

# New Target for Prop 65 Plaintiffs: Bisphenol-S

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January 8, 2025

The New Year rings in with a likely wave of new enforcement actions under California's Proposition 65 targeting Bisphenol-S (BPS), a popular substitute chemical for Bisphenol-A (BPA) which itself has been targeted by regulators and Prop 65 enforcers for the last decade.

BPS initially was [listed](#) under Prop 65 on December 29, 2023, after being identified by California's Office of Environmental Health Hazard Assessment (OEHHA) as a female reproductive toxicant. Enforcement actions are allowed to commence after expiration of a one year grace period. Hence, Prop 65 plaintiffs are expected imminently to start issuing Notices of Violation for products containing BPS, which is often found in thermal paper, such as cash register receipts and adhesive labels; hard plastic, such as food and liquid storage containers and utensils; and synthetic clothing fibers, such as those used in athletic and waterproof gear. BPS has also been detected in food and personal care products that have come into contact with BPS-containing storage containers.

In addition, on December 12, 2024, California's Developmental and Reproductive Toxicant Identification Committee (DARTIC), responsible for identifying chemicals that cause cancer or reproductive toxicity under Proposition 65, unanimously voted to list BPS as a *male* reproductive toxicant. OEHHA is expected to adopt the decision and expand the BPS listing to cover exposures to both men and women.

Bisphenols are a high priority target for OEHHA and citizen suit "bounty hunter" plaintiffs. BPA, to which BPS is similar in both chemical structure and utility, has been a major focus of Prop 65 actions since it was first listed in 2015, with over 450 notices of violation filed. In the wake of the BPA listing and other regulatory actions targeting the chemical, including by FDA and numerous states, many manufacturers turned to BPS as a substitute.

OEHHA has not adopted "safe harbor" levels for BPS based on the male or female reproductive endpoint. Accordingly, in assessing whether a product requires a Prop 65 warning, companies are left to determine for themselves, using ambiguous guidance from the state, what the threshold for warning should be. Of course, plaintiffs can have a different view of the science and the appropriate "safe" level. Given the uncertainty inherent in this state of affairs, it is not uncommon for businesses to choose to provide a Prop 65 warning if any amount of the substance is present in a product to which consumers may be exposed.

## *Background On Proposition 65*

Proposition 65 was adopted by voter referendum in 1986 as the Safe Drinking Water and Toxic Enforcement Act. The law requires businesses who expose individuals in California to substances deemed by the state to cause cancer or reproductive harm to provide a clear and reasonable warning prior to exposure. OEHHA implements Proposition 65 and maintains a list of chemicals, over

900 currently, identified as carcinogens and reproductive toxins for which warnings may be required.

If a warning is required, a business must provide one that is “reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individuals prior to exposure.” The regulations provide that if certain specific text is used, the warning is deemed to be *per se* compliant (such as below for a product containing both a carcinogen and reproductive toxin):

**⚠ WARNING: This product can expose you to chemicals including [name of one or more listed chemicals], which is [are] known to the State of California to cause cancer, and [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).**

A “short form” of the warning also is available. On-line purchases that involve California consumers also may require a warning.

The failure to provide a warning can subject violators to penalties of up to \$2,500 per day and per exposure. The state Attorney General may bring a lawsuit to enforce the law’s requirements, and some of the most high profile cases are handled in this manner. However, most cases are brought under the law’s “bounty hunter” provision, which allows private plaintiffs to bring an action seeking penalties for alleged violations. Each month, scores of new cases are filed mostly by approximately a dozen highly active private plaintiff groups alleging failure to warn due to the presence of listed substances. Thus, the law leaves businesses vulnerable not only to scrutiny from state regulators, but from private citizens as well.

A warning is not required if an exposure is so low as to create “no significant risk” of cancer or reproductive harm (per stringent standards specified under the regulations). While the exemption provides entities with some relief from liability, the burden rests on the business to demonstrate that a particular exposure level poses no significant risk, a task that can require extensive testing and technical analysis.

To facilitate compliance, OEHHA has adopted “safe harbor” warning threshold levels for approximately 300 substances that helps eliminate some of the uncertainty in determining what exposure level requires a warning. However, these “safe harbor” levels generally are very low, in accordance with highly conservative risk assumptions.

Ultimately, Proposition 65 is the source of lawsuits against many businesses for failure to provide a warning. These cases often are brought against companies that are unaware that low levels of listed chemicals are present in their products. When confronted with a lawsuit from a plaintiffs group, these businesses often rationally decide to settle the case by agreeing to provide a warning and paying a penalty, typically in the range of \$20,000-\$150,000 or more, instead of facing the costs during litigation of establishing that an exposure is exempt from warning requirements. Hence, historically, the statute has encouraged over-warning, as businesses may provide warnings even where an exemption may apply simply to avoid costs.

For extensive commentary on Prop 65, please read more on [Kelley Green Law](#).