

Vague 'Wood Dust' Toxin Added to California's Prop 65 Warnings List

Product Liability Advisory

January 2011

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In December 2009, California added "wood dust" to the list of more than 900 chemicals and other substances subject to California's Safe Drinking Water and Toxic Enforcement Act," commonly called "Proposition 65." The listing was controversial because the term "wood dust" is vague, too broad and will undoubtedly lead to overenforcement, subjecting the business community to "bounty hunter" lawsuits. The warning requirement took effect on December 18, 2010.

Proposition 65 requires any person "in the course of doing business" who exposes an individual in California to a chemical "known to the state" to cause cancer or reproductive toxicity must give a "clear and reasonable" warning. Failure to give such a warning before exposure is punishable by a civil penalty of up to \$2,500 per violation, per day. The act is enforced through civil lawsuits, which, under this unique law, places the burden of proof on defendants. Although primary jurisdiction is vested in the state attorney general and certain designated city and county prosecutors, *anyone* may sue to enforce the act, as long as the putative plaintiff first gives written notice to the alleged violator and designated public prosecutors, and the public prosecutors fail to commence a civil action within 60 days.

In the view of many, Proposition 65 permits legalized extortion of the business community by so-called bounty hunters, who retain 25 percent of any civil penalty and also recover attorneys' fees and costs. As a practical matter, a business that is unable to show that it has complied with Proposition 65 to the satisfaction of a bounty hunter is left with two alternatives: settle with the bounty hunter on its terms, or litigate the merits of the case. A plaintiff needs to show only that one of more than 900 listed chemicals is present, in *any* amount, and the defendant is left to prove at trial that the exposure at issue did not require a warning. The cost of such a defense to a single defendant is prohibitive, a fact that bounty hunters count on – they negotiate nuisance settlements whose principal component is defendants paying lucrative attorneys' fees to plaintiffs' lawyers.

Two large trade associations, Western Wood Products Association and the Lumber Association of California and Nevada, have developed signage and other information to assist their members in complying with the new listing. Undoubtedly, these efforts will help those member companies and those who sell lumber in California meet the new warning obligation. But they are not the only businesses at risk of being sued.

It is likely that private plaintiffs will target "secondary" companies that have more than 10 employees but do not directly cause the wood dust to be generated. First, manufacturers and retailers of any type of tool that may be used on wood or particle board (e.g., drill, saw, sander, sand paper and plane) should take steps to provide Proposition 65 warnings to users. There are literally hundreds of cases that have been brought against defendants concerning equipment that did not contain the listed chemical itself, but when used as intended could cause the listed chemical to be generated. Thus, the provision of a warning on the package label would ensure that a lawsuit would not be filed. Second, commercial property owners and managers (e.g., homebuilders, building owners and developers, apartment owners and property managers) should take steps not only to ensure that the workers have received appropriate warnings under by their employers, but also ensure that warning signs are posted in the area of exposure to prevent drifting dust from affecting individuals who may be working or living nearby.

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