure is calculated according to the part that resulted from human activity.⁸⁹ Human activity is not comprised of planting, plowing, sowing, irrigation, or “other mechanical preparation of soil for agricultural purposes.”⁹⁰ Human activity is inclusive of chemicals which are added to irrigation water that is used on crops or soil.⁹¹

necessity to warn given the fact that “[T]he incomplete development of the blood-brain barrier in fetuses and in very young children increases the risk of lead’s entry into the developing nervous system, which can result in prolonged or permanent neurobehavioral disorders.”)

⁸³ See, e.g., *CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations*, *supra* note 14; Agency for Toxic Substances CSEM, *supra* note 16, at 19 (indicating that even small amounts of lead can have detrimental effects on children; therefore, there is not a “safe” level of lead for children).

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ CAL. CODE REGS., tit. 27, § 25501 (1989).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

A chemical can only be deemed to have occurred naturally in a food if it could not have been prevented by “good agricultural or good manufacturing practices.”⁹² This fits with the public policy behind the “naturally occurring” exemption, which is that “some degree of culpable human activity” should be necessary in order to prove the exposure was intentional.⁹³ An additional requirement of this exemption is that appropriate measures are taken to ensure that the natural occurrence of chemical contaminants is reduced to the “lowest level currently feasible.”⁹⁴

*C. Can Baby Food Be Exempt From the
“Naturally Occurring” Exemption?*

In *People v. Tri-Union Seafoods, LLC*, 171 Cal.App.4th 1549 (2009), the Attorney General sued tuna companies seeking to require them to abide by Proposition 65 and warn pregnant women, as well as women of childbearing age, that they are exposed to methylmercury when eating canned tuna.⁹⁵ The court concluded, however, that “virtually all” of the methylmercury found in canned tuna was “naturally occurring” and, therefore, exempt from warning requirements.⁹⁶ The court sided with defense experts in their argument that despite the increase in atmospheric methylmercury between 1971 and 1998, there had not been an increase in methylmercury found in ocean fish in the preceding 100 years.⁹⁷ The experts in this case agreed that a vast amount of the methylmercury found in the ocean is the result of hydrothermal vents in the deep ocean.⁹⁸

⁹² *Id.*

⁹³ See *Nicolle-Wagner v. Deukmejian*, 230 Cal.App.3d 652, 659 (1991) (stating that the language of Proposition 65 suggests “[T]hat some degree of culpable human activity which results in toxins being added to the environment is required.”).

⁹⁴ CAL. CODE REGS. § 25501.

⁹⁵ *People ex rel. Brown v. Tri-Union Seafood, LLC*, 171 Cal.App.4th 1549, 1554 (2009); Methylmercury is known to cause harm to a developing fetus and human exposure is primarily through eating fish. Methylmercury poisoning in a fetus can cause “mental retardation, cerebral palsy, small brain size and severe sensory deficits and motor effects.” In lower doses, methylmercury exposure can affect development of the brain. Since 1998, tuna companies have been aware that tuna contains methylmercury, yet warnings have never been placed on their products. *Id.* at 1557-1558.

⁹⁶ *Id.* at 1561.

⁹⁷ *Id.* at 1562, 1565.

⁹⁸ *Id.* at 1566.

Despite finding for the defendants, the court provided interesting dicta that listed ways in which future lawsuits against tuna companies could survive res judicata and collateral estoppel issues.⁹⁹ For one, the court opinion suggested that the regulations could be amended to exclude methylmercury from the “naturally occurring” defense.¹⁰⁰ Next, the court proposed that the Office of Environmental Health Hazard Assessment (“OEHHA”) could determine whether or not the methylmercury is naturally occurring, rather than leave a court to decide based on dueling experts at trial.¹⁰¹ Last, the court stated it relied on scientific data available at the time of the case and that the data may become outdated as science develops and new research is collected.¹⁰² From this, the court purports that, while their decision is based on the law, it does not necessarily agree that a warning should not be required.¹⁰³ This is apparent in the fact that they have laid out possible outlets for this case to be re-litigated in the future.¹⁰⁴

Defendants in the *ELF* case sought to prove that the lead found in their products was “naturally occurring” and that the lead was reduced to the lowest feasible level.¹⁰⁵ The court rejected this notion, since defendants were unable to show what, if any, portion of the lead in their products was naturally occurring.¹⁰⁶ The court was not convinced that “reliable local or regional data” was used when assigning a numerical value to the “naturally occurring” lead.¹⁰⁷ Defendants also

⁹⁹ See *id.* at 1575 (stating that the court gave “[P]otential scenarios that could possibly lead to a renewed Proposition 65 claim against the Tuna Companies or similar companies that would survive res judicata and collateral estoppel challenges.”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See generally *id.*

¹⁰⁴ See *id.* (stating that the court gave “[P]otential scenarios that could possibly lead to a renewed Proposition 65 claim against the Tuna Companies or similar companies that would survive res judicata and collateral estoppel challenges.”).

¹⁰⁵ *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 19 (A.C.S.C. July 15, 2013).

¹⁰⁶ *Id.* at 2.

¹⁰⁷ See *id.* at 14 (stating that “[I]f Defendants wish to establish that the lead in their products is naturally occurring,” they must produce evidence of “[R]eliable local or regional data to demonstrate that the lead is solely geogenic.”).

failed to prove to the court that they took all actions necessary to keep natural contaminant levels down to the lowest level feasible.¹⁰⁸

If future courts are faced with food manufacturers that were able to prove that the lead found in puree baby foods is “naturally occurring” and that all appropriate measures were taken to reduce that level down to the lowest level currently feasible, the exemption still should not apply to baby food.¹⁰⁹ Even when their burden of proof is met, defendants would not be able to prove that “naturally occurring” lead found in baby food was any less dangerous to babies.¹¹⁰ If blood lead levels of unnatural and natural lead are compared, the resulting harm to babies will be the same.¹¹¹ Since there is no safe level of lead for babies, the fact that the lead is “naturally occurring” does not negate the harm to a child in their first years of life.¹¹² The effect is exactly the same as an added chemical and does exactly the same damage to a young child in the peak of developmental milestones.¹¹³ When considering the public policy behind this exemption, baby food companies are knowingly exposing babies to lead and this is the equivalent to “culpable human activity” that the “naturally occurring” exemption sought to require.¹¹⁴

The dicta found at the end of the *Tri-Union* case gave insight as to how the “naturally occurring” exemption can be overcome.¹¹⁵ The court first suggested that the legislature could amend the regulation and exclude methylmercury from the “naturally occurring” defense.¹¹⁶

¹⁰⁸ *Id.* at 21.

¹⁰⁹ See generally CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations, *supra* note 14.

¹¹⁰ See AMERICAN CANCER SOCIETY, <http://www.cancer.org/cancer/cancercauses/othercarcinogens/athome/lead> (last visited Oct. 13, 2013) (describing that, “[T]he effects of lead on the nervous system are even more of a concern in young children, whose brains are still developing and whose bodies take in lead more readily.”).

¹¹¹ See generally AMERICAN CANCER SOCIETY, *supra* note 110 (describing that whether present in its natural state or combined with other carbon groups or elements, the properties of lead remain the same).

¹¹² See AMERICAN CANCER SOCIETY, *supra* note 110.

¹¹³ See generally AMERICAN CANCER SOCIETY, *supra* note 110 (describing that whether present in its natural state or combined with other carbon groups or elements, the properties of lead remain the same).

¹¹⁴ See *Nicolle-Wagner v. Deukmejian*, 230 Cal.App.3d 652, 659 (1991) (stating that the language of Proposition 65 suggests “[T]hat some degree of culpable human activity which results in toxins being added to the environment is required.”).

¹¹⁵ See *supra* text accompanying note 104.

¹¹⁶ See *supra* text accompanying note 100.

From this dicta, an inference can be made that regardless of how methylmercury ended up in canned tuna, the toxin is harmful to pregnant women, and pregnant women should be warned of the potentially harmful effects to their fetus.¹¹⁷

The suggestion to exclude methylmercury from the “naturally occurring” defense could, similarly, be applied to exclude lead found in baby food from the same defense. The potential exclusion of methylmercury from the “naturally occurring” defense serves to protect a fetus from potentially harmful health risks.¹¹⁸ The purpose of disallowing this defense in the scenario of lead in baby food would not protect a fetus, but would protect an infant in the very crucial early stages of development. Both fetus and infant are more susceptible to the harmful effects of toxins, when compared to adults.¹¹⁹

Additionally, the rate of exposure for canned tuna¹²⁰ would likely be less than that of baby food.¹²¹ A pregnant woman may eat canned tuna on occasion, depending on her particular choice of foods; whereas, an infant will eat several jars of baby food each day.¹²² It is not highly unlikely that at least one of the jars consumed each day has some amount of lead in it.¹²³ Thus, lead in baby food can lead to daily

¹¹⁷ See *id* (indicating that there are potential scenarios where future litigation against Tuna Companies could survive res judicata and collateral estoppel issues. By providing particular situations that would allow the issue to be re-litigated, the court is showing concern for the people that would have benefitted from the proposed warning).

¹¹⁸ *Id.*

¹¹⁹ See Agency for Toxic Substances CSEM, *supra* note 16, at 18.

¹²⁰ See Globefish Research Programs: World Tuna Markets (2004) [hereinafter World Tuna Markets],

http://www.globefish.org/upl/Publications/GRP74TUNA_Mailing.pdf (indicating that “[T]he annual eatings of canned tuna per capita in the United States declined from 13.3 in 1990 to 10.2 in 2000.”).

¹²¹ See JOHN HOPKINS MEDICINE,

http://www.hopkinsmedicine.org/healthlibrary/conditions/pediatrics/feeding_guide_f_or_the_first_year_90,P02209/ (stating that children 4 months to 12 months are encouraged to consume baby food twice per day, or approximately 480 times in their first year of life).

¹²² See *generally* World Tuna Markets, *supra* note 120, at 41 (indicating that it is recommended that pregnant women not consume more than 4 meals of canned tuna per month).

¹²³ See Baby Food: Top Flavors in New Global Product Launches [hereinafter Top Flavors in New Global Product Launches], http://www.datamonitor.com/store/News/baby_food_top_flavors_in_new_global_product_launches?productid=C3F8FE27-28F3-43CB-BAA2-233C38F699DF (last visited Jan. 9, 2014) (indicating that

exposure of lead.¹²⁴ Lead in canned tuna is not nearly as likely to result in daily exposure.¹²⁵ These exemptions to Proposition 65 should follow the lead of other laws involving toxins, which have particularized rules in regards to children's exposure.

IV. WHAT SHOULD BE DONE TO PROTECT OUR CHILDREN?

A. Babies are Protected from BPA and Should Also be Protected from Lead

While Proposition 65 made a step in the right direction by mandating specific requirements for lead and other contaminants found in food and water, the law should go a step further and require that consumers be warned if the baby food they purchase contains lead, when the product is specifically marketed for children under the age of two.

Lawmakers should grant lead in baby food similar, if not more, attention than other exposures of concern.¹²⁶ There has been a recent movement in the United States to eliminate BPA from "food containers, beverage containers, and products for infants and children under age three."¹²⁷ BPA is an endocrine disruptor that is often used in plastics production.¹²⁸ While the effects remain uncertain, there is sufficient scientific evidence to suggest reproductive and metabolic harm.¹²⁹ Infants are more susceptible than adults, yet BPA has been found in baby bottles and sippy cups, both of which are sources for

Carrots, Pears, and Peaches are in the top ten for most used flavors in baby food products. Since these are the flavors that may contain lead, the likelihood of ingesting a jar of baby food with lead in it is heightened).

¹²⁴ See *id.*; see JOHN HOPKINS MEDICINE, *supra* note 121 (stating that children 4 months to 12 months are encouraged to consume baby food twice per day, or approximately 480 times in their first year of life).

¹²⁵ See World Tuna Markets, *supra* note 120, at 42 (indicating that "[T]he annual eatings of canned tuna per capita in the United States declined from 13.3 in 1990 to 10.2 in 2000.").

¹²⁶ See generally About Bisphenol-A, SAFER STATES (Jan. 14, 2013), www.saferstates.com/2010/01/bisphenol-a.html#.Uf7b_uPZ974 (explaining that studies are not clear on health effects of BPA in low doses and the potential health effects of BPA are similar in nature to the health effects that exist when children consume lead in low doses); see also *supra* Part II.A.

¹²⁷ Michelle Crozier-Haynes, *Keeping BPA from Baby: Why the Endocrine Disruptor Bisphenol-A Should Be Banned from Products for Infants and Children*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 167, 169 (2010).

¹²⁸ *Id.* at 168.

¹²⁹ *Id.*

getting liquid into the body.¹³⁰ In October of 2011, California lawmakers survived strong opposition from the chemical industry and banned BPA from baby bottles and sippy cups.¹³¹

On June 10, 2013, Senator Dianne Feinstein introduced the “BPA in Food Packaging Right to Know Act” to the United States Senate.¹³² The legislation sets forth labeling requirements if the container is composed of BPA, whether in whole or in part.¹³³ Specifically, the label would require the following statement: “This food packaging contains BPA, an endocrine-disrupting chemical.”¹³⁴ The safety standard reads that:

[T]he Secretary shall determine whether there is a reasonable certainty that no harm will result from aggregate exposure to bisphenol A, taking into consideration potential adverse effects from low dose exposure, and the effects of exposure on vulnerable populations, including pregnant women, infants, children, the elderly, and populations with high exposure to bisphenol A.¹³⁵

This bill has been referred to the Senate Committee on Health, Education, Labor, and Pensions for consideration before it goes to the Senate floor.¹³⁶

While there have been optimistic strides in securing the health and safety of fetuses, infants, and children, as it pertains to BPA, the same level of concern is not given to the lead that is found in baby food.¹³⁷ Scientific evidence, as well as the FDA, have concluded that there *may* be reproductive or metabolic harm as a result of BPA.¹³⁸ Scientific evidence, along with the American Academy of Pediatrics and the CDC, agree that there *is* no safe level of lead for children under age six.¹³⁹ The BPA safety standard is clearly geared towards protecting

¹³⁰ *See id.* (indicating that BPA is “[U]sed extensively in plastics production” and that “[I]nfants are considered a particularly susceptible risk group.”).

¹³¹ SAFER STATES, *supra* note 126.

¹³² BPA in Food Packaging Right to Know Act, S. 1124, 113th Cong. (2013).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See generally* SAFER STATES, *supra* note 126 (explaining that the legislature passed a BPA ban on baby bottles and sippy cups. No such legislation has been passed to ban lead from baby food).

¹³⁸ Crozier-Haynes, *supra* note 127, at 168.

¹³⁹ CDC *Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations*, *supra* note 14 (describing that the term “[B]lood lead level of

vulnerable populations from exposure over time and exposure in low doses, when there is a risk of any type of harm.¹⁴⁰ There should be equal, if not more, concern for the effects of lead on babies.

California has completely banned BPA from baby bottles and sippy cups.¹⁴¹ The public policy behind this BPA legislation is to protect young children that are in early development and are at the highest risk of susceptibility to toxins.¹⁴² Congress is currently working towards providing a warning on baby products that contain BPA, in order to provide parents with information as to the potentially harmful effects that it may have on their children.¹⁴³ Lead is proven to be dangerous to young children,¹⁴⁴ whereas the studies done on BPA show that there is only a potential for harm.¹⁴⁵ BPA can be found in baby bottles and sippy cups, which are the source of getting liquids into the body.¹⁴⁶ Baby food is purposefully and directly placed into the body.¹⁴⁷ There is no doubt that a child is ingesting lead if fed one of the particular flavors of baby food with lead in its contents.¹⁴⁸

concern” should be eliminated “[B]ased on compelling evidence that low BLLs are associated with IQ deficits, attention-related behaviors, and poor academic achievement.” This further stated that there is an absence of identified BLL without deleterious effects).

¹⁴⁰ Letter from Dianne Feinstein, *supra* note 2 (Senator Feinstein expresses her concern about the negative health effects that chemicals like BPA may have on children, who are particularly susceptible to toxins while their bodies are developing).

¹⁴¹ CAL. HEALTH & SAFETY CODE § 108940 (2012) (stating that “On and after July 1, 2013, no person shall manufacture, sell, or distribute in commerce any bottle or cup that contains bisphenol A, at a detectable level above 0.1 parts per billion (ppb), if the bottle or cup is designed or intended to be filled with any liquid, food, or beverage intended primarily for consumption from that bottle or cup by children three years of age or younger.”).

¹⁴² Letter from Dianne Feinstein, *supra* note 2.

¹⁴³ *Id.*

¹⁴⁴ See, e.g., CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations, *supra* note 14; Agency for Toxic Substances CSEM, *supra* note 16.

¹⁴⁵ See Crozier-Haynes, *supra* note 127, at 168 (indicating that uncertainty exists about the effects of BPA).

¹⁴⁶ See *id.*

¹⁴⁷ See JOHN HOPKINS MEDICINE, *supra* note 121 (encouraging that parents feed their child baby food with a spoon).

¹⁴⁸ See *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 1 (A.C.S.C. July 15, 2013) (stating that “[T]here is no dispute that Defendants’ products contain small amounts of lead.”).

Eliminating lead from baby food should be given the same attention that was given to eliminate BPA from plastics or, at the very least, unsuspecting parents should be provided a warning. While it is important to protect infants and young children from both BPA and lead exposure, studies are clearer as to the adverse effects that result from lead exposure.¹⁴⁹ The same level of concern and treatment should be given to lead that is found in baby food, as is given to BPA found in food containers.

B. Lead Has Been Banned From Household Paints

In 1978, lead was banned from household paints, as well as paints that coat both toys and furniture, by the U.S. Consumer Product Safety Commission (“CPSC”).¹⁵⁰ The purpose of the ban was to “reduce the risk of lead poisoning in children who may ingest paint chips or peelings.”¹⁵¹ Since the ban on lead in household paints did not allow any exceptions in its quest to protect children,¹⁵² lead in baby food should also be banned without exceptions.

The public policy behind the removal of lead from household paint involves the fact that young children, especially infants, tend to put toys, paint chips, or paint peelings picked up off of the floor and furniture into their mouths.¹⁵³ Studies have shown that “a flake of paint the size of a pencil eraser tip swallowed daily for a few weeks could poison a child.”¹⁵⁴ This figure is based on 1.5% lead content.¹⁵⁵

While the amount of lead found in baby food is markedly less than that which is found in pre-1978 household paint, it is well established that there is not a safe amount of lead that can be ingested by

¹⁴⁹ See Crozier-Haynes, *supra* note 127, at 168 (indicating that uncertainty exists about the effects of BPA); See also Agency for Toxic Substance, *supra* note 16, at 19 (describing that there is not a threshold level of exposure for the detrimental health effects that toxic lead has on children).

¹⁵⁰ UNITED STATES CONSUMER PRODUCT SAFETY COMM’N, <http://www.cpsc.gov/en/Recalls/1977/CPSC-Announces-Final-Ban-On-Lead-Containing-Paint/> (last visited Jan. 9, 2014).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See 42 U.S.C.A. § 4851 (West 1992) (stating that “[T]he health and development of children living in as many as 3,800,000 American homes is endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes.”).

¹⁵⁴ Rosen, *supra* note 24.

¹⁵⁵ *Id.*

children.¹⁵⁶ If one flake of paint ingested on a daily basis for a few weeks can cause lead poisoning,¹⁵⁷ what are the repercussions to a six month old baby that eats one jar of baby food containing a trace amount of lead each day for a few weeks? While the effects of a severe case of lead poisoning on a child can be extreme and outrageous, the fact that lower dosages of lead can *only* lead to cognitive or behavioral problems should make a ban, or at the very least a warning, a viable option.¹⁵⁸ Just as it is important to protect children from disastrous health risks, it is also important to protect children from devastating learning disabilities and behavioral issues.¹⁵⁹

Moreover, the purpose of the ban on paints that contain lead is to protect children from lead poisoning that *may* result if paint chips or peelings are ingested.¹⁶⁰ There is no question that baby food containing lead will be ingested when the particular flavors containing lead are fed to them.¹⁶¹ If the CPSC saw the need to eliminate lead from items that can be inadvertently placed into a child's mouth and ingested, then the FDA should implement measures to eliminate lead from baby food, which is purposefully placed into a child's mouth and ingested.

C. What Would A Warning Do?

An adequate warning in accordance with Proposition 65 would require a notification that the product contains a chemical known to cause cancer, birth defects, or other reproductive harm.¹⁶² This warning would have to be clearly readable on either the packaging of a product or near the display of the product in the store.¹⁶³ Most parents

¹⁵⁶ CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations, *supra* note 14.

¹⁵⁷ Rosen, *supra* note 24.

¹⁵⁸ See 42 U.S.C.A. § 4851 (West 1992) (indicating that lead banned from household paint because even at low levels, lead poisoning causes "intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems.").

¹⁵⁹ See discussion *supra* Part II.A.

¹⁶⁰ UNITED STATES CONSUMER PRODUCT SAFETY COMM'N, *supra* note 150.

¹⁶¹ See JOHN HOPKINS MEDICINE, *supra* note 121 (encouraging that parents feed their child puree baby food with a spoon).

¹⁶² Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. CODE REG. tit. 27 § 25601 (1989).

¹⁶³ See *id.* (indicating that the "[W]arning must be reasonably calculated ... to make the warning message available to the individual prior to exposure.").

that see a warning label which indicates that they are feeding their child toxic chemicals that can lead to learning disabilities and behavioral disabilities would no longer purchase the product or allow their child to consume it.¹⁶⁴

A warning would place parents on notice that they are feeding their child a toxic chemical, and in turn, parents would no longer purchase that product.¹⁶⁵ Even more, although lead is only found in particular flavors, many parents may decide not to purchase the brand altogether.¹⁶⁶ In response to this, companies will be persuaded to reformulate their product in order to minimize liability and to lessen the stigma that will accompany consumer reaction to a warning.¹⁶⁷ Since this would have a potentially devastating effect on baby food companies, the hope is that they would eliminate lead from all of their products or eliminate the flavors that contain lead.¹⁶⁸

V. FEASIBILITY

A. *The Burden on Baby Food Companies*

If baby food companies were required to eliminate lead from all of their products, the burden placed upon them would be high.¹⁶⁹ They would likely have to initiate extensive and costly testing of soils, packaging, and machinery, among other things, in order to either locate the source of the lead or to ensure that they are not placing a product into the stream of commerce which contains lead.¹⁷⁰ While it is true that the cost of eliminating lead from all of their products would be high, the cost of poisoning children with lead and creating lifelong

¹⁶⁴ See Rechtschaffen, *supra* note 42, at 344 (stating that consumer demand can be extremely sensitive to the disclosure of adverse health and safety product information, particularly in food products).

¹⁶⁵ *Id.* at 344-345 (stating that “Some argue that Proposition 65 warnings play on consumer sensitivity by stigmatizing products with warnings likely to encourage consumer overreaction.”).

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See Agency for Toxic Substances CSEM, *supra* note 16, at 12 (discussing that lead contaminates food through production, processing, packaging, and storage. In order to completely eliminate lead from their products, baby food companies would have to examine and possibly reorganize the entire process, from formulation to product placement on the store shelf).

¹⁷⁰ *Id.*

cognitive and behavioral problems is much more burdensome to the affected child and the public as a whole.¹⁷¹

If the requirement on baby food companies was scaled back and they were forced to label the products that contain lead, the burden and cost to the companies would, again, be high.¹⁷² As previously mentioned, a label would likely deter parents from purchasing an entire brand.¹⁷³ Also, since Proposition 65 is only enforced in California, baby food companies would have to either make special packaging that includes a warning label for California only, or they would have to place a warning on flavors that contain lead for retailers nationwide.¹⁷⁴ While the burden of labeling may be high for baby food companies, that is far outweighed by the burden cast upon children ingesting lead, as well as society in general.¹⁷⁵

If the cost to baby food companies is considered unreasonably high, there is a third alternative that would place a relatively low burden on them. Baby food companies could choose to discontinue the few stages and flavors that contain lead, namely particular stages of peaches, sweet potatoes, carrots, and pears. By eliminating only those foods or flavors that harm young children, the problem would be solved.¹⁷⁶ This option is the most feasible, as it will not eliminate an entire brand or market, but only the particular flavors that contain lead. For example, Gerber would only have to eliminate carrots, sweet potatoes, peaches, and pears.¹⁷⁷ While this may seem drastic, as these could be considered staple flavors of baby food, there are over 100 Gerber flavors to choose from when shopping for baby food.¹⁷⁸ Eliminating only the dangerous flavors is also a feasible alternative because it could protect consumers from increased prices.¹⁷⁹ By

¹⁷¹ See discussion *supra* Part II.A.

¹⁷² See Rechtschaffen, *supra* note 42, at 345 (stating that businesses perceive placing a warning on products that contain a toxic chemical to be anathema to business).

¹⁷³ *Id.*

¹⁷⁴ See generally BUREAU VERITAS GROUP, www.bureauveritas.com (last visited Nov. 22, 2013).

¹⁷⁵ See discussion *supra* Part II.A.

¹⁷⁶ See generally *Env'tl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 7 (A.C.S.C. July 15, 2013).

¹⁷⁷ Lead for Lunch? Not in My Baby's Food! *available at* <http://www.envirolaw.org/documents/2013BabyFoodGuide.pdf> (last visited Jan. 9, 2014).

¹⁷⁸ See GERBER, *supra* note 56.

¹⁷⁹ See generally Agency for Toxic Substances CSEM, *supra* note 16, at 12 (discussing how lead contaminates food through production, processing, packaging,

eliminating a small fraction of flavors, baby food companies would not have to raise their prices to accommodate the costs associated with their other options, such as expensive testing, warning labels, and damage to reputation.¹⁸⁰

B. Too Many Warnings Dilute the Purpose of a Warning

In *ELF*, defendants argued that when a warning is required for insignificant risks, then nearly all foods would contain a warning and consumers would no longer pay attention to warning labels.¹⁸¹ Since even a trace amount of lead can be harmful to young children, lead in baby food cannot be considered an insignificant risk.¹⁸²

In *ELF*, the baby food companies relied upon *Nicolle-Wagner v. Deukmejian*, 230 Cal.App.3d 652, 661 (1991), in which the court stated it presumed that “foods that have been eaten for thousands of years are healthful, despite the presence of small amounts of naturally occurring toxins.”¹⁸³ The *Nicolle-Wagner* Court further stated that if a warning label was required on all foods with any amount of toxic chemical, then it could lead to a reduction in “the availability of certain foods or could lead to unnecessary warnings, which could distract the public from other important warnings on consumer products.”¹⁸⁴ The *Nicolle-Wagner* Court was concerned that if a warning was required for an “insignificant risk,” then most, if not all, food products would have a warning and, as a result, the warning would be “diluted to the point of meaningless.”¹⁸⁵

While *Nicolle-Wagner* raised a valid, albeit scary, point, it is distinguishable from the issue of lead in baby food. Lead poisoning, cancer, behavioral problems, and cognitive problems can in no way be

and storage. Eliminating only the dangerous flavors would prevent baby food companies from having to figure out how to effectively eliminate lead from their products).

¹⁸⁰ See generally *id.*

¹⁸¹ See generally *Env'tl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. (A.C.S.C. July 15, 2013).

¹⁸² See discussion *supra* Part II.A.

¹⁸³ *Nicolle-Wagner v. Deukmejian*, 230 Cal.App.3d 652, 660 (1991) (describing that this is a case where grocery manufacturers successfully sought to add a regulation after Proposition 65 was passed, in order to add an exemption for toxic chemicals that were found to be naturally occurring).

¹⁸⁴ *Id.* at 661.

¹⁸⁵ *Id.*

categorized as “insignificant risks.”¹⁸⁶ It is not unsound policy that parents should be afforded the opportunity to know that they are feeding their child a toxic chemical.¹⁸⁷ This is especially true since children absorb lead at a much faster rate and the effects can potentially be lifelong.¹⁸⁸

Overall, it is possible that a warning could become meaningless if it is put on all products.¹⁸⁹ Troubling as it is to consider, lead or other toxins are commonly found in all food (that is, food consumed by both children and adults)¹⁹⁰ and such a broad requirement may not be a feasible answer.¹⁹¹ Food that is marketed for children under the age of two should require a warning when it contains any amount of lead, since lead can be harmful in low doses¹⁹² and parents should be able to make an informed decision when deciding what to feed their children.¹⁹³ Such a requirement would not dilute the purpose of the warning, since it would be limited to foods that are specifically geared towards small children, and not food geared toward all ages. Parents will never be able to avoid all lead exposure for their children, but, by labeling an essential and frequent food product, parents can minimize these dangers.¹⁹⁴

¹⁸⁶ See discussion *supra* Part II.A.

¹⁸⁷ Rechtschaffen, *supra* note 42, at 314 (stating that, “[M]embers of the public have a ‘fundamental right to know’ what chemicals are ‘out there’ and the chemicals to which they are being exposed.”).

¹⁸⁸ *Nicolle-Wagner*, 230 Cal.App.3d at 661.

¹⁸⁹ See *Id.* (stating that “[W]arnings would be diluted to the point of meaninglessness if they were to be found on most or all food products.”).

¹⁹⁰ See *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 17 (A.C.S.C. July 15, 2013) (indicating that an abundance of foods “[C]ontain low levels of carcinogens or reproductive toxicants.”).

¹⁹¹ *Nicolle-Wagner*, 230 Cal.App.3d at 661.

¹⁹² See, e.g., CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations, *supra* note 14; Agency for Toxic Substances CSEM, *supra* note 16, at 19.

¹⁹³ Rechtschaffen, *supra* note 42, at 314 (stating that “[M]embers of the public have a ‘fundamental right to know’ what chemicals are ‘out there’ and the chemicals to which they are being exposed.”).

¹⁹⁴ See *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 17 (A.C.S.C. July 15, 2013) (indicating that an abundance of foods “[C]ontain low levels of carcinogens or reproductive toxicants.”).

C. The Benefits Outweigh the Risks

Dowhal v. SmithKline Beecham Consumer Healthcare, et al., 32 Cal.4th 910, 917 (2004) is a California Supreme Court case distinguishable from lead in baby food for two significant reasons. *Dowhal* posed the question of whether a warning was required when smoking cessation aids could assist a pregnant woman in reducing the harmful effects of tobacco on her fetus, but the product itself could potentially harm a fetus.¹⁹⁵ This case is related to lead in baby food, since the protected class are babies and the product in question has health benefits;¹⁹⁶ however, this case is distinguishable in that there is actual harm proven with lead consumption and the health benefits of baby food that contains lead does not outweigh the alternative.

In 2004, the California Supreme Court addressed the warnings required by Proposition 65 in the case of *Dowhal*.¹⁹⁷ Plaintiff in this case challenged defendants' failure to place a warning of potential reproductive harm on over the counter smoking cessation aids, since the products contain nicotine.¹⁹⁸ Plaintiffs argued that the product should contain a warning of potential birth defects, or other reproductive harm, for those women using the product while pregnant.¹⁹⁹ Defendants contended that the FDA did not require such a warning, thus, the federal preemption applied.²⁰⁰ The warning required by the FDA read, in part: "This medicine is believed to be safer than smoking. However, the risks to your child from this medicine are not fully known."²⁰¹

Although nicotine was listed by both the United States Surgeon General and the Environmental Protection Agency as a chemical that is harmful to a fetus, the court found that plaintiffs failed to show actual evidence to prove that the smoking cessation aids, which

¹⁹⁵ *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th 910, 919-920 (2004).

¹⁹⁶ See *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th at 920.

¹⁹⁷ *Id.* at 917.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 921.

²⁰⁰ See *id.* at 919 (stating that the issue was whether California's Proposition 65 requirements were preempted by the FDA regulation).

²⁰¹ *Id.*

contain nicotine, would cause actual harm to a fetus.²⁰² The possibility of harm was not enough to require such a warning, since the repercussions of smoking on a fetus, along with numerous other harmful contaminants found in a cigarette, were believed to be more harmful than the smoking cessation aid.²⁰³ Overall, the court sided with the FDA that warning pregnant women that smoking cessation aids *can* harm their baby may give too much weight to the warnings and pregnant women might continue smoking instead of using a product that could help them stop smoking entirely.²⁰⁴

Applying this case to the situation at hand, there are two reasons that it is distinguishable. First, the court did not find actual evidence that the smoking cessation aids would cause actual harm to fetuses.²⁰⁵ As previously established, lead is completely unsafe when deliberately consumed by an infant.²⁰⁶ Second, we would be hard pressed to believe that the benefits of consuming baby puree food that contains lead outweighs other possibilities, such as choosing other flavors and brands that do not contain lead.²⁰⁷ There is not one benefit that can be attributed to eating pears, peaches, sweet potatoes, and carrots that contain lead.²⁰⁸ This is especially true when the alternative is simply to feed your child another one of the many flavors that are available; one that does not contain lead.²⁰⁹ The argument that we would discourage parents from making healthy choices for their children is hardly

²⁰² See *id.* at 930 (stating that “[T]here continue to be unanswered questions involving the clinical pharmacology and toxicology of NRT during pregnancy in humans and additional research should be conducted to answer those questions.”).

²⁰³ See *id.* at 929 (indicating that there was concern that “Proposition 65 warnings on product labels might lead pregnant women to believe that NRT products were as dangerous as smoking... and thus discourage the women from stopping smoking.”).

²⁰⁴ *Id.* at 929, 931.

²⁰⁵ *Id.* at 930.

²⁰⁶ See, e.g., CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations, *supra* note 14; Agency for Toxic Substances CSEM, *supra* note 16, at 19.

²⁰⁷ See generally GERBER, *supra* note 56 (indicating that there are 131 choices of flavors and stages in the Gerber brand alone).

²⁰⁸ See generally discussion *supra* Part II.A. (establishing that since any amount of lead can be dangerous to young children, there can be no benefit to consuming these flavors that contain lead).

²⁰⁹ See GERBER, *supra* note 56 (indicating that there are 131 choices of flavors and stages in the Gerber brand alone).

persuasive, since we can get the same benefits from flavors that have no amount of lead in them.²¹⁰

VI. RECOMMENDATIONS

People, in general, would rather that food not contain lead, regardless of whether it is food consumed by infants, children, or adults.²¹¹ As it stands, the elimination of lead from all food is not in our near future.²¹² It is imperative that we take “baby steps” in the right direction and work towards protecting young children, as they are more vulnerable to the effects of lead and their bodies are in the infancy of development.²¹³ When Proposition 65 was passed, voters intended to protect the public from the detrimental “health threats posed by hazardous chemicals.”²¹⁴ There should be enhanced protection for developing babies, not only because of their established vulnerability but because they are the future adults of our society. The *ELF* decision failed to consider the need for enhanced protection and, instead, focused on calculations and whether or not the level of lead was below the “safe harbor” level.²¹⁵ Future courts faced with a similar issue should focus on the accepted notion that babies are affected by any amount of lead and that no amount of expert witnesses or scientific calculations will change the health threats posed to babies.

The most effective way to ensure protection of our children is to amend Proposition 65 to include an exception wherein the “naturally

²¹⁰ See generally discussion *infra* Part II.A. (since is established that any amount of lead can be dangerous to young children, there can be no benefit to consuming these flavors that contain lead); see also GERBER, *supra* note 56 (indicating that there are 131 choices of flavors and stages in the Gerber brand alone).

²¹¹ See generally Agency for Toxic Substances CSEM, *supra* note 16, at 12 (describing that lead is poisonous and contaminates food during production, processing, packaging, and storage. In general, people do not want to be poisoned or consume food that is contaminated).

²¹² See generally The Food Project: Soil Testing and Remediation, *available at* thefoodproject.org/soil-testing-and-remediation (last visited Nov. 10, 2013) (stating that eighty two percent of 113 gardens tested had levels of lead above reportable limits.); see also Agency for Toxic Substances CSEM, *supra* note 16, at 12 (describing that lead is poisonous and contaminates food during production, processing, packaging, and storage).

²¹³ See Penofsky, *supra* note 19 (stating that young children are disproportionately affected by lead poisoning, when contrasted with adults).

²¹⁴ Rechtschaffen, *supra* note 42, at 305.

²¹⁵ See generally *Envtl. Law Found. v. Beech-Nut Co.*, No. RG11597384, slip op. at 44 (A.C.S.C. July 15, 2013).

occurring” and “safe harbor” level exceptions would not apply to children under the age of two. In California, electors can propose an amendment to a statute when the amendment is “certified to have been signed by electors equal in number to five percent in the case of a statute... of the votes for all candidates for Governor at the last gubernatorial election.”²¹⁶ The proposed amendment is then placed on the ballot for voter approval.²¹⁷

The public policy behind other legislation aimed to keep potentially toxic substances away from our kids is the rationale for my assertion that lawmakers should consider an exception to the Prop 65 exceptions- just for children. Legislators recognized the importance of both eliminating the use of lead in paint that *may* be ingested by young children and warning consumers purchasing a baby bottle or sippy cup that is made with BPA; therefore, baby food containing lead shall contain such a warning since the lead will absolutely be ingested by babies. Once baby food companies are forced to inform parents that there is lead in certain flavors of baby food, they will cave under the pressure of a required warning and cease selling any products that would expose a child under the age of two to any amount of lead.

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²¹⁶ CAL. CONST. art. II, § 8.

²¹⁷ *Id.*

²¹⁸ J.D. Candidate, San Joaquin College of Law, May 2015. The author would like to thank her husband, Brian, for his unwavering encouragement and support.