STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

EDMUND G. BROWN JR.
ATTORNEY GENERAL

May 11, 2007

Clifford A. Chanler
Hirst & Chanler LLP
71 Elm Street, Suite 8
New Canaan, CT 06840

RE: Proposition 65 Glassware and Ceramicware Cases

Dear Mr. Chanler:

We are writing to express our concern about the manner in which you and your clients have pursued Proposition 65 matters concerning lead in the surface coatings of glassware and ceramicware. It needs to change. While these matters generally involve lead exposures that exceed Proposition 65 standards, and which need to be corrected, your manner of pursuing them does not appear to be in the public interest.

A. Background of the Issue

1. Underlying Issue of Lead Exposure

Underlying these claims is a serious issue: in contrast to lead in the surface coatings of toys and lead in the food-contact areas of dishware, lead on the outside surface of glassware has been largely unregulated. (See Consumer Product Safety Commission regulations at 16 CFR Part 1303 establishing 0.06% lead content standard for surface coatings of toys and certain furniture.) Coatings, particularly decorations and decals, sometimes contain as much as 50% or more lead. Simple contact with the hand rubs off some of this lead, resulting in exposure to the user. Depending on the product and its use, the amount may be large or small, but in a large number of instances will exceed the Proposition 65 Maximum Allowable Dose Level for lead of 0.5 micrograms per day. In the matter of *DiPirro v. J.C. Penney*, the court found that the defendant had failed to prove that the exposure would not exceed the safe-harbor level. (*DiPirro v. J.C.Penney*, San Francisco Superior Ct. No. 407150, Tentative Decision of May 20, 2004.)

Indeed, the Attorney General has filed three cases concerning lead on the surface of soft drink bottles, based on our analysis showing substantial violations. (*People v. Pepsico, Inc.* Los Angeles Superior Ct. No. BC351120, judgment entered July 18, 2006, *People v. Dr Pepper/Seven-Up, Inc.*, Los Angeles Superior Ct. No. BC363378, *People v. The Coca Cola Company*, Los Angeles Superior Ct. No. BC3523402.)

2. Cases Pursued by Your Clients

Your clients, Michael DiPirro, Russell Brimer, and Whitney Leeman have pursued these matters for a number of years. The initial notices were issued in December of 2001 but many more were issued beginning in early 2003. According to our records, they have served over 600 sixty-day notices of violation concerning lead in glassware and ceramicware. They have filed over 200 complaints in Superior Court, many naming multiple defendants. Through the end of 2006, you have collected over $15 million, of which $9.2 million is attorney fees for your firm. This does not include another roughly $1 million collected so far in 2007, or another $645,000 in fees and costs provided in the *People v. Pepsico* settlement, or $410,000 in settlement with Dr Pepper/Seven Up.[1]

a. Initial Cases

The initial cases resulted in settlements such as the Arc International matter, and resulted in recoveries for you and your clients of $4.68 million, of which $3.15 million was attorney fees. Neither the financial recoveries or the injunctive relief standard in these matters were entirely consistent, creating some doubt as to the proper compliance standards under the law.

b. The *Boelter* Settlement

In early 2005, based on the significant number of settlements entered by your clients in 2003 and 2004, it became apparent that a somewhat more uniform and efficient approach to resolving the claims was needed. In early 2005, you and some of the defendants (with some consultation with our office), developed the lead and cadmium standards reflected in the settlement in *Brimer v. The Boelter Companies* (San Francisco Superior Court No. CGC-05-

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[1]These figures (and the other figures discussed in this letter) are based on our records, which in turn are based on settlement information that you are required to provide to the Attorney General under Proposition 65. Each year, we provide our information to you for verification. To date, we have received no response to our request that you verify our 2006 information. If these figures, or any of the figures in the letter, appear to you to be incorrect, please let us know.

440811). That settlement also provided an extensive "opt-in" program establishing fixed relief and payments, including penalties and attorney fees, for categories of companies. Although we ultimately chose not to object to the settlement, this was after extensive inquiry on our part, some agreement on your part to reduce fees, and our indication of concern that if the number of opt-ins was extensive, the fee schedule might not be reasonable. (See Attorney General's Response re settlement [August 4, 2005], Declaration of Clifford Chanler, Pars. 7, 8 [August 10, 2005], Declaration of Daniel Bornstein [August 15, 2005].) We also questioned the propriety of the fees charged by attorneys for the defendants. Ultimately, the settlement was approved by the court on August 18, 2005. As you know, however, our regulations provide that the failure of the Attorney General to object to a settlement does not constitute an endorsement of the settlement. (Cal. Code Regs., tit. 11, § 3003.)

According to the report filed with the court by Morrison & Foerster, counsel, as of November 3, 2006, 205 companies had opted in to the *Boelter* settlement under the auspices of that firm's representation. This generated $1.018 million in fees for the administering defense counsel, who concluded that this amount exceeded the reasonable fee for the services by over $350,000, and donated that amount to various charitable activities. (Defendants' Counsel's Report to Court Regarding Results of "Opt-in Program"[November 3, 2006].) According to that report (and our records), the program generated total payments of over $9 million, including $5.3 million in attorney fees to your firm and penalty payments of over $2.8 million ($700,000 of which is given to plaintiffs by statute). This equals over $26,000 in fees per defendant, which assuming all time was attorney time at $400 per hour, would equal over 65 hours of attorney time per company. This, as we understand it, is for companies that did not contest liability, but instead sought to resolve the matter immediately.

c. Additional Settlements.

Since the closing of the *Boelter* "opt-in" program, and where other companies chose not to opt in to that settlement, you have pursued additional actions. According to our records, in other cases through the end of 2006, you have collected another $1.3 million, including $850,000 in attorney fees. As noted above, this does not include over $2 million collected in other cases since that time. Based on your continuing issuance of notices of violation, we expect this to continue.

B. Current Practices

Our primary concern at this point is the manner in which your clients have collected significant sums of money from businesses that have little or no liability for past violations, and an amount of attorney fees that appears to exceed a reasonable amount.

In a number of instances, we have been contacted by retailers who have received your clients' notices, who assert that they had no knowledge that the products contain lead. While we have not verified these claims, it certainly is plausible that a typical small retailer would have no such knowledge. Of course, the statute does not require that the retailer know that it is in violation of the law, but it does require knowledge that there is an exposure to the chemical. The retailer may have had no knowledge of the lead exposure until receiving your notice, and therefore no liability. Where the retailer acts promptly to either provide warnings or cease sales of the product, there would be no continuing liability, and little likelihood that a court would award a penalty.

At that point, the only issue would be whether your clients are entitled to an attorney fee for your efforts to investigate the matter and issue the notices. The basis for an award of fees is Code of Civil Procedure section 1021.5, which requires, among other things, that the plaintiff show a "significant benefit" to the public, and the "necessity of private enforcement" in order to obtain a fee. Where the alleged violator has no back liability, and immediately begins complying with the law, there is no apparent need for a case to be filed, and these standards may not be satisfied. For the potential defendant to assert a defense to a fee claim, however, would cost more than simply paying the fee, as a result of which few, if any, companies have done so.

Moreover, the amount of fees sought in your settlements seems unwarranted, given the nature of the activity needed to reach a settlement with a defendant who does not contest the matter. For example, in a recently submitted settlement in *Brimer v. Archie McPhee & Co.* (Alameda County Superior Ct. No. HG06264912) provides for payment of $19,000 in attorney fees and costs. It asserts that actual fees and costs are over $42,000, based on 100 hours of attorney time, and including $16,000 in investigative time. It includes investigative time for "initial general investigation on product type and use" (see Declaration of Aparna C. Reddy, Par. 2.6.), which does not seem plausible at this point in the series of cases. Indeed, in a case such as this, however, it would appear that the work consists of the initial investigation (i.e., inspection of the store and testing of products), which is not appropriately compensated at attorney rates; completion of the notice of violation, based on the clearly established template; filing of the complaint (again based on a template), "negotiation" of the settlement (again, based on a template), and filing of the settlement approval motion (template). Given your firm's familiarity with this process, 100 hours of attorney time seems excessive. In this particular example, the actual amount collected is much smaller, but still appears unreasonable.

We are aware that the settlements in these matters have been approved by courts, with the court in each instance specifically finding that the amount of attorney fees is reasonable. Moreover, the Attorney General has not objected to the settlements. Looking at the entire

pattern of conduct, however, including the extent to which the work has been routinized, we think that the fees may not be legally justifiable.

C. Future Conduct

Accordingly, we are considering a number of steps in order to improve the manner in which companies are brought into compliance with Proposition 65.

1. Information Concerning Your Practices

In order to help us evaluate the best way to proceed, we would appreciate it if you could answer the following questions:

- How do you determine whether the alleged violator has knowledge that the products cause an exposure to lead or cadmium?
- If the alleged violator is a retailer who appears to have had no knowledge that the products cause exposure to lead or cadmium until the notice of violation was received, how does that fact affect your approach to the matter?
- Do you make it clear to alleged violators that if they had no knowledge that the product exposed persons to lead or cadmium, they have no liability for any past violation?
- At what point was any initial start-up investment fully recovered?
- Can you explain how the preparation of template materials requires the number of hours set forth in fee applications?
- If the alleged violator was willing to comply immediately, and had no back liability, how is your action in the public interest, and how was it "necessary" under Code of Civil Procedure section 1021.5?

Please provide answers to these questions, and any other information you think would be helpful to our consideration of these matters, at your earliest convenience.

2. Potential Actions by the Attorney General

We are considering a number of actions to assure that compliance with Proposition 65 in these matters is achieved in the manner that truly promotes the public interest. Given the long

history of your activities, we are willing to discuss these issues with you before we embark upon actions we think most appropriate. Options we are considering include the following:

- Information and education campaign to affected entities.
- Closer scrutiny of settlement documents and fee applications, particularly with respect to whether the defendant came into compliance quickly, and knew of lead exposure before receiving your notice.
- Where your clients provide a notice of violation that we believe has merit, filing and diligently prosecuting our own action in each instance, in which we will assure that the defendant complies and collect a penalty and costs only if appropriate.

We solicit your immediate response. Further, please advise us of whether you intend to proceed in these matters as you have the past, or modify or cease your practices. We look forward to your response, which should be directed to Supervising Deputy Attorney General Edward G. Weil.

Sincerely,

EDWARD G. WEIL
Supervising Deputy Attorney General

EDMUND G. BROWN
Attorney General

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May 14, 2007

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RE: Proposition 65 Glassware and Ceramicware Cases

Dear Mr. Chanler:

In our letter to you of May 11, 2007, at footnote 1, page 2, it states that we had not received a response from you to our earlier request for information concerning settlements entered into by your firm. In fact, you responded on May 3, 2007 to our March 28 request. While some corrections were made, the information you provided did not substantially affect the figures set forth in our letter.

Sincerely,

EDWARD G. WEIL
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General