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CALIFORNIA'S PROPOSITION 65

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INTRODUCTION AND OVERVIEW

Proposition 65, known as the Safe Drinking Water and Toxic Enforcement Act of 1986, had its genesis in good intentions. Passed as a ballot initiative in November 1986, Proposition 65 was designed to reduce the California public's exposure to certain toxins and to ensure businesses provided consumers with enough information to make informed choices in the marketplace. To accomplish this, Proposition 65 prohibits two types of activities. First, it limits the discharge of toxic chemicals into the state's drinking water. Second, it prohibits businesses from "knowingly and intentionally" exposing any individual to known carcinogens or reproductive toxins ("Prop. 65 Chemical")[1] without a "clear and reasonable" warning. While Proposition 65 may have been intended to protect the public and impose on businesses a sense of social responsibility, its private enforcement, or "bounty hunter" provision, and its shifting burden of proof have instead resulted in a serious, unreasonable and unfair burden for businesses—particularly retailers—in California, across the country and internationally.

PROPOSITION 65'S "BOUNTY HUNTER" PROVISION

The principal problem with Proposition 65 stems from its enforcement provisions. Proposition 65 is enforced entirely through litigation. And, while Proposition 65 vests the California Attorney General with principal enforcement responsibility, Proposition 65 also empowers any individual or organization "acting in the public interest" to sue a business for violations. Because public funds for prosecution are limited, and because individuals or organization can potentially recover attorneys' fees and 25% of any penalties assessed—which penalties can be up to $2,500 per violation per day—Proposition 65 has spawned a cottage industry for "bounty hunter" plaintiffs who bring costly suits against businesses involving non-meritorious claims or *de minimus* violations of the statute. These "bounty hunters" are largely private attorneys acting on behalf of "straw man" plaintiffs, rarely motivated by the desire to act in the "public interest." Rather, the majority of these "bounty hunter" suits are little more than thinly disguised shakedowns of legitimate businesses that leverage the threat of protracted litigation, daily aggregating penalties and attorneys' fees to extract quick, monetary settlements from businesses.

SHIFTING THE BURDEN OF PROOF TO DEFENDANTS

Further exacerbating the proliferation of "bounty hunter" suits is the statutory burden-shifting provision of Proposition 65. To state a cause of action under Proposition 65, a plaintiff need

[1] Proposition 65 requires the Governor of California to publish and periodically update a list of known carcinogens and reproductive toxins. To date, almost 1,000 substances appear on this list.

only allege and prove that one of the almost 1,000 Prop. 65 Chemicals is present in a product, and that the defendant business knowingly exposed[2] a California consumer to that product without warning. Under Proposition 65, a business must provide a warning for products containing a Prop 65 Chemical unless the exposure to the Prop. 65 Chemical poses "no significant risk" in that daily exposure to it over 70 years would result in no more than one excess case of cancer per 100,000 individuals exposed. Similarly, a warning is required for products containing a known reproductive toxin unless the exposure to it at 1,000 times the level present would cause "no observable effect" to humans or laboratory animals.

The problem lies in the allocation of the burden of proof. While a Proposition 65 plaintiff need only show that a business's product contains trace amounts of one of the nearly 1,000 Prop. 65 Chemicals to file suit, Proposition 65 places the burden of proving that there is "no significant risk" or "no observable effect" squarely on the defendant's shoulders. That proof can quickly get to be very expensive for any business. Indeed, the California Court of Appeals has noted that the burden on a Proposition 65 defendant is "virtually impossible" to carry short of an actual trial on the merits and even then "may take a full scale scientific study" to prove. *Consumer Defense Group, et al. v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185 (2006). That a defendant may be liable for attorneys' fees and daily aggregating penalties in itself is a powerful incentive to settle quickly, but this incentive is strengthened by the expense, the time and the effort a meaningful defense would require. In other words, defending a "bounty hunter" suit and settling a "bounty hunter" suit are, often times, synonymous.

RECOGNIZING THE FLAWS WITH AND ABUSE OF PROPOSITION 65

Both the California Court of Appeal and California's Attorney General have recognized the inherent flaws with Proposition 65's bounty-hunter and burden shifting provisions, and their potential for abuse.

In 2006, for example, the California Court of Appeal in *Consumer Defense Group, et al. v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185 (2006), reversed the lower court's approval of a settlement agreement in a bounty-hunter suit brought by a "shell-entity" against defendant apartment owners and managers (who were represented by a trade group) that alleged exposure to certain common and ubiquitous carcinogens. In reversing the agreement, the court noted that litigation under Proposition 65 was "absurdly easy" given its burden-shifting provisions, (*Id.* at 1214-15) and emphasized the resulting abuse of Proposition 65's private "bounty hunter" provisions. *Id.* at 1219 ("This settlement represents the perversity of a shake down process in which attorney fees are obtained by bargaining away the public's interest in

[2] Plaintiff's routinely use the requisite 60-day notice to establish the element of knowledge, and Proposition 65's broad definition of "exposure"—which includes inhalation, ingestion or skin contact—is open to creative legal interpretation.

warnings that might actually serve some public purpose.... Instead of $540,000, this legal work merited an award closer to a dollar ninety-eight.").

Similarly, in 2007, California's Attorney General at the time—Edmund Brown, Jr.—expressly acknowledged the abusive nature of "bounty hunter" suits under Proposition 65. In a letter to Clifford Chanler, one of California's most prolific "bounty hunters," Brown expressed his concern that Chanler had collected significant sums of money from businesses that may have had little or no liability, and attorney fees that appeared excessive. Brown noted that several retailers Chanler sued may have had no knowledge that lead was present in the products in question, and that they could have avoided liability by acting promptly to warn or remove the questioned products from their shelves. Brown concluded that the Attorney General's office was considering a number of actions to address these abuses, including the possibility of an education campaign for affected entities, closer scrutiny of settlement documents and fee applications, and taking over future actions originally filed by private plaintiffs.

The California legislature has also undertaken efforts to amend Proposition 65 to curb many of its negative effects on businesses and its potential for abuse. For example, AB 1447 (introduced in 2003), sought to amend Proposition 65's enforcement provision to allow companies receiving a 60-day notice to settle the matter by providing a warning or eliminating the exposure, and paying the enforcer's reasonable investigation costs; to allow the Attorney General to extend the 60-day pre-enforcement period if he needed more time to review the allegations made by the private enforcer. Similarly, AB 1380 (also introduced in 2003), sought to prohibit public and private enforcers from bringing an enforcement action under the warning provision "against a retail seller of consumer products"; to replace the automatic 1000-fold safety factor with a floating safety factor of 10, 100, or 1000, depending on the nature and quality of the underlying data. Yet both these bills died in the house after lobbying efforts to block reform. Moreover, legislative efforts at reform are also hamstrung by the requirement that any change or amendment to Proposition 65—a ballot initiative—be passed by a two-thirds majority of the California Assembly and Senate.

Unfortunately, although the California Court of Appeal, the Attorney General and the legislature have made efforts to address and crack down on "bounty hunter" suits, Proposition 65 nonetheless remains a money-maker for those vigilante plaintiffs preying on unsuspecting businesses.

IMPACT ON CALIFORNIA RETAILERS

For retailers—especially large, high profile businesses with significant revenue—these "bounty hunter" suits have become an inherent cost of doing business in California. Indeed, given that these businesses deal openly with high volume sales of many different products (the sale of each "offending product" may be considered a separate violation), Proposition 65's enforcement and burden-shifting provisions virtually assure that any such business—whether in California, nationwide or international—that sells products in California will be a target for these

extortionate suits. And, unfortunately, the unique challenges faced by retailers further increase their susceptibility to private enforcement actions.

To begin with, although retailers are frequently the targets of "bounty hunter" suits, most "bounty hunter" actions are not brought over a retailers' private label products. Under Proposition 65, if an offensive product makes it into California without the requisite warning, all involved—manufacturers, suppliers, distributors and retailers—are potentially liable. But because the manufacturer, supplier or distributor of the alleged offensive products may be an out-of-state corporation, exempt from Proposition 65's requirements,[3] or not readily known to the plaintiff, retailers doing business in California bear the brunt of private enforcement actions targeting those products. As a result, to mitigate the financial risks of doing business in California, retailers must also face the challenge and bear the cost of ensuring supplier compliance.

Yet even retailers with sufficient resources to implement and manage compliance programs cannot guarantee supplier compliance. For example, suppliers managing multiple environmental standards may not understand Proposition 65's unique compliance requirements, may not understand the risks of noncompliance, or may not have defined processes to ensure that a product complies with Proposition 65. Often, therefore, retailers must incur the added costs to train and educate their suppliers. Even then, retailers may have trouble obtaining accurate and timely data to ensure a product's compliance status. Nevertheless, just a single product containing trace amounts of a Prop. 65 Chemical is sufficient to expose a retailer to the significant and onerous financial liability that a "bounty hunter" suit may pose. In the end, however, a retailer has no choice but to address these challenges or give up the California market.

Retailers trying to satisfy Proposition 65's warning requirements also face significantly more cost and risk than businesses in similar industries. For example, a restaurant selling a variety of food or beverages—one or more of which may contain a Prop. 65 Chemical—can satisfy its warning obligations by simply putting up a sign at its retail location or by placing on its menu a warning that "[c]hemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold here." 27 C.C.R. §§ 25603-25603.3. By contrast, retailers of consumer products must specifically identify or list by name each individual product containing a Prop. 65 Chemical sold at that retail location. Retailers must place that warning in sufficiently close proximity to the identified product so that it would be reasonable to expect a consumer to see it when making a purchasing decision. *Id.* §§ 25603-25603.1. Thus, when a producer or packager does not provide a warning label on its product or its packaging, the retailer necessarily bears the burden and cost of implementing such warnings,

[3] Small businesses with less than 10 employees, governmental agencies, and public water systems are exempt from the warning requirement and discharge prohibition of Proposition 65.

and further bears the risk that its warnings may fall short of any Proposition 65 requirement or is not conspicuous enough.

CONCLUSION

While the safety and the health of consumers remains a paramount concern for retailers doing business in California, the abuse of Proposition 65's private enforcement and burden shifting provisions by unscrupulous law firms place a serious, unreasonable and unfair burden on retailers both in California and nationwide. Retailers—or any other person doing business in California—should not have to view the cost of settling "bounty hunter" suits involving non-meritorious claims or *de minimus* violations as a cost of doing business. But, until such time as there is meaningful reform, aggressive attorneys motivated by greed will continue to undermine the good intentions of Proposition 65, and threaten the continued economic viability for retailers of doing business in California. This would not be in the "public interest."