

## California's Proposition 65

### Overview

Proposition 65 (Health & Safety Code §§ 25249.5 et seq.) was an initiative overwhelmingly approved by California voters in November 1986. The stated purpose of Proposition 65 was to address growing concerns about exposures to toxic chemicals. The goals of Proposition 65 are to allow consumers to make an informed choice before exposing themselves to carcinogens or reproductive toxins, and to protect all California drinking water sources from chemical discharges. These goals seek to provide manufacturers with a market based incentive to remove listed chemicals from their products and manufacturing processes.

Proposition 65 applies, with few exceptions, to any business entity with ten or more employees operating within the State of California. Entities subject to Proposition 65 are, in the course of doing business:

1. prohibited from knowingly discharging a “listed chemical” into sources of drinking water; and
2. required to provide “clear and reasonable” warnings before knowingly and intentionally exposing (through any medium) anyone to a “listed chemical.” Such warnings may be given through such methods as product labels, posted signs, or published notices in newspapers.

“Listed chemicals” are those known to the State of California to cause cancer or reproductive toxicity, regardless of whether or not such chemicals are naturally occurring or synthetic, or intentionally added ingredients or naturally occurring contaminants. A list of chemicals known to the State of California to cause cancer or reproductive toxicity must be published by the Governor and updated at least annually. The most recent list is attached. Chemicals are listed if an authoritative body or agency (e.g., EPA, FDA, NIOSH, IARC), or the State’s “qualified experts” determine that a chemical is either a carcinogen or reproductive toxin. At present, there are more than 750 chemicals listed, with about 65% chemicals known to the State of California to cause cancer and 35% that cause reproductive toxicity.

Violations of Proposition 65 are subject to penalties of \$2,500 per day, per violation. Proposition 65 is unique among environmental laws because enforcement is accomplished entirely through litigation. Litigation may be initiated without warning by the Attorney General, or other public attorneys. Litigation may also be initiated by private interests after giving the Attorney General 60 days notice. Private interests who sue to enforce Proposition 65 are entitled to 25% of any penalties collected and are frequently awarded attorneys fees. Once a plaintiff has demonstrated that there has been a significant amount of discharge or exposure without warning, the burden of proof is on the allegedly offending party to demonstrate that (1) no significant amount was discharged, or (2) no warning was required because any exposure was at a level that, *when multiplied by 1000*, does not cause a significant increase in cancer risk, or has no observable effect on reproductive toxicity. Other exemptions apply, but are very limited.

Enforcement actions filed for violations of Proposition 65 are almost always combined with an action for violation of California's unfair business practices statutes (Business & Professions Code Section 17200 et seq.). Any violation of Proposition 65 is automatically deemed an unlawful business practice. B&P §17200 actions are also the medium through which private enforcers can obtain a disgorgement or restitution of profits made through the unlawful activity, and for recovery of attorney's fees on the basis that the enforcement action is brought in the "public interest."

There have been few trials in Proposition 65 cases. The vast majority of cases brought are settled by entry of consent judgments that provide for injunctive relief, civil penalties, 'contributions' to public interest groups in lieu of disgorgement of profits, and attorney's fees and costs. The injunctive relief provisions of consent judgments usually provide for some reformulation or labeling of products to reduce the amount of the listed chemical in question.

### **Who Are The Plaintiffs?**

The Act may be enforced by the California Attorney General, county district attorneys, and other law enforcement officials. A private enforcer can only file suit after giving the alleged violator a 60-Day Notice, which must also be served on the attorney general and other public prosecutors. If, after a properly composed 60-Day Notice is served on alleged violator, no public prosecutor has commenced and is diligently prosecuting an action against the alleged violator, any person may bring an enforcement action in the public interest. Recently enacted regulations and a California Court of Appeals decision have clarified the standards for the content of the 60-Day Notice. A 60-Day Notice must state sufficient specific facts to enable the alleged violators and the appropriate governmental agencies to undertake a meaningful investigation and remedy the alleged violations prior to citizen intervention. *Yeroushalmi v. Miramar Sheraton* (2001) 88 Cal.App.4<sup>th</sup> 738.

Since Proposition 65's enactment, there have been nearly 23,000 60-Day Notices served (82% in the last five years), and nearly 300 have been served in 2003 (through June). More than 50 cases have been filed in 2003, with four cases filed by public prosecutors and the balance served by private enforcement plaintiffs.

Several private enforcement action plaintiffs are active in Proposition 65 litigation. They are comprised of public interest organizations and private individuals. The most active private enforcers in 2003 include the following (alphabetically):

- As You Sow (AYS)
- California Community Health Advocates
- Center for Environmental Health (CEH)
- Consumer Advocacy Group
- Consumer Defense Group
- Environmental Rights Foundation
- Mateel Environmental Justice Foundation
- Michael DiPirro
- Whitney Leeman, Ph.D.

#### Who And What Are The Focus Of The Proposition 65 Lawsuits?

A wide range of companies have been sued over a wide range of products and chemicals. In terms of product categories, frequent categories of products subject to Proposition 65 include the following (alphabetically):

- Diesel/Automotive Exhaust
- Hose-Couplings & Nozzles
- Paints and Coatings
- Plumbing products (faucets, valves, pumps)
- PVC Coated Wire or Cable
- Second Hand Smoke (ETS)
- Solvents (all types)
- Strength-Building Dietary Supplements
- Tobacco Products (including cigars and smokeless)
- Tools (Power and Manual)
- Welding, Brazing and Soldering Products

In terms of the chemicals that are the subject of litigation, the most frequent litigation targets include the following (alphabetically):

- Arsenic
- Benzene
- Cadmium Perchloroethylene
- Carbon Monoxide
- Chromium (hexavalent)
- Formaldehyde
- Lead and Lead Compounds
- Nickel and Nickel Compounds
- Toluene

## What Are The Litigation Costs?

Companies sued under Proposition 65 have spent tens of millions of dollars in legal fees to defend these suits. Countless millions more have been spent testing, reformulating, and labeling products to meet negotiated levels deemed compliant with Proposition 65.

The California Attorney General has published settlement statistics in Proposition 65 cases for 2000 - 2002. These statistics reveal the following:

Number of settlements	547
Settlement Totals	\$ 22,900,000
Civil Penalties Paid	\$ 1,442,700
Attorney's Fees & Costs	\$ 13,885,033
Cy Pres	\$ 7,572,267
Average Settlement:	\$ 42,251

## How Do You Avoid Proposition 65 Litigation?

Given the enormous business and litigation costs associated with Proposition 65 litigation, any business that is subject to its provisions must logically assess whether or not, in the course of doing business, its products discharge listed chemicals into a source of drinking water or expose consumers to a listed chemical without warning. As referenced above, a number of chemicals have become favorite targets of Proposition 65 enforcement actions. Similar to requirements imposed by other environmental statutes (e.g., Toxic Substances Control Act, Superfund Amendments and Reauthorization Act of 1986, and various state "right to know" laws) an accounting and audit program to identify the presence and tracking of chemicals is becoming increasingly necessary for Proposition 65 compliance.

Environmental audits can provide management with important factual information and an important early warning sign of possible Proposition 65 compliance issues. If not done before, such audits should be seriously considered where other members of a company's industry have already been targeted in Proposition 65 enforcement actions. In this regard, the early engagement of legal counsel, through which an environmental audit can be conducted, can provide important controls over the acquisition and dissemination of information on a 'need to know' basis without.

## Legal Strategies In Defending Proposition 65 Cases

Questions about the constitutionality of Proposition 65's citizen enforcement provisions have been largely settled. In *National Paint & Coatings Association, Inc. v. State of California* (1997) 58 Cal.App.4<sup>th</sup> 753 the California Court of Appeal upheld the constitutionality of Proposition 65 against separate challenges under the California and U.S. Constitution. Most attempts to undermine Proposition 65 through pre-emption arguments have also failed.

Defending Proposition 65 cases should start with an environmental audit to identify and resolve potential issues. Failing that, counsel should be retained the moment a company is served with a 60-Day Notice. Close coordination of fact gathering and likely concurrent settlement negotiations with the Attorney General or private enforcer is imperative. The vast majority of Proposition 65 cases are resolved through settlement and the entry of a consent judgment that may contain detailed and stringent compliance requirements, with penalties for failure to comply. The early and rigorous assessment of the merits of a Proposition 65 action can allow the defendant to focus its energies, and money, on resolution instead of full-scale litigation war that may result in the same consent judgment.

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Cases involving allegations of violations of Proposition 65 are fact and procedurally intensive, and involve cutting edge scientific issues related to risk assessment, toxicology, and other areas. If you would like to discuss a potential issue, please do not hesitate to contact Patrick J. Hagan and Edward E. Hartley of Dillingham & Murphy, LLP (415) 397-2700 or at the e-mail addresses below.

Dillingham & Murphy, LLP is a medium size law firm headquartered in San Francisco, CA with offices in Washington, DC. and Santa Rosa, CA. Founded in 1982 by two colleagues from Pillsbury, Madison & Sutro, Dillingham & Murphy LLP provides strategic, innovative, effective, and efficient solutions that help our clients achieve their goals.

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