Physician's Committee for Responsible Medicine v. Applebee's, 224 Cal.App.4th 166 (2014)

- PhIP in grilled chicken v. chain restaurants
- 3 rounds of successful demurrers
- Allegations kept changing – no warnings, insufficient warnings, etc.
- Plaintiff's lawyer admitted he had not done a sufficient pre-suit investigation
- Unsurprusing holding: 60-day notice and certificate of merit defective when served

Applebee's (cont'd.)

- Ds try to use case to argue for discovery into sufficiency of pre-suit investigation
- Per H&S § 25249.7(h)(1), basis for the certificate of merit discoverable only to the extent relevant and not privileged
- Per H&S § 25249.7(h)(2), at the conclusion of a case, if the court determines there was no actual or threatened exposure, the court can review the basis for the certificate of merit

Applebee's (cont'd.)

- Do your homework: "You don't get to file a complaint unless you have a reasonable belief that there is a violation. . . . If you don't have any example of a violation, you shouldn't be here"
- Be prepared: "'we don't have the slightest idea what KFC does with its warnings'"
- Bad facts make bad law

Yeroushalmi v. Miramar Sheraton, 88 Cal.App.4th 738 (2001)

- Sufficiency of three 60-day notices at issue
- "tobacco smoke and cigars," consumer product, occupational and environmental exposures
- "cigars" was adequate, but notices otherwise too vague: "While the notice names the specific type of consumer product – cigar, it fails to provide adequate, or indeed, any information to assess the nature of the alleged violation."

Yeroushalmi (cont'd.)

- Per OEHHA regulations, notice "shall provide adequate information from which to allow the recipient to assess the nature of the alleged violation, as set forth in this paragraph. The provisions of this paragraph shall not be interpreted to require more than reasonably clear information, expressed in terms of common usage and understanding, on each of the indicated topics." 27 C.C.R. § 25903(b)(2).

Yeroushalmi (cont'd.)

- Per OEHHA Statement of Reasons, "ceramic dishes," "spray paint," "car wax," and "paint thinner" ok, but various aerosol, paint, adhesive and/or automotive products, including but not limited to . . .' or 'various chemical products, sold in bulk or as finished products'"

Dowhal v. Smithkline Beecham Consumer Healthcare, 32 Cal.4th 910 (2004)

- Failure to warn about nicotine exposures from over the counter smoking cessation products (e.g., nicotine gum/patches)
- Preemption
  - Express – no
  - Field – no
  - Conflict - yes
    - Impossibility
    - Obstacle

Dowhal (cont'd.)

- Federal law: prohibits states from enacting "any requirement . . . that is different from or in addition to, or that is not identical with, a requirement under this chapter."
- But n/a to "a State requirement adopted by a State public initiative or referendum enacted prior to September 1, 1997." Undisputed this was intended to save Prop 65.

Dowhal (cont'd.)

- Presumption against preemption gets lip service but not enough
- Congressional intent is touchstone of preemption analysis but saving clause not enough
- Be careful what you ask for – citizen petition to FDA led to bad letter that formed basis for ruling
- Timing is everything: citizen petition filed in August 2000, response August 2001

Dowhal (cont'd.)

- Public policy concerns
  - Overwarning
  - Right to know versus nuanced warnings – balancing of public health goals
  - "Unusual case; in most cases FDA warnings and Proposition 65 warnings would serve the same purpose – informing the consumer of the risks involved in use of the product – and differences in wording would not call for federal preemption."