Client Alert

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Reforming Proposition 65: Governor's "Update" Is a Promising Start

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Yesterday, Governor Jerry Brown's office announced his intention to propose "updates" to Proposition 65 (Health & Safety Code section 25249.5 *et seq.*) supposedly designed to make the law less susceptible to the widespread abuses by plaintiffs' lawyers suffered by those who do business in California. While it is encouraging that the Governor and his staff recognize the significant problems and abuses engendered by this statute over the last 25 years, the suggestions they make fall short of what needs to be done, and in the case of warnings would only increase the burdens on businesses in California. Therefore, much work remains to be done if true reform is to be achieved.

"FRIVOLOUS LAWSUITS"

Under the banner heading of frivolous lawsuits, the proposal suggests that when determining attorneys' fee reimbursement amounts, which are required in virtually every Proposition 65 settlement, courts consider (1) the novelty of the alleged violation, the notice of violation, and any resolution, and (2) the amount of time that passes, and the amount of necessary litigation that occurs between the alleged violator's receipt of the notice of violation and correction of the violation. Unless carefully crafted, this provision could actually end up rewarding plaintiffs for trotting out expanded theories of liability and for avoiding early settlements, and interfere with the considerable discretion courts already have in determining whether fees are reasonable and whether there has been a public benefit. Minimizing abusive lawsuits will require strong statutory language that requires very specific showings of public benefit and efficient efforts to achieve early and low-cost settlements before attorneys are awarded their fees for bringing Proposition 65 lawsuits.

The proposal also suggests requiring a stronger certificate of merit and making it somewhat more available for review (it currently must be kept under lock and key by the California Attorney General's office). However, as a practical matter, true reform would require a plaintiff that wishes to bring suit to demonstrate in a certificate of merit that the exposure to the listed chemical at issue involves a level exceeding the threshold for warning—the mere presence of a single detectable molecule can no longer be a sufficient test. This too is a good start, but to be effective, the statute needs to require a showing that a material violation exists before a lawsuit can be filed, and these standards must be enforced by the Attorney General.

The proposal also targets "payments in lieu of penalties"—a favorite tool used by plaintiffs in Proposition 65 settlements. These payments essentially direct full funding to the plaintiffs themselves or related parties to steer around the statute's directive that allocates 75% of penalties to the state and provides plaintiffs with a 25% cut. Taking into account California's fiscal woes, one would think the Governor would propose to outlaw this practice entirely; however, his proposal merely requires the plaintiffs to make a clearer showing that these "in lieu of"

payments to private organizations have a closer nexus to the "specific basis for the case." Very few Proposition 65 cases actually entail any harm to anyone, and in most cases, these payments should simply be banned.

WARNINGS

As to warnings, the Governor's proposal takes an outright and decided turn for the worse. The proposal suggests that Proposition 65 warnings be made much more burdensome and essentially eliminates the system of prophylactic warnings that has developed over the last 25 years. Businesses—even those that have settled on and agreed to very specific warning terms—would have to start over from scratch. The proposal seeks to do by legislation what was definitively shot down when it was attempted by regulation several years ago. Under the proposal, warnings would need to:

- List the specific chemicals involved; if multiple chemicals are involved, the three with the highest exposure levels need to be named but the sign should say that there are also others in the area;
- Designate the harm posed by *each* of the chemicals involved including, but not limited to, cancer, male reproductive harm, female reproductive harm, and/or harm to a developing baby;
- Specify the general location of the chemical in the area (e.g. in the air, in food, on painted surfaces, etc.);
- List steps to be taken to minimize exposure (including those which are usually minimal or taken already). For example, washing hands after touching certain dirty surfaces which may contain listed chemicals before the preparation or consumption of food; and
- Provide a URL and a QR code (readable by a Smartphone) that direct users to an OEHHA-maintained website that provides more information about Prop. 65 and the chemicals commonly subject to area warnings.

These changes could require a complete reevaluation and revision of every one of the millions of Proposition 65 warnings we see in California today. To make those revisions, one would have to reevaluate the product in order to determine what the top three chemicals are, and then for each chemical decide: (1) what combinations of effects are associated with each of the chemicals; (2) where each of the chemicals might be found; and (3) what steps might be taken to minimize exposure. That's at least nine different parameters that would need to be evaluated for each situation. Of course, each of these nine parameters opens a new area for disputes and litigation challenging the adequacy of warnings. This would be a great boon for lawyers and consultants, but of little value to the public.

SAFE HARBOR LEVELS

Recognizing one of Proposition 65's most significant defects, the proposal suggests that the law's 1000-fold safety factor for reproductive toxicants be reduced to 100-fold. Eliminating a large number of cases involving trivial exposures is certainly laudable and long overdue. But the proposal is oddly limited to chemicals where the no observable effect level is "based on human epidemiological data." It is not clear which, if any chemicals, this qualification would apply to, but it seems to be a fairly elite club. The better approach would be to include all chemicals, especially those where the safety factor is based on animal data, since animal data is generally a weaker indicator of risk.

While the Governor is to be commended for recognizing the significant burdens of this statute, and its propensity for abuse, the changes reflected in this proposal are only a start, and in some respects would make it even harder for businesses to comply.

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Our lawyers were Proposition 65 experts even before it became law. Michèle Corash, former general counsel of the U.S. Environmental Protection Agency, authored the principal ballot argument against the Prop. 65 initiative in 1986. Our lawyers have served as the business community's preeminent voice in Prop. 65 litigation, settlements, listings and reform efforts ever since. For more information regarding our Proposition 65 practice, click here.

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