BY-LINED ARTICLE

California Proposition 65: A Toxic Solution for Toxic Torts

By Paul Rosenlund
September 2, 2010
Duane Morris LLP

Introduction

California's Proposition 65 is a law that can almost defy explanation, because when one tells the uninitiated how it operates and who is affected, the typical response runs along the lines of "You must be mistaken, nobody would pass a law like that!"

Many have contended that the law was a mistake, but Proposition 65 is real and is not going away. Any business operating in California or selling products into California should be aware of it and take appropriate steps to comply with it.

Formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code §§ 25249.5 et seq., Proposition 65 was passed by voters reacting to a simple campaign message promising that the act would prohibit businesses from exposing California residents to chemicals that cause cancer or reproductive harm.

In practice, the law does not ban the use of any particular chemicals, but it seeks to achieve its objectives through two distinct mandates: (1) businesses may not discharge certain chemicals into sources of drinking water, and (2) businesses must provide a "clear and reasonable warning" before exposing people to even minute quantities of specified chemicals that are potential carcinogens or reproductive toxins.

These two provisions are not the real issue. The potential abuse and expense resulting from Proposition 65 are creatures of the law's unique enforcement scheme, which empowers virtually anyone to file a Proposition 65 lawsuit against a business that fails to provide the requisite warnings, and it rewards the filer with a share of any penalties resulting from a settlement or judgment. A plaintiff may file suit even if he or she has suffered no harm and has never been to the defendant's premises or used its products. This scheme has created armies of so-called "citizen enforcers" vying for a share of statutory penalties, backed by law firms seeking an award of attorneys' fees.

Companies that do not comply with Proposition 65's warning requirements face a risk of lawsuits, civil penalties (up to $2,500 per violation per day), attorneys' fee awards and more. Proposition 65 suits are often costly to defend, are generally not covered by insurance, and can place essentially all burdens of proof upon the defendants. The apparent net result is another "litigation tax" that lines the pockets of a small group of lawyers and provides few benefits to consumers.

What's a business operator to do? Do not give up. About the only favorable news in Proposition 65 is that it includes a relatively simple safe-harbor warning provision, which if properly followed, can provide substantial protection from the risks of Proposition 65 litigation.

Who is subject to Proposition 65?

The law applies to all businesses with 10 or more employees. Typical exposure risks involve companies that manufacture, distribute or sell consumer or commercial products, including those used in the workplace; companies that discharge chemicals into the air or groundwater; and companies that may be involved in occupational exposures to regulated chemicals. Businesses outside of California are not exempt, and they may be subject to enforcement activities if they produce or sell products that end up in California.

What chemicals and products are regulated?

California put the world on notice of Proposition 65 through publication and regular updating of "The List"—officially known as the list of chemicals "known to the state to cause cancer or reproductive toxicity"—on the website of the California Office of Environmental Health Hazard Assessment (OEHHA) at http://oehha.ca.gov/Prop65.html. The list currently has more than 800 chemicals and continues to grow. Procedures are available for challenging a listing, but they are rigorous.

Hundreds of chemicals commonly encountered in consumer products are on the list. Private enforcers often pursue chemicals and products in batches. Once they identify a product or material that tends to have traces of a listed chemical, they scour the marketplace for offenders. Current "hot" items include lead and phthalates in apparel, toys and sporting goods; lead in drinking glasses; lead in keys, locks, tools and items made of brass; lead and phthalates in PVC; chlorine; tobacco smoke; alcohol; pesticides; gasoline and various greases and solvents.

How much is too much?

The OEHHA list identifies chemicals by name and Chemical Abstract Service (CAS) number, and in some cases, it states the exposures that are considered hazardous. However, the list otherwise may not be particularly helpful to manufacturers and retailers because it does not provide formulation levels that are considered safe, or any other information that is directly usable when formulating or testing finished products. Instead of taking the approach of the U.S. Consumer Product Safety Act, which specifies formulation levels that can be readily determined (for example, no more than 90 parts per million of lead in paint), the Proposition 65 list provides safe-harbor levels based on a 1-in-100,000 lifetime risk for carcinogens and an exposure that is 1,000 times lower than the "no observed effect level" in animals studied for reproductive toxicants. These are potentially useful data points for researchers, but they do little to guide a business that actually makes or sells products.

Functional safe-harbor formulation levels end up being determined on a case-by-case basis in litigation, primarily lawsuits brought by bounty-hunting private enforcers, resulting in judgments or settlements. All notices of violation, settlements and judgments must be reported to the California Attorney General, who tracks them on a public database.

Are there any defenses?

Yes, there are some defenses, but not many. The warning defense is relatively straightforward. Other defenses can be complex and costly to prove, because in the absence of a warning, the only defenses usually available involve expert testimony on such issues as safe exposure limits; human behaviors that can lead to exposures; rates of absorption resulting from dermal exposures, inhalation or ingestion; or in some cases, whether a given toxin is naturally occurring in the substance or product at issue—which may place it within a special exception.

Limited instances exist where federal law may preempt Proposition 65 warning requirements, but in most cases, compliance with a state or federal labeling, design or formulation requirement is not a defense to a Proposition 65 warning claim. The Consumer Product Safety Improvement Act of 2008 (CPSIA), which states maximum formulation levels for lead, phthalates and certain other chemicals in toys and children's products, specifically provides that it does not preempt Proposition 65 warning requirements.

Courts are, however, beginning to accept settlements of Proposition 65 cases that specify CPSIA levels of lead and phthalates as a safe harbor. The California Attorney General has stated—at least in the case of phthalates in toys and childcare products—that products meeting federal phthalate standards will "in most cases" not require a Proposition 65 warning for phthalates, but that advice is nonbinding and may provide relatively little comfort.

What must a business do to comply?

Manufacturers operating in California may want to consider the makeup of their products and, if possible, keep levels of listed chemicals below safe-harbor limits. Potential air emissions or groundwater releases of listed chemicals, and exposures to workers, visitors or neighbors, also must be considered. Proposition 65 permits compliance by providing warnings in the case of finished products, occupational exposures and, in some cases, air emissions, but it prohibits groundwater discharges—there is no warning option.

All businesses operating in California or filling goods into California markets may wish to consider the products used, stored, sold or released on their properties. Businesses located outside of California should consider whether their products are likely to end up in California, even if by happenstance. Any business that makes, sells or distributes products or components likely to be sold in California may want to consider their use of listed chemicals and assess their compliance with Proposition 65.

Audits: All businesses are likely to benefit from conducting a risk-management audit of their Proposition 65 exposures. The up-front cost is likely to be saved many fold by avoiding litigation.

Warnings: The most significant safe harbor simply involves providing a "clear and reasonable warning" that meets the requirements of OEHHA regulations. This may involve nothing more than a warning sign on the front door, but it also may involve products on labels, packaging, store shelves, websites, catalogs or in other contexts, and may depend on whether the exposure is consumer, environmental or occupational.

Responding to an enforcement notice

Proposition 65 may be enforced by the California Attorney General, county district attorneys and other law-enforcement officials, but most enforcement actions are brought by private bounty hunters seeking to recover attorneys' fees and their share of statutory penalties. The first step in enforcement usually involves a so-called 60-day notice of a claimed violation, which is given to the alleged violator and to public officials; if no public prosecutor has commenced and is diligently prosecuting an action against the alleged violator after 60 days, any person may bring an enforcement action "in the public interest" and recover attorneys' fees, a share of civil penalties and other costs.

The law appears to be stacked heavily against business defendants, and it gives public and private enforcers the benefit of the doubt. Because of this as well as the high cost and risk of litigation, most cases are settled, but often not without

engaging in preliminary discovery or investigations. Proposition 65 settlements and consent decrees have developed a somewhat formulaic approach. Yet within the "standard" outline, many potential variants can be negotiated. The use of legal counsel with experience in Proposition 65 cases is essential.

Paul Rosenlund is a partner in the San Francisco office of Duane Morris LLP, a full-service law firm with more than 700 attorneys in 24 offices in the United States and internationally. He is admitted to practice in California and Washington, D.C., and he advises and represents business clients in a variety of areas, including products liability litigation and risk management; toxic torts; unfair competition and commercial disputes, including international arbitration, trade secrets, trademark, copyright and patent litigation; and class actions, including consumer protection, antitrust and unfair lending issues.

Mr. Rosenlund advises and represents manufacturers, importers and distributors of jewelry, apparel, toys, sporting goods, electronics and other consumer products in claims, litigation and risk management involving California Proposition 65 and the U.S. Consumer Product Safety Commission (CPSC). He has experience dealing with virtually all of the major Proposition 65 "bounty hunters," and he recently concluded a settlement of the largest penalty proceeding ever instituted by the CPSC, which involved alleged violations of federal law involving toy safety and toxic chemicals in children's products and art materials.

If you have any questions regarding this article or would like more information about California Proposition 65 or the Consumer Product Safety Act, please contact Paul Rosenlund or the attorney in the firm with whom you are regularly in contact.