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Private Plaintiffs Attempt to Usurp Attorney General's Role under Proposition 65

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For many years, companies whose consumer products are sold in California have complained about Proposition 65 lawsuits being brought against retailers on the basis of allegations concerning chemicals in those products. Now, for the first time, a state court is poised to consider whether such suits may be barred under certain circumstances.

The issue before the Los Angeles Superior Court is both interesting and novel: Does Proposition 65 prohibit a private plaintiff from bringing an action based on the same products or product category at issue in an action already being diligently prosecuted by the Attorney General? Specifically, the court has been asked to determine whether a "violation" of Proposition 65 is limited to the conduct of a single "violator," or whether the term should be interpreted to include the same exposure scenario posed by the same product or product category.

The Litigation

In August 2005, the Attorney General sued nine companies, alleging that their french fries and potato chips expose people to acrylamide (a chemical formed when certain foods are cooked at high temperatures) and, therefore, must carry warnings under Proposition 65.

One year later, private plaintiff Environmental Law Foundation (ELF) sued six potato chip manufacturers not named in the Attorney General's Complaint, making essentially the same allegations as the Attorney General.

Both cases would require a court to decide whether and/or at what level acrylamide created as an unintended byproduct of cooking chips poses a "significant risk" to consumers, based on extensive expert testimony. Among other important issues of first impression, the court will be called upon to interpret and apply section 12703(b) of Proposition 65's implementing regulations (found in title 22 of the California Code of Regulations), which requires application of an alternative risk level where supported by sound considerations of public health. The "sound considerations" regulation has been on the books for over a decade but has never been reviewed, interpreted, or applied by a court.

All parties agree that the category of products in the two cases is the same, and that both cases involve the same legal, scientific, and policy issues. Moreover, the parties agree that both cases are likely to turn on the same expert testimony. The *only* differences are the brand names of the chips at issue, the fact that the ELF case is before a different Los Angeles Superior Court judge, and that the first case is being prosecuted by the Attorney General. Indeed, these cases initially were found similar enough to be related, and would have been tried together but for a procedural maneuver by ELF that resulted in the ELF case being severed and reassigned to a different judge.

Defendants filed a demurrer, asking the court to dismiss the ELF action based on the Attorney General's diligent prosecution of his action. The court heard arguments on the demurrer on February 5, 2007. The Attorney General subsequently weighed in on the issue in a March 12, 2007, letter to

the court.

The Issue: What is a Violation?

Proposition 65's citizen suit provision expressly prohibits a private plaintiff from pursuing an enforcement action where "the Attorney General, any district attorney, any city attorney, [or] any prosecutor has commenced and is diligently prosecuting an action against the violation." The specific question now pending before the court in the ELF case is what exactly is meant by the term "the violation" in Proposition 65's citizen suit provision.

Plaintiff: One Violation Per Violator

On demurrer, ELF argued that the citizen suit provision precludes private actions only against the specific "*violator*" named in the public enforcement action. Because only an individual can violate the statute, ELF argued, the term "violation" encompasses the term "violator." Under this interpretation, a private enforcer could sue any entity that was not expressly named in an action already being prosecuted by the Attorney General.

Because Proposition 65's liability scheme establishes independent liability for any person in the distribution chain of a product, ELF's view is that each manufacturer, distributor, and retailer may be individually sued regardless of an ongoing public enforcement action against any other involving the same product or category of product. Using the acrylamide litigation as an illustration, this would mean that manufacturers, distributors, and retailers may each be sued individually in separate cases by separate plaintiffs before separate judges based on *the same bag of potato chips* at issue in the Attorney General's case.

The Attorney General: One Violation, Many Violators Per Product

The Attorney General has taken a broader view of the term "violation." In his March 12 letter, the Attorney General argued that an exposure caused by the sale of a single product constitutes a single violation, even though each of the entities in the distribution chain may be individually characterized as "violators." Thus, the Attorney General concluded that an action against any company in the chain of distribution for a given product precludes private action against any other company in the chain based on the allegations of exposures to the same chemical in the same product.

Thus, if a private party were to provide a notice alleging that Company A manufactured Product X, but also identifying Retailer B as a violator, it could sue both companies over that product. If the Attorney General, however, were to file a suit concerning the sale of Product X against Company A, the action is "against the violation" and precludes a private party from suing other violators for the same violation, even if they are not identified in the Attorney General's suit.

However, the Attorney General concluded that different products gave rise to separate "violations." Thus, an action by a public prosecutor against Company A for Product X would not preclude a private action against Company B for Product Y, even if Products X and Y were identical and resulted in the same alleged exposure.

Defendants: One "Violation" Per Product Category

Defendants have argued for a broader interpretation still, one that would preclude suits by private enforcers for claims where the Attorney General is diligently prosecuting an action involving the same *category of products*, particularly where the Attorney General's claims involve the same important legal, science, and policy issues of first impression. This interpretation is required, Defendants argued, to further the plain language of the statute and the voter's policy preference for public enforcement of Proposition 65.

In support of this interpretation, Defendants argued that, as the "chief law officer" of the state, the Attorney General must be free to pursue litigation of important issues of public policy in a manner of his choosing. Defendants urged that allowing private plaintiffs to proceed with separate cases—potentially on faster trial schedules—filed after the Attorney General has commenced an action would lead to duplicative litigation and potentially inconsistent interpretations, and would deprive the public prosecutor of the ability to control and bring order to litigation that contribute to the development of Proposition 65.

According to Defendants, these considerations apply whether the name on the bag is the same or not. In ether scenario, both ELF's interpretation and the Attorney General's would require the public enforcer to sue hundreds of companies to assert his primacy on these issues and prevent this result.

Thus, Defendants proposed an interpretation that would effectively stay the right to initiate private enforcement actions during the pendency of an action by the Attorney General addressing the same alleged exposures from the same category of products. Once the Attorney General's case was resolved, whether through litigation to judgment or by settlement, any unresolved claims could be pursued by private enforcers.

Practical Implications

This issue presented in the case goes beyond acrylamide or even cases applying Proposition 65 to foods. However, even confining the analysis to acrylamide, the implications of this issue go well beyond potato products: It has been estimated that acrylamide is formed by cooking in foods comprising up to 38% of calories consumed in the American diet. It is also well known that other chemicals listed under Proposition 65 may be created in foods when they are cooked.

By contrast, allowing the Attorney General's case to be resolved before private enforcers are allowed to pursue claims based on the same issues offers the best hope for consistent results. Such consistency benefits the regulated community by allowing it to efficiently conform its conduct to predictable legal requirements. Consumers also benefit where warnings are only provided where warranted. If the Attorney General's claims are resolved through settlement, it is likely that similar standards for injunctive relief would be offered to other companies situated similarly to the defendants in that case. Similarly, if the Attorney General prevails at trial, warning thresholds established by the court would likely set the standard for settlement or trial of other actions.

Either way, an interpretation of the statute that allows the Attorney General to develop and assure the uniform application and interpretation of Proposition 65 without suing every company who makes, distributes, markets, or sells the same or similar products is the only one that furthers the purpose of the voter initiative. Regardless of the outcome in the acrylamide case, this issue is one that requires thoughtful attention from the courts and regulators, and possibly, from voters.

Note:

Morrison & Foerster LLP represents Birds Eye Foods, Snyder's of Hanover, Poore Brothers, Inc., and Zappe Endeavors in *Environmental Law Foundation v. Birdseye Foods*.

Citations:

Envtl. Law Found. v. Birdseye Foods, (Los Angeles Superior Court Case No. 356591)

People v. Frito-Lay, Inc. (Los Angeles Superior Court Case No. 338956)

Camp v. Bd. of Supervisors, 123 Cal. App. 3d 334, 353 (1981)

Cal. Health & Safety Code § 25249.7(d)(2)

Cal. Const. Art. V, § 13