Litigation in California:
What Every Business Needs to Know

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Proposition 65: A Deceptively Simple Law with Costly Consequences

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The relentless pursuit by the California plaintiffs' bar of Proposition 65 claims against companies doing business in the state has all the makings of a reality television show.

Prop. 65 – the deceptively simple law requiring warning signs if products or environments expose individuals to toxic chemicals – has resulted in more than 2,200 settlements and more than $125 million in damages paid for by California businesses in the last decade alone. Almost 70 percent of that amount – $86 million – has gone to attorney fees.

For companies who lack a thorough understanding of the law and its defenses, a Prop. 65 settlement can end up being a cost of doing business in the state. If your company has a presence in California, you need to know about this litigation reality.

WHY IS PROP. 65 PROBLEMATIC?

Formally known as The Safe Drinking Water and Toxic Enforcement Act, Prop. 65 is a seemingly straight-forward statute, authored by several well-known environmental defense groups. The thrust of the statute is to require a specific warning of potential exposure to harmful chemicals. Codified in California Health and Safety Code section 25249.6, it provides:

> 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, except as provided in Section 25249.10.

On its face, it is reasonable to expect manufacturers to abide by this statute. Where the problem arises is that Prop. 65 applies regardless of the amount of the chemical in a product

emission or workplace exposure. Even minute or trace amounts will arguably trigger the warning requirement – *even if there is virtually no risk of cancer or reproductive harm from the exposure*.

› PROP. 65 CHEMICAL LIST

Over 700 different chemicals are identified, or "listed" by California, as being subject to Prop. 65's prohibitions. The Prop. 65 chemical list can be accessed here: http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html. An entity "violating" the statute may be enjoined. Violators are liable for civil penalties of up to $2,500 per day for each violation.

Most Prop. 65 compliance problems arise because targeted products or business operations are not intended to cause exposures to the listed carcinogens or reproductive toxicants. Ongoing advancements in chemical detection methodologies provide the plaintiffs' bar with data that supports claims of alleged exposures to detectible levels of Prop. 65 listed chemicals.

WHAT DOES PROP. 65 COVER?

Products and chemicals that have been the target of Prop. 65 litigation include: French fries and potato chips (acrylamide); belts and shoes (lead compounds); secondhand tobacco smoke (numerous carcinogens); wood dust (carcinogen); shampoo (1,4 dioxane) and railroad ties (creosote).

Prop. 65 regulations provide specific guidance on what warning language to use, and how to warn different classes of individuals that may be exposed to a listed chemical(s). The warning language for a consumer product should basically read as follows:

> **WARNING: This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm. (27 Cal. Code of Regs. § 25603.2.)**

Warnings for the workplace are somewhat more complex, as businesses may rely on an appropriate form of Hazard Communication Standard, among options. Finally, so-called "environmental exposures" require a warning similar to those for consumer products, but the term "area" replaces the "product" reference in the warnings. If these warnings are provided, in a proper manner before an individual is "exposed" to the listed chemical, your business can skip this Prop. 65 Reality Show. Unfortunately, as the settlement statistics show, many businesses are not aware of their warning obligations.

WELCOME TO THE PLAINTIFFS' PROP. 65 REALITY SHOW: PRIVATE ENFORCEMENT FOR ALL

With their environmental defense background, the authors of Prop. 65 added one critical wrinkle rendering it a highly effective tool for plaintiffs' attorneys: ***A Private Enforcement Right.***

Private individuals or environmental groups are entitled to bring Prop. 65 enforcement actions if they determine a listed chemical is present in the product or exposure scenario at issue[1]. Actions to enforce Prop. 65 "may be brought by the Attorney General in the name of the People of the State of California, by any district attorney, or any city attorney of a city having a population in excess of 750,000." (*Id*., § 25249.7, subd.(c).) Private parties may enforce Prop. 65 "in the public interest," but only after providing written notice of alleged violation to the alleged violator, the Attorney General, and every District Attorney in whose jurisdiction the alleged violation occurs. If no public prosecutors commence enforcement within sixty (60) days, then the private party may sue. (*Id*., § 25249.7(d).)

In practice, the Attorney General's office and district and city attorneys invariably choose not to bring an enforcement action unless the notice clearly indicates there is a real public health risk or threat. In virtually all Prop. 65 enforcement actions, the private enforcer will bring its own lawsuit and enforce its own interpretation of Prop. 65 requirements.

Plaintiffs' attorneys and environmental groups have tested thousands of California products and environmental conditions to support their alleged exposure scenarios, oftentimes discovering trace amounts of Prop. 65 chemicals that arguably trigger a warning. Not surprisingly, private enforcement will then occur if no Prop. 65 warning is provided. After almost 25 years of litigation under Prop. 65, it is (painfully) apparent that many products and workplaces contain trace amounts of listed chemicals. Because of the technical defense issues, and the uncertainty associated with chemical and toxicological assessments of assumed exposures to listed chemicals, virtually all Prop. 65 litigation results in settlements[2].

Consequently, thousands and thousands of lawsuits have been filed and settled under Prop. 65 since its passage. Plaintiffs' attorneys and environmental organizations are thus compensated for penalties and attorneys' fees to the tune of hundreds of millions of dollars.

HOW CAN I ESCAPE THE PROP. 65 SHOW?

If your business is the target of a Prop. 65 enforcement action, the most sound legal advice is usually negotiation of an early settlement. The settlement will include monetary payment(s) and normally involves inclusion of a Prop. 65 warning or an enforceable reformulation of a product's chemical composition. This scenario has too often been a "cost of doing business" in California for over two decades.

Despite the predilection to settle Prop. 65 claims early, strategic evaluation of the legal and technical aspects of a Prop. 65 claim can lead to different results. For example, Prop. 65 requires warnings only if exposures are "knowingly" and "intentionally" caused by the product or business activity. (Ca. Health & Safety Code, § 25249.6.) "Intentionally" is not defined by Prop. 65 regulations. There are thus potential defenses in the event an exposure takes place in a manner that is not "reasonably foreseeable" to the business (i.e., not intended). (27 Cal. Code of Regs. §§ 25602(b)-(c).) On the other hand, "knowingly" is defined in a broad manner by Prop. 65 regulations to mean:

> …knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the [Prop. 65] Act is occurring. No knowledge that the discharge, release or exposure is unlawful is required. (*Id.* at § 25102 (n).)

A successful "knowingly" defense will require some unique facts, given the somewhat relaxed Prop. 65 scienter requirement. Notwithstanding these factual and legal complexities, initial evaluation of a Prop. 65 enforcement action should include strategic analysis of a defendant's intent, knowledge or both. Prop. 65 is not a strict liability statute; strong facts, coupled with legal argument, can help a business defend itself from inclusion in the Prop. 65 reality show[3].

Successful defense (or reasonable resolution) of Prop. 65 litigation should also include sound technical evaluation, with a strong analysis of the complex Prop. 65 human health risk assessment regulations. In addition to technical defense details, there are Federal preemption issues, workplace and OSHA defenses, challenges to the adequacy of pre-lawsuit notices from plaintiffs, identification of average consumer product uses and many other aspects of alleged chemical exposures under Prop. 65 regulations[4]. Successfully litigating Prop. 65 thus requires a defense team that includes seasoned environmental consultants, excellent analytical laboratories and environmental counsel that understand the variables and uncertainties of Prop. 65 and its chemical exposure and risk assessment details.

THE SUCCESSFUL PROP. 65 "DEFENSE" IS DON'T GET SUED

Notwithstanding potential defenses, very few Prop. 65 cases go to trial due to the litigation costs and the potential for scientific uncertainty (*i.e.*, disagreement) over the actual toxicity posed by alleged environmental exposures or the assumed usage of products targeted for enforcement. Consequently, the best "defense" under Prop. 65 is to develop a sound statutory compliance program. This strategy generally focuses on sourcing consumer products and confidentially testing them to ensure compliance with Prop. 65, or assessing workplace risks and other environmental exposure scenarios to determine if a warning could shield a company from private enforcement. The most appropriate defense strategy depends on the interplay of the scientific, regulatory and usage details of a particular product or exposure scenario. Even in compliance or counseling situations, a sound strategy should include input from environmental litigators that have vigorously defended and tried Prop. 65 enforcement actions.

With the right counsel, your business can avoid being the star of California's Proposition 65 Reality Show. There are far better ways to spend time and money when doing business in California.

[1] Prop. 65 is not a class action or other type of suit involving a class or numerous plaintiffs. It is only provides for citizen enforcement of an environmental statute.

[2] Luce Forward and the author have successfully defended Prop. 65 claims at trial and received judgment in favor of defendants, but resolution through trial is the exception.

[3] Unlike certain California product liability tenets, Prop. 65 warning requirements will apply to businesses that expose anyone to a listed Prop. 65 chemical, even if the exposed individual is a "sophisticated user" of the product or chemical, and should have known of the potential for human exposure. (*See Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 74.)

[4] The Prop. 65 regulations are complex and ever-changing, as the California Office of Environmental Health Hazard Assessment is continually adopting and amending them in an ongoing manner. The latest regulatory updates can be found here: http://www.oehha.ca.gov/prop65.html.