

CALIFORNIA ENVIRONMENTAL PROGRAMS

This section highlights the extensive and complex system of environmental controls imposed by the State of California. Each major California state environmental program is summarized with particular emphasis on the ways in which each varies significantly from the federal programs. County and municipal ordinances may impose additional controls. This year's features include an article on Proposition 65 Consumer Products Suits.

CALIFORNIA 2001 ENVIRONMENTAL DEVELOPMENTS

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PROPOSITION 65 CONSUMER PRODUCTS SUITS: FROM ANTACIDS TO ZINC OXIDE, IS THERE AN END IN SIGHT?

In 1986, California voters overwhelmingly adopted by initiative the Safe Drinking Water and Toxic Enforcement Act of 1986.³ More commonly known by its ballot number – Proposition 65 – the initiative, as described by its proponents, was designed to break through governmental gridlock over regulation of toxic chemicals. Proposition 65 contains two basic prohibitions. First, with limited exceptions, it prohibits any person “in the course of doing business” from discharging a chemical known to the state to cause cancer or reproductive harm (a “listed chemical”) into a source of drinking water.⁴ Second, with several exceptions, it bars businesses from exposing persons to a listed chemical without first giving clear and reasonable warning to them.⁵ Enforcement consists of civil penalties and injunctive relief in actions brought by the Attorney General, district attorneys, city attorneys and private citizens.⁶ Proposition 65 rapidly became known as a “bounty hunter” statute because successful citizen plaintiffs may keep a portion of the civil penalties.⁷

Over the past decade and one-half, the bounty hunter provisions of Proposition 65 have been increasingly used by self-described public interest or consumer advocates in consumer product lawsuits, covering a myriad of products ranging from antacids to zinc oxide ointment, that allegedly contain listed chemicals and were sold to consumers without the requisite warning. This article focuses on Proposition 65's warning requirement and briefly examines why consumer product lawsuits will likely continue to be a significant feature of the California environmental landscape.

Barring Specific Legislation, Proposition 65 Consumer Product Lawsuits Will Continue Into The Future

Proposition 65's warning requirement is based on the premise that if a business provides consumers with health risk warning information, they will be empowered to take action shunning unsafe products and purchasing safe ones. Their purchasing decisions will then force businesses to make a safer product. As the California Deputy Attorney General who is directly responsible for Proposition 65 state enforcement noted: “For consumer products, the use of warnings rather than government-set content standards has created a market incentive to reformulate products in order to reduce the use of toxic chemicals without driving needed products out of the market and without waiting years-long product-by-product standard setting.”⁸

Public disclosure schemes have been increasingly used by agencies to harness “the forces of the marketplace to change individual and institutional behavior and, as a result, environmental risks.”⁹ Whether the premise is accurate, these types of programs have increasingly become part of the environmental statutory scene.¹⁰ Because voter initiatives are enumerated as a power reserved to the people in the California Constitution¹¹, even if the legislature were to seek to significantly amend or void Proposition 65, the legislative action would only become effective when approved by the voters, unless the initiative statute permits amendments or repeal without voter approval.¹² Proposition 65 does not allow amendments or repeal without voter approval. In essence, without voter approval, Proposition 65 as we know it is here to stay.

The Ever-Expanding Nature And Scope Of Consumer Products (And Chemicals) Subject To Proposition 65 Is Daunting

The number of products manufactured, sold, distributed and marketed in California to the consumer population at large is staggering. According to the Office of Economic Research, California has a \$1.2 trillion economy (1999 GSP) and a population of 34 million people (Jan. 1999). According to the *1999 California Statistical Abstract*, California has the largest manufacturing complex in the nation with value added in 1996 amounting to \$189 billion. There were 106,357 retail trade businesses in 1997. These retail trade businesses sell an astonishing number of consumer products. In the metropolitan area of San Diego alone, for example, during 1996-1997, the average consumer household spent \$37,974 on food, alcohol, lodging, household supplies, personal care products, etc.

There are now over 660 such chemicals on the Proposition 65 list according to the Office of Environmental Health Hazard Assessment. And the list will continue to expand. Given the large economy and vast array of consumer products, it is not surprising that substantial numbers of them contain Proposition 65 listed chemicals. As of the beginning of 1998, more than 950 Proposition 65 notice letters affecting more than 3,710 separate businesses had been filed,¹³ more than 200 lawsuits had been litigated, more than \$25 million had been obtained in enforcement payments, and more than \$250 million has been spent in reformulation/process changes/compliance costs.¹⁴ And the numbers just keep growing – so much so that the Attorney General's office has decided to no longer maintain or keep any kind of running tally, preferring to utilize its limited resources on enforcement. The very number of chemicals, consumer products, industries/companies across the marketing chain and theories/media and pathways of exposure combined with the continuing legal uncertainties compel the conclusion that there is no end to these Proposition 65 lawsuits in sight.

In addition, Proposition 65 is increasingly being used as a potent and successful tool in the plaintiff bar's arsenal. The Proposition 65 "deck" is stacked in the citizen enforcer's favor and provides substantial financial incentive for more to enter and enlarge this arena of litigation. Both compliance and non-compliance costs and consequences can be significant for industry. Some of the more important reasons for this are:

- P In one of the few defenses available in a Proposition 65 exposure suit, i.e., that there has been no significant risk/no observable effect to the allegedly exposed persons, defendants carry the burden of proof.¹⁵ This creates a "battle of the experts" at trial and substantial liability exposure, defendants typically prefer to avoid. Thus, settlement is promoted in the overriding majority of Proposition 65 cases.
- P There is no requirement under Proposition 65 that a person claiming exposure show actual injury or damage.
- P Proposition 65 provides for penalties up to \$2,500 per day for each violation and private enforcers are entitled to collect up to 25% of the penalties assessed. Given the vast quantity of products sold in the California market, the theoretical calculation of the potential penalty is invariably daunting.
- P Since Proposition 65 claims are brought in "the public interest," it is clear that a settlement or judgment would not preclude individual damage claims in a subsequent toxic tort lawsuit. Often, the two claims are joined together.
- P There is, as yet, no published opinion regarding the *res judicata* effect of a Proposition 65 settlement or judgment. Thus, whether there is *res judicata* protection against subsequent

Proposition 65 lawsuits when there has been a settlement "in the public interest," remains uncertain.

- P Proposition 65 technically provides for several liability for others in the marketing chain of commerce beyond manufacturers, *i.e.*, manufactures, distributors, retailers, property owners, etc., can each be liable under Proposition 65 for the alleged exposure without a warning by the very same item.
- P Second generation lawsuits have been cropping up, *e.g.*, lawsuits for failure to comply with settlement agreements and stipulated judgments, lawsuits to include latecomers to a particular industry, and lawsuits regarding new chemicals in products already arguably covered by settlement agreements or judgments.
- P Plaintiffs commonly bring related causes of action for unfair business practices¹⁶, arguably doubling the penalty exposure and lengthening the applicable statute of limitations period. Defendants are also at risk for plaintiff's attorneys' fees (as well as their own).¹⁷

Preemption Has Not Proven Successful

One possible limitation on the reach of Proposition 65's duty to warn is based on federal preemption. Proposition 65 itself recognizes that it cannot apply to "[a]n exposure for which federal law governs warning in a manner that preempts state authority."¹⁸ In connection with prescription drugs, the Proposition 65 regulations provide that: "the labeling approved or otherwise provided under federal law and the prescriber's accepted practice of obtaining a patient's informed consent shall be deemed to be a clear and reasonable warning."¹⁹ However, as reflected in the recent litigation regarding the anti-lice drug Lindane, the California Attorney General's position remains that this provision neither provides a generic exemption from Proposition 65 for prescription drugs regulated

by federal food and drug laws, nor does it mean that FDA-approved prescription inserts necessarily fulfill the manufacturer's duty to warn provision. The Attorney General's position is that the provision merely allows prescription inserts to use warnings that differ in language and format from safe harbor warning language.²⁰

In addition, note that in the early stages of Proposition 65's implementation, industry requested an exemption for food, drug, cosmetic, and medical devices that were otherwise in compliance with federal law. The California Health and Welfare Agency, at the time the lead agency for the implementation of Proposition 65, adopted an interim regulation as an emergency regulation. Proponents of Proposition 65 filed a lawsuit to have the regulation invalidated.²¹ After an adverse ruling in superior court, industry appealed. The parties ultimately settled and the regulation was repealed in 1993.

Furthermore, Proposition 65 does not answer the question of which federal laws, if any, preempt Proposition 65 and under what circumstances. Unfortunately for the companies who have litigated the issue, the exemption has proven to be of very limited value, as indicated by the key judicial opinions to date and as reflected in a recent Congressional hearing outlined below. Moreover, courts are usually reluctant, absent clear Congressional intent to find preemption of state "police power" laws protecting public health, welfare and the environment.²²

The California Attorney General has typically taken the position that the federal statutes do not facially conflict with or preempt Proposition 65's warning requirements. In addition, neither California nor federal courts have been receptive to the argument that the federal warning requirements scattered throughout a host of environmental, food, drug and cosmetic statutes preempt Proposition 65. [It appears that to be successful, a preemption case would have to be made based on a specific federally-regulated product as to which the federal agency has expressly denied permission to include a Proposition 65 warning on a

federally-regulated label, not by way of a generic or categorical attack.] Finally, Congress has yet to be persuaded to pass a statute preempting Proposition 65, or limiting it to a certain class of products, despite a more than 10-year crusade by the industry. Indeed, the FDA Modernization Act of 1997, which expressly preempts state labeling requirements for non-prescription drugs, has a savings clause precluding preemption of initiative statutes enacted prior to September 1, 1997, *i.e.*, Proposition 65.

A Recent Congressional Hearing Reflects The Frustration Of Many In The Business Community

The U.S. House of Representatives Committee on Small Business held a hearing on October 28, 1999, to examine the impact of Proposition 65 on small businesses.²³ Committee Chairman James Talent (R-Mo.) stated that he was concerned about abusive lawsuits by private enforcers. Although, preemption was not the focus of the hearing, the Chairman noted that the committee would like to work with the Consumer Product Safety Commission ("CPSC") to determine whether the CPSC's preemptive authority might be used "to protect against abusive lawsuits against small business people."

Five small business owners, from both inside and outside California, testified that, among other things, they had been sued for violating Proposition 65 even though they had been in compliance with federal law regarding labeling their products. The chair of the CPSC told the Committee that "[s]ince both the federal and California courts have rejected the view that the Hazardous Substances Act preempts Proposition 65, the Commission's position is that it is not prudent to spend more of our time and resources on this particular issue." Noting the testimony of the business owners, however, she stated that "it does appear that the State of California, its voters and legislators will have to do something to aid the very sad situations that we have typically heard about today." A California Deputy Attorney General and a member of the plaintiff's bar

testified in favor of the act, although they both conceded that a few private enforcers have used Proposition 65 to bring cases of questionable merit. In addition, the Deputy Attorney General stated that the recent amendment to Proposition 65 requiring disclosure of the litigation (and settlement) activities of private plaintiffs, should help the public and the Attorney General detect abusive practices.²⁴ One business person summarized businesses' position and frustration when he countered that Proposition 65 subjects businesses to unreasonable and unnecessary costs, which are ultimately passed on to consumers. He also stated that Proposition 65 inundates consumers with so many warnings that they cease to be useful.

Proposition 65 Consumer Product Lawsuits Will Continue; Needed Clarification And Abuse Redress Will Come In Time

In summary, Proposition 65 appears to be here to stay. Has Proposition 65 served its stated goals of (1) public right to know; (2) reduction and elimination of toxics; and, (3) tougher enforcement? Given the absence of hard empirical data and Proposition 65's relatively short life, it is difficult to say. It appears that Proposition 65 has raised public consciousness of consumer product toxics in many cases. And it is also clear that product reformulations to reduce or eliminate toxics in consumer products have occurred in many cases to the overall presumed public benefit. However, from an information economics perspective, many believe Proposition 65 provides too little useful warning information to promote informed consumer decision-making and only results in exacerbating the already significant warning "background noise" overload.

Is society as a whole better off? Have lives been saved? Have the benefits outweighed the costs? Although many can make a strong anecdotal case to answer these questions "yes," the overall empirical jury is still out as to the true impact of Proposition 65's intended and unintended consequences. What remains clear is that the Proposition 65 toxics

regulation "experiment," i.e., "guilty of health risk until proven innocent," will continue. Public fear of toxics is no less today (and arguably more) than in 1986. Overall, toxic tort litigation is a growth industry. Substantive changing of Proposition 65 is politically and legislatively difficult, if not impossible. As with any "new" statute, the many existing legal, technical and compliance uncertainties will be addressed slowly over time through the eventual appellate court decisional process and ongoing policy guidance interpretation by the State particularly the Attorney General's Office (who has continued to act as a moderating force throughout, though perhaps not always as actively or as often to check the abuses as many would like).

"Bounty hunter" abuses must likewise be addressed on a case-by-case basis by the judicial and executive processes. One "ray of light" is that the recent Proposition 65 amendment requiring plaintiffs to notify the Attorney General of all Proposition 65 lawsuits and settlements²⁵ will help provide the hard empirical data needed for the Attorney General to take corrective action or initiate needed legislative changes (capable of being supported by the public) if and where necessary. For example, many believe that some plaintiffs' "creative" structuring of settlements to divert payment of "penalty" monies from the State to their own coffers will be curbed by the information generated by this amendment and the Attorney General action to stop such abuses. Nonetheless, Proposition 65, and the threat of private enforcer lawsuits remain an all too real threat to those who do business in California. Proactive compliance (*i.e.*, product self-audits and making the appropriate warnings; product reformulation, etc.) has proven to be the only viable solution to date.

ENDNOTES

1. Mr. Visser is a partner in the Los Angeles office of Morgan Lewis and a member of the Tort, Environmental and Construction Practice Group. His biography appears elsewhere in this Deskbook.
2. Mr. Oppenheimer is an associate in the Los Angeles office of Morgan Lewis and a member of the Tort, Environmental and Construction Practice Group. His biography appears elsewhere in this Deskbook.
3. Codified at *Cal. Health and Safety Code* §§ 25249.5 - 25249.13.
4. *Id.* § 25249.5.
5. *Id.* § 25249.6.
6. *Id.* § 25249.7.
7. *See id.* § 25192.
8. California Deputy Attorney General Ed Weil (Oct. 28, 1999 Congressional Hearing On Prop. 65 and Small Business).
9. EPA 1990 Strategy Blueprint.
10. Besides Proposition 65, notable statutory “toxic disclosure” schemes include “community right-to-know laws” such as the federal *Emergency Planning and Community Right-to-Know Act of 1986* (42 U.S.C. §§ 11001 to 11050) and various analogous state programs, including California’s Hazardous Materials Release Response Plans and Inventory Program (*Cal. Health and Safety Code* §§ 25500-25547.2).
11. *Cal. Const.* Art. II, § 8.
12. *Id.* Art. II, § 10(c). The legislature may amend a statute adopted by initiative without voter approval if the amendment is not in conflict with provisions of the initiative.
13. At least 60 days prior to filing a lawsuit under Proposition 65, a private party plaintiff must send a notice to the prospective defendant(s), the Attorney Generals, the applicable district attorney and city attorney (if any) alleging the violation. *Cal. Health and Safety Code* § 25249.7(d)(1).
14. *Proposition 65 Handbook* (2nd ed. 1998).
15. *Cal. Health and Safety Code* § 25249.10(c).
16. *See Cal. Business and Professions Code* § 17000 *et seq.* (California Unfair Practices Act).
17. Although Proposition 65 does not provide for the prevailing party to collect attorneys fees, the under the California Unfair Practices Act, a victorious plaintiff is entitled to reasonable attorneys fees. *Id.* §17082.
18. *Cal. Health and Safety Code* § 25249.10(a).
19. 22 *California Code of Regulations* § 12601(b)(2)).
20. Regulations implementing Proposition 65 designate the language and format for certain warnings, the use of which presumptively shields a business from liability. *See, generally*, 22 CCR § 12601(b).
21. *AFL-CIO, et al. v. Deukmejian, et al.* (Sacramento County Superior Court No. 502541, filed May 31, 1988).

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22. It should also be pointed out that Proposition 65 has also withstood attacks on its constitutionality. *See, e.g., National Paint & Coatings Association, Inc. v. State of California*, 58 Cal. App. 4th 753 (1997).
23. An unofficial transcript of the hearing may be obtained on the Internet at www.house.gov/smbiz/hearings.
24. *See*, Cal. Health and Safety Code § 25249.7(e) and (f).
25. *Id.*